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EDWARD W. TUTTLE  
EDITOR

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Vol. XXIV

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LOS ANGELES  
L. D. POWELL COMPANY  
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1911

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# STARE DECISIS

By the Editorial Staff.

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Judgments;

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**I. GENERAL STATEMENT.**—Stare decisis is the maxim which expresses the legal principle that a judicial decision which settles a question of law will be adhered to thereafter in all similar cases.<sup>1</sup> The doctrine, however, can only be invoked in support of cases which

1. See the following cases: **U. S.** Cox v. Wood, 247 U. S. 3, 38 Sup. Ct. 421, 62 L. ed. 947; Supreme Lodge, K. of P. v. Smyth, 245 U. S. 594, 38 Sup. Ct. 210, 62 L. ed. 492; Bright v. State (C. C. A.), 249 Fed. 950. **Ala.**—Gill v. More, 76 So. 453. **Ark.**—Britt v. Harper, 132 Ark. 193, 200 S. W. 787. **Cal.** McManus v. Red Salmon Canning Co. (Cal. App.), 173 Pac. 1112. **Colo.**—Imperial Securities Co. v. Morris, 57 Colo. 194, 141 Pac. 1160. **Conn.**—Taft v. Lord, 92 Conn. 539, 103 Atl. 644, L. R. A. 1918E, 545. **Del.**—In re Du Pont, 8 Del. Ch. 442, 68 Atl. 399. **D. C.** Overland Washington Motor Co. v. Alexander, 43 App. Cas. 282. **Fla.** State ex rel. West v. Butler, 70 Fla. 102, 69 So. 771. **Ga.**—Glover v. Atlanta, 96 S. E. 562. **Haw.**—Wilder v. Colburn, 21 Hawaii 701. **Idaho.**—Hyatt v. Blackwell Lumber Co., 31 Idaho 452, 173 Pac. 1083. **Ill.**—People v. Schlick, 200 Ill. App. 605. **Ind.**—Harmon v. Bolley, 120 N. E. 33. **Ia.**—Sandel v. Des Moines C. R. Co., 168 N. W. 226. **Kan.**—Thurston v. Fritz, 91 Kan. 468, 138 Pac. 625, Ann. Cas. 1915D, 212, 50 L. R. A. (N. S.) 1167. **Ky.** Herndon v. Brawner, 180 Ky. 807, 203 S. W. 727. **La.**—Jones v. Kan. City So. R. Co., 143 La. 307, 78 So. 568. **Me.** Jordan v. McKenzie, 113 Me. 57, 92 Atl. 995. **Md.**—McGraw v. Merryman, 104 Atl. 540. **Mass.**—New York Co. & H. R. R. Co. v. York & Whitney Co., 119 N. E. 855. **Mich.**—Colburne v. Detroit United Ry., 177 Mich. 139, 143 N. W. 32. **Minn.**—State v. Townley, 140 Minn. 413, 168 N. W. 591. **Miss.**—Ill. Cent. R. Co. v. Rogers, 116 Miss. 99, 76 So. 686. **Mo.**—Chilton v. Hedges, 204 S. W. 900; State ex rel. Reifsnider v. Goldstein (Mo. App.), 205 S. W. 529. **Mont.**—Curry v. Drew, 47 Mont. 592, 131 Pac. 677. **Neb.**—Torbitt v. Bennett, 98 Neb. 129, 152 N. W. 301. **Nev.** Ex parte Woodburn, 32 Nev. 136, 104 Pac. 245. **N. J.**—Gordon v. Gordon, 88 N. J. Eq. 436, 103 Atl. 31. **N. M.** Duncan v. Brown, 18 N. M. 579, 139 Pac. 140. **N. Y.**—McEwen Bros. v. Cobb, 104 Misc. 477, 172 N. Y. Supp. 44. **N. C.**—S. R. Fowle & Son v. O'Ham, 96 S. E. 639. **N. D.**—Youmans v. Hanna, 35 N. D. 479, 160 N. W. 705, 161 N. W. 797, Ann. Cas. 1917E, 263. **Ohio.** Shoemaker v. Cincinnati, 68 Ohio St. 603, 68 N. E. 1. **Okla.**—McDougal v. McKay, 43 Okla. 251, 142 Pac. 987. **Ore.**—State v. Hyde, 88 Ore. 1, 169 Pac. 757, 171 Pac. 532, Ann. Cas. 1918E, 688. **Pa.**—Ricketts v. Capwell, 241 Pa. 138, 88 Atl. 319. **P. I.**—Kuenzle v. Collector, 12 Phil. Isl. 117. **S. C.**—Lillard v. Melton, 103 S. C. 10, 87 S. E. 421. **S. D.**—Polluck v. Minneapolis & St. L. R. Co., 166 N. W. 641. **Tenn.**—Peck-Williamson H. & Vent. Co. v. McKnight, 140 Tenn. 563, 205 S. W. 419. **Tex.**—Fearis v. Gafford (Tex. Civ. App.), 204 S. W. 675. **Utah.**—Kuchenmeister v. Los Angeles & S. L. R. Co., 172 Pac. 725. **Vt.**—Enright v. Amsden, 70 Vt. 183, 40 Atl. 37. **Va.**—Chesapeake & O. Ry. Co. v. National Bank, 95 S. E. 454. **Wash.**—Foster v. Comrs. of Cowlitz County, 100 Wash. 502, 171 Pac. 539. **W. Va.**—Starcher Bros. v. Duty, 61 W. Va. 371, 56 S. E. 527. **Wis.** State v. Sutherland, 166 Wis. 511, 166 N. W. 14. **Wyo.**—Zancanelli v. Central C. & C. Co., 25 Wyo. 511, 173 Pac. 981. **Can.**—Chancey v. Brooking, 1 Newf. 314.

See 1 STANDARD PROC. 6.

The maxim in full is *Stare decisis et non quia movere*.

[a] Stare decisis is not a rule of order, but a rule affecting the practical administration of justice. Mead v. McGraw, 19 Ohio St. 55, 62.

[b] The rule of stare decisis means in general that, when a point has been once settled by judicial decision, it forms a precedent for the guidance of courts in similar cases. It expresses the principle upon which rests the authority of judicial decisions as precedents in subsequent litigations, and adherence to it is necessary to preserve the certainty, stability and symmetry of our jurisprudence. Menge v. The Madrid, 40 Fed. 677.

[c] Stare decisis is a name given to the doctrine that, when the court has once laid down a principle of law as applicable to a certain state of facts,



are alike in principle,<sup>2</sup> and also in the elemental facts upon which the decision rests,<sup>3</sup> and not of cases wherein the facts are essentially different.<sup>4</sup>

The doctrine is applied, as a general rule, only to decisions of a court having final jurisdiction of the questions involved,<sup>5</sup> and, while the decisions of intermediate appellate courts may sometimes be regarded as precedents when there are none to the contrary by a higher court,<sup>6</sup> the rule does not apply with full force to such decisions,<sup>7</sup> and in some jurisdictions, by statute, has no application whatever.<sup>8</sup> The decisions

it will adhere to that principle, and apply it to all future cases where the facts are substantially the same. *Moore v. Albany*, 98 N. Y. 396.

**Distinguished from law of the case,** see the title "Law of the Case."

**Distinguished from res judicata,** see the title "Res Judicata."

2. **U. S.**—*Pollock v. Farmers' Loan, etc. Co.*, 157 U. S. 429, 574, 15 Sup. Ct. 673, 39 L. ed. 759; *Northern Pac. Ry. Co. v. North America Tel. Co.*, 230 Fed. 347, 144 C. C. A. 489. **Ill.**—*Bergman v. Arnhold*, 242 Ill. 218, 89 N. E. 1000. **Ky.**—*Com. v. Crumbaugh*, 176 Ky. 720, 197 S. W. 401. **Md.**—*McGraw v. Merryman*, 104 Atl. 540. **Mo.**—*Bender v. Weber*, 250 Mo. 551, 157 S. W. 570, 46 L. R. A. (N. S.) 121. **N. J.** See *Ross v. Bd. of Chosen Freeholders*, 90 N. J. L. 522, 102 Atl. 397. **N. Y.** *Gleason v. Northwestern Mut. L. Ins. Co.*, 203 N. Y. 507, 97 N. E. 35. **Wash.** *Kanaskat Lumber & S. Co. v. Cascade Timber Co.*, 80 Wash. 561, 142 Pac. 15. **Wis.**—*Minahan v. Minahan*, 145 Wis. 514, 130 N. W. 476.

3. **U. S.**—*Supreme Lodge, K. of P. v. Smyth*, 245 U. S. 594, 38 Sup. Ct. 210, 62 L. ed. 492; *Sturges v. Crowninshield*, 4 Wheat. 122, 207, 4 L. ed. 529. **Ark.** *McWilliams v. Bonner*, 69 Ark. 99, 61 S. W. 378. **Cal.**—*Colusa & Hamilton R. Co. v. Glenn*, 35 Cal. App. 205, 169 Pac. 423. **Colo.**—*Aurora v. Hayden*, 23 Colo. App. 1, 126 Pac. 1109. **Ga.**—*Bond v. Perrin*, 145 Ga. 200, 88 S. E. 954. **Ill.** *People v. Schlick*, 200 Ill. App. 605. **Ia.**—*Sandell v. Des Moines C. R. Co.*, 168 N. W. 226. **Ky.**—*Com. v. Crumbaugh*, 176 Ky. 720, 197 S. W. 401. **Mich.**—*Larzelere v. Starkweather*, 38 Mich. 96. **Minn.**—*Anderson v. Pittsburgh Coal Co.*, 108 Minn. 455, 122 N. W. 794, 26 L. R. A. (N. S.) 624. **Mo.** *Bender v. Weber*, 250 Mo. 551, 157 S. W. 570, 46 L. R. A. (N. S.) 121. **Mont.** *Wetzstein v. Boston & M. C. & S. Min.*

*Co.*, 25 Mont. 135, 63 Pac. 1043. **N. Y.** *Moore v. Albany*, 98 N. Y. 396; *Hart v. Metropolitan St. Ry. Co.*, 65 App. Div. 493, 72 N. Y. Supp. 797. **N. C.** *American Nat. Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738. **S. D.**—*Sioux Falls Sav. Bank v. Minnehaha County*, 29 S. D. 146, 135 N. W. 689, Ann. Cas. 1914D, 910. **Tex.**—*Hamill v. Samuels*, 104 Tex. 46, 123 S. W. 419. **Utah.** *Larson v. Salt Lake City*, 34 Utah 318, 97 Pac. 483, 23 L. R. A. (N. S.) 462. **Wis.**—*Minahan v. Minahan*, 145 Wis. 514, 130 N. W. 476.

[a] The rulings of courts must be considered always in reference to the subjectmatter of litigation and the attitude of parties in relation to the point under discussion, and it is wrong to use as an illustration or authority a judicial ruling which was applied to a different state of things. *Gaines v. Hennen*, 24 How. (U. S.) 553, 566, 16 L. ed. 770.

4. *Brooks v. Marbury*, 11 Wheat. (U. S.) 78, 91, 6 L. ed. 423.

[a] In another and different case, general principles, which are perfectly sound expressions of the law under the facts of a particular case, may be wholly inapplicable. *Parsons v. Dist. of Columbia*, 170 U. S. 45, 51, 18 Sup. Ct. 521, 42 L. ed. 943.

5. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209; *Northern Pac. Ry. Co. v. Snohomish County*, 101 Wash. 686, 172 Pac. 878. See *infra*, II, B, 1.

6. *Wilson v. Swords* (Ga. App.), 95 S. E. 1013. See *infra*, II, B, 1.

7. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209.

8. *Giesecke v. Cullerton*, 280 Ill. 510, 117 N. E. 777.

[a] Merely Persuasive.—Such opinion has, however, a certain persuasive

of district and other inferior courts are not within the rule,<sup>9</sup> and decisions, opinions, rules and provisions are not strictly precedents when rendered or made by a legislature,<sup>10</sup> executive departments of the government,<sup>11</sup> military tribunals,<sup>12</sup> commissions,<sup>13</sup> or an attorney general.<sup>14</sup>

The reasons generally advanced for the necessity of the rule of stare decisis are that it is indispensable to the due administration of justice,<sup>15</sup> to preserve settled rules,<sup>16</sup> to avoid confusion,<sup>17</sup> and to establish uniformity, certainty and stability in the law,<sup>18</sup> as illustrated by judicial construction and interpretation of statutes,<sup>19</sup> or rules of common

force or authority which is respected by other courts. *Glescock v. Callerton*, 180 Ill. 510, 117 N. E. 777.

9. See *infra*, II, B, 1.

10. See *Ky.*—*Young v. Trimble*, 164 Ky. 177, 175 S. W. 306. *N. Y.*—*People ex rel. Furman v. Chase*, 59 N. Y. 451, 10 Am. Rep. 508. *Ohio.*—*Treasurer v. Bank*, 47 Ohio St. 503, 25 N. E. 697, 10 L. R. A. 126.

11. *U. S.*—*Lonsdale v. Portland*, Dundy 39, 15 Fed. Cas. No. 8,579. *Ala.*—*Wilson v. Wall*, 34 Ala. 288. *Colo.*—*Reid v. People*, 29 Colo. 333, 68 Pac. 228, 92 Am. St. Rep. 69. *Neb.*—*State ex rel. Voss v. Quinn*, 86 Neb. 738, 126 N. W. 388.

12. *Taylor v. Murphy*, 50 Tex. 291; *Robertson v. Talmadge* (Tex. Civ. App.), 174 S. W. 627.

13. See the cases cited *infra*, this note.

[a] *Supreme Court Commission.* Unofficial reports not precedents. *Flint v. Chaloupka*, 72 Neb. 34, 99 N. W. 825, 117 Am. St. Rep. 771; *Hoagland v. Stewart*, 71 Neb. 102, 98 N. W. 428, 160 N. W. 133.

[b] *Arbitration Committee.*—*Henderson v. Beaton*, 52 Tex. 29.

14. *People v. Shetler*, 30 Cal. 645; *Ledy v. Cornell*, 52 Colo. 189, 120 Pac. 153, Ann. Cas. 1913C, 1304, 38 L. R. A. (N. S.) 918.

15. *Moss Point Lumber Co. v. Harrison County*, 89 Miss. 448, 44 So. 290, 873.

16. *Northern Pac. Ry. Co. v. Snohomish County*, 101 Wash. 686, 172 Pac. 878.

17. *Mast v. Stover Mfg. Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. ed. 856; *Norwich U. F. Ins. Co. v. Stanton*, 191 Fed. 813, 112 C. C. A. 327.

18. *U. S.*—*Menge v. The Madrid*, 40 Fed. 677. *Cal.*—*Ferris v. Coover*, 11 Cal. 175. *Colo.*—*People v. Cassidy*, 50

*Colo.* 503, 117 Pac. 357. *Del.*—*Daniels v. State*, 2 Penn. 586, 48 Atl. 196, 54 L. R. A. 286. *Idaho.*—*Walling v. Bown*, 9 Idaho 749, 76 Pac. 318. *Ill.*—*Geohagan v. Union Elev. R. Co.*, 266 Ill. 482, 107 N. E. 786, Ann. Cas. 1916B, 762. *N. Y.*—*Goodwin v. Mass. Mut. L. Ins. Co.*, 78 N. Y. 480.

[a] Certainty is more essential to justice than absolute correctness. *Leustarf v. Leustarf*, 118 Wis. 159, 95 N. W. 261.

[b] The rule criticized as a fetish more honored in the breach than in the observance. *Shelton v. Jackson*, 29 Tex. Civ. App. 443, 451, 49 S. W. 415.

[c] "When a decision or a series of decisions have established a rule of property, and, more particularly, a rule affecting the title to real estate, which has become generally known, and has been acted upon, such a landmark should not be disturbed." *Wilkins v. Chicago, etc. R. Co.*, 110 Tenn. 442, 75 S. W. 1026, 1024; *Sherfy v. Argonbright*, 1 Heisk. (Tenn.) 128, 143, 2 Am. Rep. 690.

[d] Without the observance of stare decisis the law is divested of one of its most important attributes, becomes fluctuating and capricious, and, instead of being a steady light to guide or shield to protect, becomes an *ignis fatuus* to mislead or a snare to entrap the citizen. *Perkins v. Clements*, 1 Pat. & H. (Va.) 141, 153.

19. *U. S.*—*District of Columbia v. Lynchburg Inv. Co.*, 236 U. S. 692, 35 Sup. Ct. 477, 59 L. ed. 792; *Henry v. Dick Co.*, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. ed. 645, Ann. Cas. 1913D, 880; *Kealeha v. Castle*, 219 U. S. 149, 28 Sup. Ct. 684, 52 L. ed. 298; *Sobell v. Faubus*, 138 U. S. 902, 972, 11 Sup. Ct. 376, 34 L. ed. 1949. *Cal.*—*Bellingham Bay Lumb. Co. v. Hopkins*, 34 Cal. App. 534, 168 Pac. 159. *Mo.*—*Chilton v.*

law,<sup>20</sup> decisions relating to rules of procedure,<sup>21</sup> or establishing rules of property,<sup>22</sup> particularly concerning the acquisition of and title to real estate,<sup>23</sup> decisions on taxation,<sup>24</sup> priority of creditors,<sup>25</sup> contractual<sup>26</sup>

Hedges, 204 S. W. 900. **N. Y.**—Barnet v. New York Cent. & H. R. R. Co., 222 N. Y. 195, 118 N. E. 625. **S. D.** Polluck v. Minneapolis & St. L. R. Co., 166 N. W. 641. **Tex.**—Clay v. Atchison, T. & S. F. Ry. Co. (Tex. Civ. App.), 201 S. W. 1072; Park v. South Bend Chilled Plow Co. (Tex. Civ. App.), 199 S. W. 843. **Wash.** Tamblin v. Crowley, 99 Wash. 133, 168 Pac. 982; State v. Warburton, 97 Wash. 243, 166 Pac. 615.

[a] **Question of a Statute's Constitutionality.**—Fearis v. Gafford (Tex. Civ. App.), 204 S. W. 675.

[b] **Civil and Criminal Cases.**—The construction of a statute in a civil cause should be followed in a criminal case. *United States v. Keitel*, 211 U. S. 370, 392, 29 Sup. Ct. 123, 53 L. ed. 230.

[c] **Identical Statutes.**—Decisions construing statutes are binding in subsequent cases involving the same questions but arising under a different yet identical statute in the same state. *Wrathall v. Miller* (Utah), 169 Pac. 946.

20. *Williams v. Pryor*, 272 Mo. 613, 200 S. W. 53.

21. **U. S.**—*Lewers v. Atcherly*, 222 U. S. 235, 32 Sup. Ct. 94, 56 L. ed. 202; *Jellison v. Krell Piano Co.*, 246 Fed. 509; *Audiffren Refrigerating Mach. Co. v. General Elec. Co.*, 245 Fed. 783. **Cal.**—*Bohn v. Bohn*, 164 Cal. 532, 129 Pac. 981. **Ga.**—*Wilson v. Swords* (Ga. App.), 95 S. E. 1013; *Horton-Hughes Furn. Co. v. Broad Street Hotel Co.* (Ga. App.), 95 S. E. 373; *Lee v. Central of Ga. R. Co.*, 21 Ga. App. 558, 94 S. E. 888. **Ill.**—*Overland Motor Co. v. Tennant*, 195 Ill. App. 6. **Ia.**—*Hayes v. Snader*, 165 N. W. 1041. **Ky.**—*Com. v. Crumbaugh*, 176 Ky. 720, 197 S. W. 401. **Mo.**—*Cook v. Smith* (Mo. App.), 204 S. W. 919. **N. Y.**—*Mittnacht v. Kellermann*, 105 N. Y. 461, 12 N. E. 28; *Fisher v. Gould*, 81 N. Y. 228; *Baerlein v. Winter*, 103 Misc. 506, 170 N. Y. Supp. 399. **Tex.**—*Gray v. Eleazer*, 43 Tex. Civ. App. 417, 94 S. W. 911.

22. **U. S.**—*Peralta v. United States*, 3 Wall. 434, 439, 18 L. ed. 221; *Goodtitle v. Kibbe*, 9 How. 471, 13 L. ed.

220. **Mo.**—*Abington v. Townsend*, 271 Mo. 602, 197 S. W. 253. **Tenn.**—*Wilkins v. Chicago, etc. R. Co.*, 110 Tenn. 442, 75 S. W. 1026. **Wis.**—*State v. Sutherland*, 166 Wis. 511, 166 N. W. 14.

[a] **Property and the Police Power.** "The principle of stare decisis is a rule of property the use of which does not affect the public welfare. It cannot be invoked to shut off police power." *Schmitt v. F. W. Cook Brew. Co.* (Ind.), 120 N. E. 19; *State v. Aiken*, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345.

[b] **In the construction of wills**, (1) since it seldom happens that two cases are precisely alike, prior decisions are of little aid, except as to general principles (*Lambert's Lessee v. Paine*, 3 Cranch [U. S.] 96, 131, 2 L. ed. 377), and (2) the meaning of particular expressions. *Lambert's Lessee v. Paine*, 3 Cranch (U. S.) 96, 134, 2 L. ed. 377.

23. *Minnesota Co. v. National Co.*, 3 Wall. (U. S.) 332, 18 L. ed. 42; *American Mortg. Co. v. Hopper*, 64 Fed. 553, 12 C. C. A. 293; *Kearny v. Buttles*, 1 Ohio St. 362.

[a] **Validity of Tax Deeds.**—*Britt v. Harper*, 132 Ark. 193, 200 S. W. 787.

[b] **Forming Rules of Descent.** *Oliver v. Vance*, 34 Ark. 564.

[c] **Judicial Sales of Decedent's Estates.**—*Grignon's Lessee v. Astor*, 2 How. (U. S.) 319, 343, 11 L. ed. 283.

24. *Welch v. Boston*, 211 Mass. 178, 97 N. E. 893.

25. *White v. Denman*, 1 Ohio St. 110, 115; *Park v. South Bend Chilled Plow Co.* (Tex. Civ. App.), 199 S. W. 843.

26. **U. S.**—*The Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 443, 458, 13 L. ed. 1058. **N. J.**—See *Ross v. Bd. of Chosen Freeholders*, 90 N. J. L. 522, 102 Atl. 397; *Robt. H. Ingersoll & Bro. v. Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030. **N. C.**—*Bryan v. Louisville & N. R. Co.*, 174 N. C. 177, 93 S. E. 750. **Ohio.**—*Cincinnati v. Taft*, 63 Ohio St. 141, 58 N. E. 63.

[a] **As to Extraterritorial Effect of Insolvency Laws on Contracts.**—*Cook*



relations, and commercial transactions.<sup>27</sup>

**II. APPLICATION OF THE DOCTRINE.**—A. AS DETERMINED BY NATURE OF DECISION.—1. **Matters Not Considered.**—The rule of stare decisis can be applied only to the questions actually decided by a decision,<sup>28</sup> and as to any point which is not brought distinctly before the court, considered and passed upon, a decision cannot be regarded as a precedent.<sup>29</sup> Thus a case is not a precedent merely be-

*v. Moffat*, 5 How. (U. S.) 295, 309, 12 L. ed. 159.

27. **Ark.**—*State v. Bank of Commerce*, 202 S. W. 834. **Mich.**—*Newberry v. Trowbridge*, 4 Mich. 391. **Ohio.** *Trean v. Brown*, 14 Ohio 482.

28. **Ala.**—*Ex parte Gunter*, 193 Ala. 486, 69 So. 442. **Cal.**—*Southern Pac. Co. v. Robinson*, 132 Cal. 408, 64 Pac. 572, 12 L. R. A. (N. S.) 497. **Colo.** *Montgomery v. Colorado Springs & L. R. Co.*, 50 Colo. 210, 114 Pac. 659. **Ga.**—*Atkinson v. Battle*, 11 Ga. App. 837, 76 S. E. 597. **Ill.**—*Lichtenstein v. Fish Furn. Co.*, 272 Ill. 191, 111 N. E. 729, Ann. Cas. 1918A, 1987. **Ind.** *O'Brien v. Moffitt*, 134 Ind. 660, 33 N. E. 616, 36 Am. St. Rep. 566. **Mich.** *First Nat. Bank v. Union Trust Co.*, 158 Mich. 94, 122 N. W. 547, 133 Am. St. Rep. 362. **Mo.**—*Koerner v. St. Louis Car Co.*, 209 Mo. 141, 107 S. W. 481, 17 L. R. A. (N. S.) 292. **N. Y.** *People v. Stephens*, 71 N. Y. 527. **Ohio.** *Evans v. Moore*, 28 Ohio C. C. 1. **Ore.** *Hough v. Porter*, 51 Ore. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728. **Pa.** *Storeh v. Lansdowne*, 239 Pa. 366, 86 Atl. 861. **S. D.**—*Cain v. Ehrler*, 36 S. D. 127, 153 N. W. 941. **Tenn.** *State v. Nashville Baseball Club*, 147 Tenn. 292, 154 S. W. 1151, Ann. Cas. 1914B, 1243. **Tex.**—*Young v. Marshall St. Bank*, 54 Tex. Civ. App. 206, 117 S. W. 476. **Utah.**—*Salt Lake Inv. Co. v. Oregon S. L. R. Co.*, 46 Utah 203, 148 Pac. 439. **Va.**—*Williams Printing Co. v. Saunders*, 113 Va. 156, 73 S. E. 472, Ann. Cas. 1913E, 693. **Wis.** *Wankowski v. Crivitz P. & P. Co.*, 137 Wis. 123, 118 N. W. 643.

29. **U. S.**—*United States ex rel. Arant v. Lane*, 245 U. S. 166, 38 Sup. Ct. 94, 62 L. ed. 223; *The Edward*, 1 Wheat. 261, 276, 4 L. ed. 86. **Ala.** *Ex parte Gunter*, 193 Ala. 486, 69 So. 442. **Cal.**—*People v. McKamy*, 168 Cal. 531, 143 Pac. 752. **Ill.**—*Gage v. Parker*, 178 Ill. 455, 53 N. E. 317. **Ia.**—*State v. Hess*, 170 Iowa 397, 130 N. W. 609. **Kan.**—*Dyson v. Bux*, 92 Kan. 154, 139

Pac. 1159. **Mass.**—*Swan v. Superior Ct. Justices*, 222 Mass. 542, 111 N. E. 386. **Mo.**—*Rourke v. Holmes St. R. Co.*, 257 Mo. 555, 166 S. W. 272; *Bank of Seneca v. Morrison* (Mo. App.), 204 S. W. 1119. **Neb.**—*Larson v. First Nat. Bank*, 66 Neb. 595, 92 N. W. 729. **N. Y.**—*In re Godney's Will*, 142 N. Y. Supp. 157. **N. C.** *American Nat. Bank v. Fountain*, 148 N. C. 590, 62 S. E. 738. **Tenn.**—*Van Tyl v. Carpenter*, 135 Tenn. 629, 188 S. W. 234. **Tex.**—*Hamill v. Samuels*, 104 Tex. 46, 133 S. W. 419. **Utah.** *Hilton v. Sloan*, 37 Utah 359, 108 Pac. 689. **Va.**—*McClanahan's Adm. v. Norfolk & W. R. Co.*, 118 Va. 388, 87 S. E. 731. **W. Va.**—*Peabody v. Gillaspie*, 63 W. Va. 561, 61 S. E. 416.

[a] The general approval of instructions is not a specific approval of an instruction not criticized. *Graff v. United Railroads* (Cal.), 172 Pac. 603.

[b] This rule (1) is applied to jurisdictional questions (*New v. Oklahoma*, 195 U. S. 252, 25 Sup. Ct. 68, 49 L. ed. 182; *United States v. More*, 3 Cranch (U. S.) 159, 2 L. ed. 397. See *Rourke v. Holmes St. R. Co.*, 257 Mo. 555, 166 S. W. 272 [1 c. 571 and dis. op. p. 581]), but (2) such cases, while not authorities, have much weight. *United States Bank v. Deveaux*, 5 Cranch (U. S.) 61, 88, 3 L. ed. 38.

[c] A mere assumption which was indulged in when deciding a case should not prevent a determination of the question when it arises in a subsequent case. Therefore, where the construction of a statute was not raised, but its meaning was taken for granted, the case is not an authority on that point. *United States v. Corbett*, 215 U. S. 233, 239, 30 Sup. Ct. 81, 54 L. ed. 173.

[d] As to points not argued and for that reason not considered, the decision is not a precedent. *Larson v. First Nat. Bank*, 66 Neb. 595, 92 N. W. 729. See also *New York & N. H. R. Co. v. Schuyler*, 8 Abb. Pr. (N. Y.) 239.

cause it follows a certain method of procedure,<sup>30</sup> such as appeal by writ of error or certiorari,<sup>31</sup> but it has been held that the refusal of such writs is an affirmance and elevates the decision of the lower court to the dignity of final authority,<sup>32</sup> although there are decisions to the contrary.<sup>33</sup>

**2. Questions of Fact.**—The rule has no application to decisions on questions of fact.<sup>34</sup>

**3. Obiter Dicta.**—Moreover, an expression of opinion which is merely a dictum is not binding.<sup>35</sup> But while dicta are not binding as

*Compare* Michael v. Morey, 26 Md. 239, 90 Am. Dec. 106.

30. See Rourke v. Holmes St. R. Co., 257 Mo. 555, 166 S. W. 272.

[a] The power to certify cannot be regarded as settled by cases determined on certificates where that question was not raised and passed upon. United States ex rel. Arant v. Lane, 245 U. S. 166, 38 Sup. Ct. 94, 62 L. ed. 223.

31. Riggins v. Waco, 40 Tex. Civ. App. 569, 90 S. W. 657.

32. Overland Motor Co. v. Tennant, 195 Ill. App. 6; Gray v. Eleazer, 43 Tex. Civ. App. 417, 94 S. W. 911.

As to the effect of an affirmance without opinion, see *supra*, II, A, 4.

33. Bohn v. Bohn, 164 Cal. 532, 129 Pac. 981.

34. **U. S.**—Kessler v. Armstrong Cork Co., 158 Fed. 744, 85 C. C. A. 642. **Ark.**—McWilliams v. Bonner, 69 Ark. 99, 61 S. W. 378. **Ia.**—Stern v. Fountain, 112 Iowa 96, 83 N. W. 826. **Ky.** German P. O. Asylum v. Barber A. P. Co., 26 Ky. L. Rep. 805, 82 S. W. 632. **Me.**—See Adams v. Clapp, 99 Me. 169, 58 Atl. 1043. **Mont.**—See Flaherty v. Butte Elec. R. Co., 42 Mont. 89, 111 Pac. 348. **N. Y.**—Wallace v. Wallace, 137 N. Y. Supp. 43, 158 App. Div. 950, 143 N. Y. Supp. 1148. **Tex.** Birdseye v. Rogers (Tex. Civ. App.), 52 S. W. 985.

[a] On a question of boundaries, while a former decision is not binding, it may be followed. Birdseye v. Rogers (Tex. Civ. App.), 52 S. W. 985.

35. **U. S.**—Roura v. Philippine Islands, 218 U. S. 386, 399, 31 Sup. Ct. 73, 54 L. ed. 1080; Barden v. Hawarden Bank, 178 U. S. 524, 534, 20 Sup. Ct. 1000, 44 L. ed. 1175; Pollock v. Farmers' Loan, etc. Co., 157 U. S. 429, 575, 15 Sup. Ct. 673, 39 L. ed. 759; Wisconsin Cent. R. Co. v. Price, 133 U. S. 496, 509, 10 Sup.

Ct. 341, 33 L. ed. 687; Carroll v. Carroll's Lessee, 16 How. 275, 287, 14 L. ed. 936. **Ala.**—McCoy v. Prince, 197 Ala. 665, 73 So. 386. **Ariz.**—Rush v. French, 1 Ariz. 99, 25 Pac. 816. **Ark.** Scruggs v. State, 131 Ark. 320, 198 S. W. 694. **Cal.**—In re Johnson's Estate, 98 Cal. 531, 33 Pac. 460, 21 L. R. A. 380. **Colo.**—Wadsworth v. Union Pac. Ry. Co., 18 Colo. 600, 33 Pac. 515, 36 Am. St. Rep. 309, 23 L. R. A. 812. **Fla.**—Hart v. Stribbling, 25 Fla. 433, 6 So. 455. **Haw.**—United States v. John II Est., Ltd., 3 Hawaii Dist. Ct. 575. **Ill.**—Brown v. Coon, 36 Ill. 243, 85 Am. Dec. 402. **Ind.**—State ex rel. Bd. of Comrs. v. Kaufman, 117 N. E. 643; Terre Haute v. Burns (Ind. App.), 116 N. E. 604. **Kan.**—Pacific Ex. Co. v. Foley, 46 Kan. 457, 26 Pac. 665, 26 Am. St. Rep. 107, 12 L. R. A. 799. **La.**—Davis v. Millaudon, 17 La. Ann. 97, 87 Am. Dec. 517. **Me.**—State v. Intoxicating Liquors, 95 Me. 140, 49 Atl. 670. **Md.**—Baltimore v. Baltimore & O. R. Co., 6 Gill 288, 48 Am. Dec. 531. **Mass.**—Swan v. Superior Ct. Justices, 222 Mass. 542, 111 N. E. 386. **Mich.**—Detroit Lumb. Co. v. Petrel, 153 Mich. 528, 117 N. W. 80. **Minn.** State v. Great N. R. Co., 106 Minn. 303, 119 N. W. 202. **Miss.**—Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33. **Mo.**—In re Siegel, 263 Mo. 375, 173 S. W. 1. But see Gibson v. Chouteau, 7 Mo. App. 1. **Mont.**—King v. Amy & S. C. Min. Co., 9 Mont. 543, 24 Pac. 200. **Neb.**—Williams v. Miles, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 110 Am. St. Rep. 431, 62 L. R. A. 383. **Nev.**—State v. Clarke, 3 Nev. 566. **N. J.**—New York C. & H. R. R. Co. v. Board of Chosen Freeholders, 80 N. J. L. 305, 74 Atl. 954. **N. M.**—Coler v. Santa Fe, 6 N. M. 88, 27 Pac. 619. **N. Y.**—Spring v. Fidelity Mut. L. Ins. Co., 183 App. Div. 134, 170 N. Y.



precedents, there is nothing to prevent a court from adopting obiter rulings, and being guided thereby in its decisions, in the absence of controlling precedents.<sup>35</sup>

#### 4. Affirmance Without Opinion. — An affirmance without an opin-

Supp. 253. **N. C.**—*Moose v. Alexander*, 172 N. C. 412, 90 S. E. 441, Ann. Cas. 1917E, 1183. **Ohio**.—*State v. Baughman*, 38 Ohio St. 455. **Okl.**—*Lausten v. Lausten*, 55 Okla. 518, 154 Pac. 1182. **Ore.**—*Johnson v. Cook County*, 53 Ore. 329, 100 Pac. 294, 133 Am. St. Rep. 834. **Pa.**—*Mildren v. Nye*, 240 Pa. 72, 87 Atl. 607. **P. R.**—*Barros v. Porto Rico Motor Co.*, 7 Porto Rico Fed. 683. **R. I.**—*Hawcock Nat. Bank v. Farnum*, 20 R. I. 406, 40 Atl. 241. **S. C.**—*Batesburg C. O. Co. v. Jones*, 96 S. C. 148, 86 S. E. 86. **S. D.**—*McCoy v. Handlin*, 35 S. D. 487, 153 N. W. 361, Ann. Cas. 1917A, 1046, L. R. A. 1915E, 858. **Tenn.**—*Louisville & N. R. Co. v. County Ct.*, 1 Sneed 637, 62 Am. Dec. 424. **Tex.**—*Bukowski v. Williams* (Tex. Civ. App.), 198 S. W. 343. **Utah**.—*Bristol v. Brent*, 38 Utah 108, 103 Pac. 1976, 140 Am. St. Rep. 804. **Vt.**—*Unadilla Silo Co. v. Hull*, 90 Vt. 134, 96 Acl. 535. **Va.**—*Lewis v. Thornton*, 6 Munf. (20 Va.) 87. **Wash.**—*Ingham v. Harper*, 71 Wash. 286, 128 Pac. 675, Ann. Cas. 1914C, 528. **Wis.**—*Louster v. Louster*, 118 Wis. 159, 95 N. W. 961. **Eng.**—*Richardson v. Mellish*, 2 Bing. 229, 9 E. C. L. 557, 130 Eng. Reprint 294.

[a] **Inferior courts not bound by dictum of court of last resort.** *Bukowski v. Williams* (Tex. Civ. App.), 198 S. W. 343. Compare *Gilson v. Chouteau*, 7 Mo. App. 1.

[b] **Opinion on Issues When Case Dismissed for Want of Jurisdiction.** *Wright v. Georgia R. & Bkg. Co.*, 216 U. S. 420, 427, 20 Sup. Ct. 212, 54 L. ed. 544.

[c] **Statements in opinion which are responsive to a question treated by the court as decisive, are not dicta, but authority.** *State v. Bank of Commerce* (Ark.), 202 S. W. 834.

[d] **An opinion which goes beyond the limits of the case in which the decision is rendered is, to that extent, not binding as an authority.** *Herron v. Whiteley Malleable Castings Co.*, 47 Ind. App. 235, 92 N. E. 555.

[e] **General expressions in an opinion, which go beyond the case, may**

be respected, but should not control the judgment in a subsequent suit. *Downs v. Bidwell*, 182 U. S. 244, 258, 21 Sup. Ct. 770, 45 L. ed. 1088.

[f] **"Where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court and of equal validity with the other."** **U. S.**—*Union Pac. R. Co. v. Mason City & P. R. Co.*, 199 U. S. 160, 166, 26 Sup. Ct. 19, 50 L. ed. 134. **Cal.**—*San Joaquin & K. R. Canal & I. Co. v. Stanislaus County*, 155 Cal. 21, 99 Pac. 265. **Tex.**—*Park v. South Bend Chilled Pipe Co.* (Tex. Civ. App.), 199 S. W. 412.

[g] **Where Something Else Disposes of the Case.**—"It cannot be said that a case is not authority on one point because, although that point was properly presented and decided is the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter," e. g. dismissal for failure of proof. *Florida Central R. R. Co. v. Schutte*, 163 U. S. 118, 143, 26 L. ed. 327.

[h] **An expression of opinion by the federal supreme court which is unnecessary to a determination of the case before the court, but which sets forth the mature and unanimous judgment of its members on the question of law involved, should be followed, and not rejected as dictum.** *Cameron v. United States* (C. C. A.), 250 Fed. 243; *Daniels v. Wagner*, 205 Fed. 235, 238, 125 C. C. A. 93.

36. *Wilson v. Swords* (Ga. App.), 95 S. E. 1013.

[a] **May have great weight and be entitled to earnest consideration.** **U. S.**—*N. W. Terra Cotta Co. v. Caldwell*, 234 Fed. 491, 148 C. C. A. 257. **Cal.**—*San Joaquin & K. R. Canal & I. Co. v. Stanislaus County*, 155 Cal. 21, 99 Pac. 265. **S. D.**—*McCoy v. Handlin*, 35 S. D. 487, 153 N. W. 361, Ann. Cas. 1917A, 1046, L. R. A. 1915E, 858.

ion does not imply approval of everything contained in the opinion of the court below.<sup>37</sup>

**5. Decisions by Divided Court.**—The fact that the decision of a court of last resort is rendered by a divided court does not make the case any the less a precedent,<sup>38</sup> but when an affirmance results from an equal division of the court, the decision is not a binding authority for the determination of other cases.<sup>39</sup>

**6. Decisions or Opinions Concurred in.**—Opinions concurred in by other judges are deemed to be their own and the principles established thereby are the settled law of the court,<sup>40</sup> and this is true of a general concurrence when no specific grounds therefor are stated.<sup>41</sup> But the doctrine of stare decisis does not apply to the reasons, grounds, or principles stated in an opinion when a majority of the court concur merely in the result.<sup>42</sup>

37. *People ex rel. Palmer v. Travis*, 223 N. Y. 150, 119 N. E. 437. See *Flint v. Chaloupka*, 72 Neb. 34, 99 N. W. 825, 117 Am. St. Rep. 771.

[a] **An unreported decision** which is merely an affirmance of a decree, without an opinion, is not a binding authority. *Kobbe v. Harriman Land Co.*, 139 Tenn. 251, 201 S. W. 762. Unreported decisions as precedents generally, see *infra*, III, C.

38. **Cal.**—*Atkinson v. Golden Gate Tile Co.*, 21 Cal. App. 168, 131 Pac. 107. **Ga.**—*Moss v. Myers*, 12 Ga. App. 68, 76 S. E. 768. **Mass.**—*Wilcutt & Sons Co. v. Driscoll*, 200 Mass. 110, 85 N. E. 897, 23 L. R. A. (N. S.) 1236. **Mich.**—*Feige v. Michigan Cent. R. Co.*, 62 Mich. 1, 28 N. W. 685. **Mo.**—*Lampe v. United Rys. Co. (Mo. App.)*, 202 S. W. 438. **N. Y.**—*Lahr v. Metropolitan E. R. Co.*, 104 N. Y. 268, 10 N. E. 528, 4 N. Y. St. 340. **S. C.**—*Matthews v. Clark*, 105 S. C. 13, 89 S. E. 471.

But see *Hopkins v. McCann*, 19 Ill. 113.

[a] **By Intermediate Appellate Court.** *In re Yonkers*, 162 App. Div. 158, 147 N. Y. Supp. 195.

[b] **Even When It Reverses a Decision by a Full Court.**—*Lampe v. United Rys. Co. (Mo. App.)*, 202 S. W. 438. But by statute in some jurisdictions, unanimous decisions cannot be overruled or changed by decisions of a divided court. *Loeb v. Jennings*, 133 Ga. 796, 67 S. E. 101.

39. **U. S.**—*Hertz v. Woodman*, 218 U. S. 205, 30 Sup. Ct. 621, 54 L. ed. 1001. **Ariz.**—*Territory v. Gaines*, 11 Ariz. 270, 93 Pac. 281. **Fla.**—*State v.*

*McClung*, 47 Fla. 224, 37 So. 51. **Ga.**—*Hill v. State*, 112 Ga. 32, 400, 37 S. E. 441. **Ill.**—*Hopkins v. McCann*, 19 Ill. 113. **Ia.**—*Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56. **Mich.**—*Kalamazoo v. Crawford*, 154 Mich. 58, 117 N. W. 572. **N. Y.**—*People ex rel. Atty. Gen. v. New York*, 25 Wend. 252, 35 Am. Dec. 669. **N. C.**—*Durham v. Richmond & D. R. Co.*, 113 N. C. 240, 18 S. E. 208. **Ore.**—*Rowley v. Hager*, 63 Ore. 246, 127 Pac. 36. **Pa.**—*In re Griel's Estate*, 171 Pa. 412, 33 Atl. 375. **Utah.**—*Salt Lake Inv. Co. v. Oregon S. L. R. Co.*, 46 Utah 203, 148 Pac. 439. **Va.**—*Whiting v. West Point*, 88 Va. 905, 14 S. E. 693, 29 Am. St. Rep. 750, 15 L. R. A. 860. **W. Va.**—*Bratt v. Cornwell*, 68 W. Va. 541, 70 S. E. 271. **Can.**—*Milligan v. Toronto R. W. Co.*, 18 Ont. L. Rep. 109.

*Contra*, *American Mortg. Co. v. Woodward*, 83 S. C. 521, 65 S. E. 739; *Florence v. Berry*, 62 S. C. 469, 40 S. E. 871.

**Affirmance without opinion**, see *supra*, II, A, 4.

40. *Boyle v. Zacharie*, 6 Pet. (U. S.) 348, 8 L. ed. 423.

41. *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145.

42. **Ia.**—*Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56. **Mo.**—*Mapes v. Burns*, 72 Mo. App. 411. **N. Y.**—See *People v. Cole*, 43 N. Y. 508. **S. C.**—*State ex rel. Greenville Bk. v. Goodwin*, 81 S. C. 419, 62 S. E. 1100. **Va.**—*Chesapeake & W. R. Co. v. Washington, C. & St. L. R. Co.*, 99 Va. 715, 40 S. E. 20.

[a] **Where several opinions are filed**, stating different reasons for concurring



7. **Decisions Procured by Collusion.**—The fact that a decision was procured by collusion should not, it seems, affect its force as a precedent,<sup>43</sup> particularly where it was rendered only after an intervention by other interested persons who were not parties to the alleged collusion.<sup>44</sup> But it has been held that an affirmance by consent is not an adjudication binding as a precedent.<sup>45</sup>

8. **Contrary Decisions.**—While the fact that the latest decision of a court is opposed to its previous rulings may influence that court to overrule such decision,<sup>46</sup> yet when the supreme court has rendered contrary decisions on any question, the lower courts must follow its last expression on the subject,<sup>47</sup> and cannot follow a contrary decision by an intermediate court of appeals.<sup>48</sup> Where controlling decisions of intermediate appellate courts are contrary, an inferior court should follow the decision of the court of appeals of its own district.<sup>49</sup> Where coordinate appellate courts render contrary decisions on the same question, each should follow its own decision, unless convinced that it is wrong, until a higher court renders a controlling decision on the matter.<sup>50</sup> Conflict between state and federal decisions are discussed elsewhere.<sup>51</sup>

9. **Irregular Proceedings.**—A decision at an irregular proceed-

in the result, the case is not an authority for the principles enunciated in such opinions, as there is a concurrence merely in the result. *James v. Patten*, 6 N. Y. 9, 55 Am. Dec. 376.

43. See *Williams v. Baker*, 17 Wall. (U. S.) 144, 150, 21 L. ed. 561.

44. *Williams v. Baker*, 17 Wall. (U. S.) 144, 21 L. ed. 561.

45. *McGillis v. McGillis*, 154 N. Y. 532, 49 N. E. 145.

46. See *Young v. Downey*, 150 Mo. 317, 51 S. W. 751.

47. Cal.—*Chambers v. Belmore Land & Water Co.*, 33 Cal. App. 78, 164 Pac. 404.

Ind.—*Studebaker v. Alexander* (Ind. App.), 91 N. E. 606. Mo.—*Willis v. Kansas City Term. Ry. Co.* (Mo. App.), 199 S. W. 736.

N. Y.—*Costello v. Syracuse, B. & N. Y. R. Co.*, 46 Barb. 92. See *Ganson v. Tiff*, 71 N. Y. 48.

N. C.—*State v. Bell*, 136 N. C. 674, 49 S. E. 163.

Tex.—*Deweese v. Southwestern Tel. & Tel. Co.* (Tex. Civ. App.), 144 S. W. 732.

W. Va.—*Barbert v. Monongahela River R. Co.*, 90 W. Va. 253, 40 S. E. 377.

[a] Rule applied in intermediate appellate court on rehearing requiring reversal of its former ruling. *Walsh v. Hanan*, 92 App. Div. 589, 87 N. Y. Supp. 930. Compare *Horton-Hughes*

*Furn. Co. v. Broad Street Hotel Co.* (Ga. App.), 95 S. E. 379; *State v. Tinsberg Lumber Co.*, 91 Ind. App. 322, 139 N. E. 130, 111 N. E. 346.

[b] Effect on Interlocutory and Final Decisions.—The final decree of an inferior court must follow the law as laid down by the court of last resort, even though the latter's decision be rendered subsequent to a contrary interlocutory decree. *Wooten v. Handy*, 21 Fed. 61.

[c] Unless a full bench was not present when the later decision was rendered but was present at the first decision. *Warner & Co. v. Strickland*, 144 Ga. 747, 87 S. E. 267.

48. *Davis v. Hall*, 20 Ga. App. 298, 83 S. E. 25; *Bacon v. Hoadley*, 19 Ga. App. 63, 90 S. E. 1033; *Parker v. State*, 19 Ga. App. 67, 90 S. E. 1036; *James v. State*, 19 Ga. App. 67, 90 S. E. 981; *Backham v. Scott* (Tex. Civ. App.), 140 S. W. 89.

49. *James v. New York & E. R. Co.*, 20 Barb. (N. Y.) 625; *Malam v. Simpson*, 10 Abb. Pr. (N. Y.) 325, 30 How. Pr. 488; *Mass v. Rosenthal*, 62 Misc. 300, 110 N. Y. Supp. 3; *Charles v. Arthur*, 84 N. Y. Supp. 184.

50. *Frankenberg Co. v. United States*, 140 Fed. 66, 70 C. C. A. 514.

51. See *infra*, II, B, 4.

ing, contrary to authority at the time, and never followed, does not create a precedent.<sup>52</sup>

10. **Advisory Opinions.**—Merely advisory opinions given to the legislature<sup>53</sup> or governor<sup>54</sup> are not binding as precedents.

B. AS DETERMINED BY NATURE OF COURT.<sup>55</sup> — 1. **Decisions in the Jurisdiction Where Rendered.**—All courts are bound, as a general rule, to follow the decisions of the courts of last resort of their own jurisdiction when they cover the point involved,<sup>56</sup> and the rule of stare decisis is applied with full force when invoked in the same court in which the precedent relied upon was established.<sup>57</sup> Intermediate appellate and inferior courts and tribunals<sup>58</sup> are bound by

52. *Clark v. Boston Safe D. & T.*, 116 Me. 450, 102 Atl. 289, L. R. A. 1918B, 284.

53. *Perkins v. Westwood*, 226 Mass. 268, 115 N. E. 411; *Woods v. Weburn*, 220 Mass. 416, 107 N. E. 985, Ann. Cas. 1917A, 492; *In re Opinion of Justices*, 214 Mass. 599, 102 N. E. 464.

54. *In re Opinion of Judges*, 3 Okla. Crim. 515, 105 Pac. 684; *In re Opinion of Judges*, 34 S. D. 650, 147 N. W. 729.

55. As to decisions of non-judicial tribunals, etc., see *supra*, I.

56. *State ex rel. Reifsnider v. Goldstein* (Mo. App.), 205 S. W. 529; *State v. Sutherland*, 166 Wis. 511, 166 N. W. 14. See also cases cited *infra*, this section.

[a] In cases involving federal law state courts must follow the United States supreme court. See *infra*, II, B, 4. But (1) where there are no controlling federal decisions, a state court will follow its own decisions construing the common law. *Williams v. Pryor*, 272 Mo. 613, 200 S. W. 53. (2) On a federal question, the decision of the state supreme court is binding on inferior courts of appeal until the contrary is held by the federal supreme court. *Postal Tel.-Cable Co. v. Frewitt* (Tex. Civ. App.), 199 S. W. 316.

57. U. S.—*Lusk v. Botkin*, 240 U. S. 236, 36 Sup. Ct. 263, 60 L. ed. 621; *In re Markowitz*, 233 Fed. 715. Ala.—*Barrett v. Brownlee*, 190 Ala. 613, 67 So. 467. Cal.—*Pugh v. Moxley*, 164 Cal. 374, 128 Pac. 1037. Ga.—*Columbus & R. Ry. Co. v. Christian*, 97 Ga. 56, 25 S. E. 411. Haw.—*Booynaems v. Ah Leong*, 21 Hawaii 699. Ill.—*Scown v. Czarnecki*, 264 Ill. 305, 106 N. E. 276, Ann. Cas. 1915A, 772, L. R. A. 1915B,

247. Ind.—*Cahoon v. Fisher*, 146 Ind. 583, 44 N. E. 664, 45 N. E. 787, 36 L. R. A. 193. Ia.—*Zollinger v. Clark*, 172 Iowa 748, 154 N. W. 1004. Ky.—*Oliver Co. v. Louisville Rty. Co.*, 156 Ky. 628, 161 S. W. 570, Ann. Cas. 1915C, 565, 51 L. R. A. (N. S.) 293. La.—*State v. Pool*, 138 La. 228, 70 So. 107. Me.—*Jordan v. McKenzie*, 113 Me. 57, 92 Atl. 995. Mich.—*Atty.-Gen. ex rel. Barnes v. Midland County*, 178 Mich. 513, 144 N. W. 883. Mo.—*State ex rel. Delano v. Ellison*, 181 S. W. 78. Neb.—*Nelson v. Florence*, 94 Neb. 847, 144 N. W. 791. N. J.—*McFadden v. Palmer*, 83 N. J. Eq. 621, 92 Atl. 396. N. Y.—*People v. Santa Clara Lumb. Co.*, 213 N. Y. 226, 107 N. E. 495. N. C.—*Baldwin v. Atlantic C. L. R. Co.*, 170 N. C. 12, 86 S. E. 776. N. D.—*Younmans v. Hanna*, 35 N. D. 479, 160 N. W. 705, 161 N. W. 797, Ann. Cas. 1917E, 263. Ore.—*State v. McAllister*, 67 Ore. 480, 136 Pac. 354. S. C.—*Lillard v. Melton*, 103 S. C. 10, 87 S. E. 421. Tenn.—*Sequatchie & S. P. C. & T. Co. v. Tenn. Coal, I. & R. Co.*, 131 Tenn. 221, 174 S. W. 1122. Tex.—*Barnes v. State*, 75 Tex. Crim. 188, 170 S. W. 548. Can.—*Chancey v. Brooking*, 1 Newf. 314.

58. U. S.—*Gooding v. Oliver*, 17 How. 274, 15 L. ed. 148; *Jellison v. Krell Piano Co.*, 246 Fed. 509; *Audifren Refrigerating Mach. Co. v. General Elec. Co.*, 245 Fed. 783; *Davis v. Southern Pac. Co.*, 235 Fed. 731. Ala.—*Fealy v. Birmingham*, 15 Ala. App. 367, 73 So. 296. Ariz.—*Kraeger v. Twin Buttes R. Co.*, 13 Ariz. 348, 114 Pac. 553, Ann. Cas. 1913E, 1229. Ark.—*Rhea v. State*, 104 Ark. 162, 147 S. W. 463. Cal.—*Colusa & Hamilton R. Co. v. Glenn*, 35 Cal. App. 205, 169 Pac. 423; *Bellingham Bay Lumb. Co. v. Hopkins*, 34 Cal. App. 534, 168 Pac.



such decisions, irrespective of what the law may be in other jurisdictions.<sup>59</sup>

Decisions of intermediate appellate courts, while not precedents in a higher court,<sup>60</sup> until reversed or overruled are generally binding on inferior courts.<sup>61</sup>

159. Colo.—United Com. Travelers v. Benz, 27 Colo. App. 423, 150 Pac. 822. Del.—State v. Green, 1 Penns. 63, 75 Atl. 590. D. C.—Gundysen Dental v. Co. v. Brightwell, MacArthur & M. (11 D. C.) 74. Ga.—Clark v. Bank of Thomasville, 21 Ga. App. 818, 95 S. E. 331; Lee v. Central of Ga. R. Co., 21 Ga. App. 528, 94 S. E. 888. Kirkpatrick Hdw. Co. v. Hamlet, 20 Ga. App. 740, 93 S. E. 226. Ill.—Elwell v. Hicks, 180 Ill. App. 554. Ind.—Stout v. Stout (Ind. App.), 114 N. E. 473. Ia.—Telford v. Barney, 1 G. Gr. 373. Kan.—Missouri, K. & T. Ry. Co. v. Steinberger, 60 Kan. 859, 54 Pac. 1101. Ky.—Com. v. Crambaugh, 179 Ky. 729, 197 S. W. 401. La.—Thomas v. Blair, 111 La. 678, 23 So. 811. Me.—State v. Blake, 25 Me. 289. Mo.—Morgenthau-Lintyne Co. v. Hays (Mo. App.), 292 S. W. 300. N. J.—Gordon v. Gordon, 88 N. J. Eq. 449, 100 Atl. 31. N. Y. People ex rel. Hirschberg v. Seeger, 479 App. Div. 700, 166 N. Y. Supp. 912. Ohio.—Barr v. Poor, 28 Ohio C. C. 167. Pa.—Derbyshire's Estate, 22 Pa. Dist. 153. P. R.—Torres v. Robert y Catala, 6 Porto Rico Fed. 423. S. C.—Cannon v. Southern Ry., 28 S. C. 51, 40 S. E. 525. Tenn.—Hendrick v. Curvey, 42 S. W. 592. Tex.—Camp v. Gourley (Tex. Civ. App.), 201 S. W. 671; Park v. South Bend Chilled Plow Co. (Tex. Civ. App.), 199 S. W. 845; Davis v. Gulf, etc. R. Co. (Tex. Civ. App.), 196 S. W. 607. Va.—Lambert v. Jenkins, 112 Va. 376, 71 S. E. 718. Ann. Cas. 1013B, 778. Wash.—Foster v. Comrs. of Cowlitz County, 100 Wash. 505, 171 Pac. 539. Wis.—Hawkinson v. Outway, 143 Wis. 136, 126 N. W. 683, 133 Am. St. Rep. 1091. Eng.—Wilson v. Wilson, 5 H. L. C. 40, 10 Eng. Reprint 811. Can.—Crawe v. Graham, 22 Ont. L. Rep. 145.

But see *infra*, note 8 [c].

As to contrary decisions, see *supra*, II. A, 8.

[a] On the Constitutionality of a Statute.—*Fearis v. Gaffard* (Tex. Civ. App.), 264 S. W. 675.

[b] Involving Questions of the Com-

mon Law.—*McEwen Bros. v. Cobb*, 104 Misc. 477, 172 N. Y. Supp. 44.

[c] On a question of criminal law (1) the rule applies (*People v. Schlick*, 200 10. App. 605), unless (2) by a court which has no criminal jurisdiction. See *infra*, note 47.

59. Cal.—*Athlison v. Golden Gate Title Co.*, 21 Cal. App. 168, 181 Pac. 107. N. Y.—*Head v. Smith*, 44 How. Pr. 470. Tex.—*Ennis Waterworks v. Hooks* (Tex. Civ. App.), 136 S. W. 513.

As to the force of decisions of other states, see *infra*, II. B, 2.

60. *State ex rel. Harriman v. Reynolds*, 173 Mo. 131, 560 S. W. 296.

61. U. S.—*Mark Smeig v. United States*, 145 Fed. 496, 153 C. C. A. 372. La.—*Martin v. Hagan*, 37 La. Ann. 240. N. J.—*State v. Toth*, 86 N. J. L. 347, 90 Atl. 1123; *Fletcher v. Camden*, 56 N. J. L. 244, 78 Atl. 82. N. Y. *In re Lammis*, 101 Misc. 258, 166 N. Y. Supp. 326; *Hamlin v. Bender*, 92 Misc. 16, 155 N. Y. Supp. 964; *In re Meyer*, 72 Misc. 566, 131 N. Y. Supp. 27; *Adams v. Bush*, 2 Ath. Pr. (N. S.) 112. Ohio.—*Continental Gas Light & C. Co. v. Bowman*, 12 Ohio Dec. (Reprint) 147. Pa.—*Charalster v. York R. Co.*, 50 Pa. Super. 2nd. Can.—*Baird v. Grieco*, 4 Newf. 432.

But see *supra*, notes 2, 8, 48.

[a] Decisions by appellate courts of other districts should be followed by an inferior court when there is no controlling decision by the court of last resort or the appellate court of its own district. *Hamlin v. Bender*, 92 Misc. 16, 155 N. Y. Supp. 963. Compare *Nichols v. Fanning*, 20 Misc. 73, 45 N. Y. Supp. 466. See *supra*, note 49.

[b] A federal district court is bound (1) by the standing decisions of its own circuit court of appeals (*Prudential Ins. Co. v. Herald*, 247 Fed. 681), but (2) not by the decisions of a court of appeals of another circuit. *Bright v. State* (C. C. A.), 249 Fed. 950; *Continental Securities Co. v. Inverhorough R. Trans. Co.*, 165 Fed. 945; *In re Baird*, 154 Fed. 215. (3)



District and other inferior court decisions are never binding as precedents on higher courts,<sup>62</sup> although they may be considered and may sometimes have a certain persuasive force in the absence of a controlling precedent.<sup>63</sup>

Courts of coordinate jurisdiction are not bound by each other's decisions,<sup>64</sup> but, when apparently sound, until the matter is decided by a higher court, they are of great persuasive force and generally followed.<sup>65</sup>

Yet when the matter in hand has not been decided by the supreme court or the court of appeals of its own circuit it will generally follow such decisions when in point and apparently sound. *Courtney v. Croxton*, 239 Fed. 247, 152 C. C. A. 235; *Warren Bros. Co. v. Evans*, 234 Fed. 657; *Imbreyek v. Hamburg-American Steam Pkt. Co.*, 190 Fed. 229; *Thomson-Houston Elec. Co. v. Holland*, 113 Fed. 603; *Hale v. Hilliker*, 109 Fed. 273; *Fairfield Floral Co. v. Bradbury*, 87 Fed. 415.

62. **U. S.**—*Curtis v. Overman Wheel Co.*, 58 Fed. 784, 7 C. C. A. 493; *Wanamaker v. Enterprise Mfg. Co.*, 53 Fed. 791, 3 C. C. A. 672; *National Cash-Reg. Co. v. American Cash-Reg. Co.*, 53 Fed. 367, 3 C. C. A. 559. **Colo.**—*Wilson v. People*, 44 Colo. 608, 99 Pac. 335; *Gibson v. People*, 44 Colo. 600, 99 Pac. 333. **Ia.**—*Model Laundry Co. v. Barnett*, 180 Iowa 55, 162 N. W. 830. **La.**—*Goldman v. Goldman*, 51 La. Ann. 761, 25 So. 555. **Mo.**—*Sedalia v. Donohue*, 190 Mo. 407, 89 S. W. 386; *Padlock v. Missouri Pac. R. Co.*, 155 Mo. 524, 56 S. W. 453. **N. Y.**—*In re New York*, 114 App. Div. 519, 100 N. Y. Supp. 140. **N. C.**—*Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319. **Wash.**—*Northern Pac. Ry. Co. v. Snohomish County*, 101 Wash. 686, 172 Pac. 878.

63. **U. S.**—*District of Columbia v. Lynchburg Inv. Co.*, 236 U. S. 692, 35 Sup. Ct. 477, 59 L. ed. 792, construction of a statute on a rule of practice. **Ia.**—*Model Laundry Co. v. Barnett*, 180 Iowa 55, 162 N. W. 830. **N. Y.**—*Mittnacht v. Kellermann*, 105 N. Y. 461, 12 N. E. 28; *Fisher v. Gould*, 81 N. Y. 228. **Tex.**—*Southwestern States Portland Cement Co. v. Riser* (Tex. Civ. App.), 137 S. W. 1188.

64. **U. S.**—*Mast v. Stover Mfg. Co.*, 177 U. S. 485, 20 Sup. Ct. 708, 44 L. ed. 856, affirming 89 Fed. 333, 32 C. C. A. 231. **Ill.**—*Illinois Cent. R. Co. v. Hecker*, 129 Ill. App. 375. **N. Y.**

*People ex rel. Walter v. Woods*, 168 App. Div. 3, 153 N. Y. Supp. 872; *Bentley v. Goodwin*, 38 Barb. 633; *Andrews v. Wallace*, 8 Abb. Prac. 425, 29 Barb. 350, 17 How. Proc. 263. **Ohio.**—*State v. Fosdick*, 1 Ohio C. C. 265, 1 Ohio Cir. Dec. 145. **Pa.**—*In re Franklin County Liquor Licenses*, 32 Pa. Co. Ct. 129. **P. R.**—*Grosch v. Vannina*, 7 Porto Rico Fed. 55. **Tex.**—*Canadian & Am. Mortgage & Trust Co. v. Edinburgh-Am. L. M. Co.*, 16 Tex. Civ. App. 520, 41 S. W. 140, 42 S. W. 864.

[a] A district court on the same facts is not bound by the decision of a district court of another county. *Canadian & Am. Mtg. & Tr. Co. v. Edinburgh-Am. L. M. Co.*, 16 Tex. Civ. App. 520, 41 S. W. 140, 42 S. W. 864.

65. **U. S.**—*United States v. Lair*, 195 Fed. 47, 115 C. C. A. 49; *Norwich U. F. Ins. Co. v. Stanton*, 191 Fed. 813, 112 C. C. A. 327; *Erie R. Co. v. Russell*, 183 Fed. 722, 106 C. C. A. 160; *Gill v. Austin*, 157 Fed. 234, 84 C. C. A. 677. **Ill.**—*Bednarski v. West Hammond*, 170 Ill. App. 543; *Westfall v. Albert*, 107 Ill. App. 61; *Railton v. People*, 85 Ill. App. 384. **Mo.**—*Harwood v. Nat. U. F. Ins. Co.*, 170 Mo. App. 298, 156 S. W. 475. **N. Y.**—*Loring v. United States V. G. P. B. & P. Co.*, 30 Barb. 644; *Andrews v. Wallege*, 8 Abb. Pr. 425, 29 Barb. 350, 17 How. Pr. 263; *Malan v. Simpson*, 12 Abb. Pr. 225, 20 How. Pr. 488. **Ohio.**—*Milner v. Hulbert*, 8 Ohio Dec. (Reprint) 240. **Tex.**—*Tinsley v. Bottom* (Tex. Civ. App.), 155 S. W. 1053; *Robinson v. Galveston*, 51 Tex. Civ. App. 292, 111 S. W. 1076; *Whittaker v. Thayer*, 48 Tex. Civ. App. 508, 110 S. W. 787. **Can.**—*Meagher v. Aetna Ins. Co.*, 19 U. C. Q. B. 530; *Scouler v. Scouler*, 19 U. C. Q. B. 106.

See *supra*, note 50.

[a] In patent cases coordinate court decisions are frequently followed. Con-

**Civil and Criminal Courts.**—Where final appellate jurisdiction in civil cases is in one court and in criminal cases is in another, the decisions of each within its field is binding upon the other,<sup>66</sup> but decisions of one within the field of the other are not binding on the latter,<sup>67</sup> unless made before it was created, when jurisdiction of both classes of cases was in one court.<sup>68</sup>

**2. State Court Decisions in Other States.**—The rule of stare decisis, in its strictest application, is concerned only with decisions in the jurisdiction where rendered, and therefore state court decisions are not binding as precedents in the courts of other states;<sup>69</sup> as, for example, the adjudication of a federal question, in the absence of a federal decision,<sup>70</sup> the construction of a will,<sup>71</sup> and, although of persuasive force and not lightly to be disregarded,<sup>72</sup> decisions on rules of procedure.<sup>73</sup> But such decisions, in the absence of a controlling

solidated Rubber Tire Co. v. Diamond Rubber Co., 162 Fed. 892, 89 C. C. A. 582.

66. *State v. Coyle*, 7 Okla. Crim. 50, 122 Pac. 243; *State ex rel. Ikard v. Russell*, 33 Okla. 141, 124 Pac. 1092; *Ex parte Anderson*, 33 Okla. 216, 124 Pac. 980; *Ex parte Justus*, 26 Okla. 101, 110 Pac. 907; *State v. Savage*, 105 Tex. 467, 151 S. W. 530; *State v. Schwarz*, 103 Tex. 119, 124 S. W. 420; *Griffin v. Tucker*, 102 Tex. 420, 118 S. W. 635; *Bishop v. State*, 74 Tex. Crim. 214, 167 S. W. 363; *State v. Country Club (Tex. Civ. App.)*, 173 S. W. 570; *Redman v. State*, 67 Tex. Cr. 374, 149 S. W. 670.

67. *State ex rel. Spencer v. Nabers*, 80 Tex. Crim. 56, 187 S. W. 783; *Barnes v. State*, 75 Tex. Crim. 188, 170 S. W. 548, L. R. A. 1915C, 101.

68. *Lyle v. State*, 80 Tex. Crim. 606, 193 S. W. 680.

69. **U. S.**—*Vandegrift & Co. v. United States*, 173 Fed. 609, 97 C. C. A. 469. **Ala.**—*Nelson v. Goree's Admr.*, 34 Ala. 565. **Ark.**—*Trapnall v. Burton*, 24 Ark. 371. **Cal.**—*People v. Burbank*, 12 Cal. 378. **Colo.**—*Martinez v. People*, 55 Colo. 51, 132 Pac. 64, Ann. Cas. 1914C, 559. **D. C.**—*Coveney v. Conlin*, 20 App. Cas. 303. **Ga.**—*Krogg v. Atlanta & W. P. R. Co.*, 77 Ga. 202, 4 Am. St. Rep. 77. **Idaho.**—*State v. Nat. Surety Co.*, 29 Idaho 670, 161 Pac. 1026. **Ill.**—*Folsom v. Ohio State University*, 210 Ill. 404, 71 N. E. 384. **Ind.**—*Nathan v. Lee*, 152 Ind. 232, 52 N. E. 987, 43 L. R. A. 820. **Ia.**—*Franklin v. Two-good*, 25 Iowa 520, 96 Am. Dec. 73. **Kan.**—*Burgin v. Missouri, K. & T. R. Co.*, 90 Kan. 194, 133 Pac. 560. **Ky.**

*Brown v. Chesapeake & O. R. Co.*, 135 Ky. 798, 123 S. W. 298, 25 L. R. A. (N. S.) 717. **La.**—*Le Blanc v. New Orleans*, 138 La. 243, 70 So. 212. **Minn.**—*Anderson v. Pittsburgh Coal Co.*, 108 Minn. 455, 122 N. W. 794, 26 L. R. A. (N. S.) 624. **Mo.**—*State ex rel. Baker v. Bird*, 253 Mo. 569, 162 S. W. 119, Ann. Cas. 1915C, 353. **N. H.**—*Crippen v. Loughton*, 69 N. H. 549, 44 Atl. 538, 76 Am. St. Rep. 192, 46 L. R. A. 467. **N. J.**—*In re Verdon*, 89 N. J. L. 16, 97 Atl. 783. **N. Y.**—*St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26, 27 N. E. 849, 13 L. R. A. 241. **N. C.**—*Wickler v. Jones*, 159 N. C. 102, 74 S. E. 801, Ann. Cas. 1914B, 1083, 40 L. R. A. (N. S.) 69. **Okla.**—*McCormick v. Bonfils*, 9 Okla. 605, 60 Pac. 296. **Tenn.**—*Northcut v. Church*, 135 Tenn. 541, 188 S. W. 220, Ann. Cas. 1918B, 545. **Tex.**—*Friedman v. Sampson (Tex. Civ. App.)*, 181 S. W. 779. **Utah.**—*State ex rel. Lundberg v. Green River Irr. Dist.*, 40 Utah 83, 119 Pac. 1039. **Wis.**—*Finney v. Guy*, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486.

70. **Ill.**—*Cohn v. Adams Express Co.*, 170 Ill. App. 174. **Mich.**—*Caldwell v. Gale*, 11 Mich. 77. **N. Y.**—*People ex rel. Hoelderlin v. Kane*, 79 Misc. 140, 139 N. Y. Supp. 350.

71. *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210; *Rackemann v. Wood*, 203 Mass. 501, 89 N. E. 1037.

72. *Virginia—Tenn. Hdw. Co. v. Hodges*, 126 Tenn. 370, 149 S. W. 1056.

73. *Hayes v. Snader (Ia.)*, 165 N. W. 1041; *State ex rel. Baker v. Bird*, 253 Mo. 569, 162 S. W. 119, Ann. Cas. 1915C, 353.

local ruling, may be and frequently are consulted and followed.<sup>74</sup> Thus the judicial construction of state constitutions and statutes are generally followed by the courts of other states in determining causes arising thereunder,<sup>75</sup> as well as the judicial interpretation of con-

74. See cases cited *supra*, this section, and the following: **U. S.**—Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865. **Ill.**—Chicago Title & Tr. Co. v. Wheeler, 119 Ill. App. 508. **Miss.**—Vicksburg S. & P. R. Co. v. Porterfield, 103 Miss. 585, 60 So. 652. **Mo.**—Coombes v. Knowlson, 193 Mo. App. 554, 182 S. W. 1040. **N. Y.**—Kettel v. Erie R. Co., 176 App. Div. 430, 163 N. Y. Supp. 640. **Tenn.**—Mahoney-Jones Co. v. Sams Bros., 128 Tenn. 207, 159 S. W. 1094. **Tex.**—New York L. Ins. Co. v. English, 95 Tex. 391, 67 S. W. 884. **Wis.**—State v. Brown, 143 Wis. 405, 127 N. W. 956.
75. **U. S.**—Waterman v. Canal-Louisiana Bank & Tr. Co., 186 Fed. 71, 108 C. C. A. 183; Wiggins Ferry Co. v. Chicago & A. R. Co., 3 McCrary 609, 11 Fed. 381; Prentice v. Zane, 19 Fed. Cas. No. 11,383. **Cal.**—McManus v. Red Salmon Canning Co. (Cal. App.), 173 Pac. 1112. **Colo.**—Denver & R. G. Ry. Co. v. Waring, 37 Colo. 122, 86 Pac. 305. **Conn.**—Cristilly v. Warner, 87 Conn. 461, 88 Atl. 711, 51 L. R. A. (N. S.) 415. **Del.**—Taylor v. Crosson, 98 Atl. 375. **Ga.**—Krogg v. Atlanta & W. P. R. Co., 77 Ga. 202, 4 Am. St. Rep. 77. **Ill.**—Bell v. Farwell, 176 Ill. 489, 52 N. E. 346, 68 Am. St. Rep. 194, 42 L. R. A. 804. **Ind.**—Clark v. Southern Ry. Co. (Ind. App.), 119 N. E. 539. **Ia.**—Fred Miller Brew. Co. v. Capital Ins. Co., 111 Iowa 590, 82 N. W. 1023, 82 Am. St. Rep. 529. **Kan.**—Crooker v. Pearson, 41 Kan. 410, 21 Pac. 270. **La.**—Cucullu v. Louisiana Ins. Co., 5 Mart. N. S. 464, 16 Am. Dec. 199. **Mass.**—Clark v. Knowles, 187 Mass. 35, 72 N. E. 352, 105 Am. St. Rep. 376. **Mich.**—Rickman v. Rickman, 160 Mich. 224, 146 N. W. 609, Ann. Cas. 1915C, 1237. **Minn.**—Koecher v. Minneapolis, St. P. & S. S. M. R. Co., 122 Minn. 458, 142 N. W. 874. **Miss.**—McIntyre v. Ingraham, 35 Miss. 25. **Mo.**—Miller v. Chinn (Mo. App.), 203 S. W. 212. **Nev.**—Forrester v. Southern Pac. Co., 36 Nev. 247, 134 Pac. 753, 136 Pac. 705, 48 L. R. A. (N. S.) 1. **N. J.**—Watson v. Lane, 52 N. J. L. 550, 20 Atl. 894, 10 L. R. A. 784. **N. Y.**—Larendon v. Ocean S. S. Co. (App. Div.), 170 N. Y. Supp. 830. **N. C.**—Watson v. Orr, 14 N. C. 161. **Ohio.**—Ott v. Lake Shore & M. S. Ry. Co., 18 Ohio C. C. 395, 10 Ohio Cir. Dec. 85. **Pa.**—Converse v. Paret, 228 Pa. 156, 77 Atl. 429, 30 L. R. A. (N. S.) 1092; Schmaltz v. York Mfg. Co., 204 Pa. 1, 53 Atl. 522, 93 Am. St. Rep. 782, 59 L. R. A. 907; Forepaugh v. Delaware, etc. R. Co., 128 Pa. 217, 18 Atl. 503, 15 Am. St. Rep. 672, 5 L. R. A. 508. **S. D.**—Meuer v. Chicago, M. & St. P. R. Co., 11 S. D. 94, 75 N. W. 823, 74 Am. St. Rep. 774. **S. C.**—Johnston v. Southwestern R. Bank, 3 Strober Eq. 263. **S. D.**—*In re McKennan's Estate*, 25 S. D. 369, 126 N. W. 611, 33 L. R. A. (N. S.) 606. **Tex.**—Clay v. Atchison, T. & S. F. Ry. Co. (Tex. Civ. App.), 201 S. W. 1072. **Utah.**—Mark v. Browning, 115 Pac. 275. **Wash.**—Whitman v. Mast, B. & B. Co., 11 Wash. 318, 39 Pac. 649, 48 Am. St. Rep. 874. **W. Va.**—Gilchrist v. W. Va. Oil & O. L. Co., 21 W. Va. 115, 45 Am. Rep. 555. **Wis.**—Ruck v. Chicago, M. & St. P. R. Co., 153 Wis. 158, 140 N. W. 1074.
- [a] **The Rule Rests Upon Comity.** Nathan v. Lee, 152 Ind. 232, 52 N. E. 987, 43 L. R. A. 820.
- [b] **It does not arise out of the full faith and credit clause of the federal constitution.** Wiggins Ferry Co. v. Chicago & A. R. Co., 3 McCrary 609, 11 Fed. 381.
- [c] **A statute unconstrued may be construed by the courts of another state.** Western L. Ind. Co. v. Rupp, 235 U. S. 261, 35 Sup. Ct. 37, 59 L. ed. 220.
- [d] **A contrary construction of a similar local statute does not relieve the courts from the duty of following the decisions interpreting a foreign statute by the courts of the foreign state.** Bell v. Farwell, 176 Ill. 489, 52 N. E. 346, 68 Am. St. Rep. 194, 42 L. R. A. 804; Van Matre v. Sankey, 148 Ill. 536, 36 N. E. 628, 39 Am. St. Rep. 196, 23 L. R. A. 665. Contrary decisions generally, see *supra*, II, A, 8.



tracts in the state where made and performed or to be performed,<sup>70</sup> but not to the extent of contravening the policy of the forum.<sup>77</sup>

The prior judicial construction of a statute in the state of its origin, as a general rule, follows it into the state of its adoption,<sup>78</sup> but this rule is not absolutely controlling in all cases,<sup>79</sup> and may be disregarded in the interest of public policy,<sup>80</sup> or when the legislature expressly indicates a different intention.<sup>81</sup>

Decisions prior to the division of a state, which have become established precedents and rules of property, are binding on the courts of the new state.<sup>82</sup>

[e] **A personal injury action** should be determined according to the interpretation of the law of the state where the injury accrued. *Lee v. Missouri Pac. R. Co.*, 195 Mo. 400, 92 S. W. 614; *Gabriel v. St. Louis, I. M. & S. R. Co.*, 135 Mo. App. 222, 115 S. W. 3.

76. **Ark.**—*Watkins Med. Co. v. Johnson*, 129 Ark. 384, 196 S. W. 465. **Mo.** *Rahm v. Chicago, R. I. & P. R. Co.*, 129 Mo. App. 679, 108 S. W. 570. **Tex.** *Western Union Tel. Co. v. Brown* (Tex. Civ. App.), 202 S. W. 1049. **Wyo.** *Studebaker Bros. Co. v. Mau*, 14 Wyo. 68, 82 Pac. 2.

77. *St. Louis & S. F. Ry. Co. v. Conrad* (Tex. Civ. App.), 99 S. W. 209.

[a] **The interpretation of the common law** in one state will not be made subservient to that of another by following the decisions of the latter relating to contracts made in such state under the rules of the common law. *Akers v. Jefferson Co. Sav. Bank*, 120 Ga. 1066, 48 S. E. 424.

[b] **A question of private international law** must be determined (1) in the first instance by the court in which the suit is brought. *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123. (2) In determining its jurisdiction, the court in which the action is brought is not bound by decisions of another state, which enacted the statute, determining its nature, *e. g.*, whether penal or not. *Whitlow v. Nashville, C. & St. L. R. Co.*, 114 Tenn. 344, 84 S. W. 618, 68 L. R. A. 503. (3) In determining whether a question arising under a contract made in another state is or not a federal question, in the absence of a controlling federal decision, the courts of one state will not follow the decisions of the state where the contract was made. *Western Union Tel.*

*Co. v. Brown* (Tex. Civ. App.), 202 S. W. 1049.

78. **Ariz.**—*Copper Queen Consol. Min. Co. v. Board of Equanization*, 7 Ariz. 364, 65 Pac. 149. **Ark.**—*McNutt v. McNutt*, 78 Ark. 346, 95 S. W. 778. **Colo.**—*In re Shapter*, 35 Colo. 578, 85 Pac. 688, 117 Am. St. Rep. 216, 6 L. R. A. (N. S.) 575. **D. C.**—*Morris v. Hitchcock*, 21 App. Cas. 565. **Idaho.** *Stein v. Morrison*, 9 Idaho 426, 75 Pac. 246. **Ill.**—*People v. Fifty Cases of Eggs*, 193 Ill. App. 319, 324. **Kan.** *State v. Campbell*, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533. **Mass.** *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525. **Mich.**—*Rouse v. Donovan*, 104 Mich. 234, 62 N. W. 359, 53 Am. St. Rep. 457, 27 L. R. A. 577. **Minn.** *State v. Townley*, 140 Minn. 413, 168 N. W. 591. **N. Y.**—*New York Century Bank v. Breitbart*, 151 N. Y. Supp. 588. **Tex.**—*Tyler v. St. Louis R. Co.*, 99 Tex. 491, 91 S. W. 1. **Utah.**—*State ex rel. Lundberg v. Green River Irr. Dist.*, 40 Utah 83, 119 Pac. 1039.

79. *Ancient Order of Hibernians of Anaconda v. Sparrow*, 29 Mont. 132, 74 Pac. 197, 101 Am. St. Rep. 563, 64 L. R. A. 128.

80. *Smith v. Dayton C. & I. Co.*, 115 Tenn. 543, 92 S. W. 62, 4 L. R. A. (N. S.) 1180.

81. *Missouri Pac. R. Co. v. State*, 69 Kan. 552, 77 Pac. 286.

82. *Pyles v. Riverside Furn. Co.*, 30 W. Va. 123, 2 S. E. 909; *Clarke & Co. v. Figgins*, 27 W. Va. 663.

[a] **Maryland decisions in the District of Columbia**, rendered since the organization of the latter, (1) are not binding as authorities upon the courts of the district (*Phillips v. Negley*, 117 U. S. 665, 678, 6 Sup. Ct. 901, 29 L. ed. 1013), but (2) decisions rendered while the district was part of the state of

3. **State Laws and Decisions in the Federal Courts.**—The laws and decisions of a state as rules of decision to be followed by the federal courts, are treated elsewhere in this work.<sup>83</sup>

4. **Federal Decisions in State Courts.**—Decisions of the federal supreme court on non-federal questions are not binding on the state courts,<sup>84</sup> though of great weight.<sup>85</sup> Decisions by the United States supreme court on federal questions are binding on all state courts,<sup>86</sup>

Maryland are binding. *De Vaughn v. Hutchinson*, 165 U. S. 566, 17 Sup. Ct. 461, 41 L. ed. 827.

83. See the title "United States Courts."

84. *Union Pac. R. Co. v. Bd. of Comrs.*, 247 U. S. 282, 38 Sup. Ct. 510, 62 L. ed. 1110; *People ex rel. Hirschberg v. Seeger*, 179 App. Div. 792, 166 N. Y. Supp. 913.

85. *Robt. H. Ingersoll & Bro. v. Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030.

[a] **Where decisions of the state and federal courts conflict on non-federal questions, the state courts are bound by their own state decisions.**  
**Ill.**—*Rothschild & Co. v. Steger & Sons Piano Mfg. Co.*, 256 Ill. 196, 99 N. E. 920, Ann. Cas. 1913E, 276, 42 L. R. A. (N. S.) 793. **Mass.**—*Old Dominion Copper Min. & S. Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314. **N. Y.**—*Devitt v. Providence W. Ins. Co.*, 173 N. Y. 17, 65 N. E. 777, *affirming* 61 App. Div. 390, 70 N. Y. Supp. 654. **Tex.**—*Atchison, T. & S. F. Ry. Co. v. Stevens* (Tex. Civ. App.), 192 S. W. 304.

86. **U. S.**—*Dennison v. Christian*, 196 U. S. 637, 25 Sup. Ct. 795, 49 L. ed. 630. **Ala.**—*Gill v. More*, 76 So. 453. **Ariz.**—*Harris v. Lyon*, 16 Ariz. 35, 140 Pac. 985. **Ark.**—*Lusk v. Long*, 127 Ark. 261, 192 S. W. 213. **Cal.**—*Southern Pac. Co. v. Industrial Acc. Com.*, 171 Pac. 1071. **Colo.**—*Smith v. Farr*, 46 Colo. 364, 104 Pac. 401. **Conn.**—*Taft v. Lord*, 92 Conn. 539, 103 Atl. 644, L. R. A. 1918E, 545. **Del.**—*Van Winkle v. State*, 4 Boyce 578, Ann. Cas. 1916D, 104. **Fla.**—*Seaboard A. L. R. Co. v. Simon*, 56 Fla. 545, 47 So. 1001, 20 L. R. A. (N. S.) 126. **Ga.**—*Glover v. Atlanta*, 96 S. E. 562. **Idaho.**—*Moss v. Ramey*, 25 Idaho 1, 136 Pac. 608. **Ill.**—*Davidson v. Peoria & P. U. Ry. Co.*, 203 Ill. App. 498. **Ind.**—*Clark v. Southern Ry. Co.* (Ind. App.), 119 N. E. 539. **Ia.**—*Des Moines Nat. Bank v. Des Moines*, 153 Iowa 336, 133 N. W.

767. **Kan.**—*Brinkmeier v. Missouri Pac. R. Co.*, 81 Kan. 101, 105 Pac. 221. **Ky.**—*Louisville & N. R. Co. v. Miller*, 156 Ky. 677, 162 S. W. 73, 50 L. R. A. (N. S.) 819. **La.**—*Jones v. Kansas City So. R. Co.*, 143 La. 307, 78 So. 568. **Me.**—*State v. Intox. Liquors*, 102 Me. 385, 67 Atl. 312, 120 Am. St. Rep. 504. **Md.**—*Larrabee v. Talbott*, 5 Gill 426, 46 Am. Dec. 637. **Mass.**—*New York C. & H. R. R. Co. v. York & Whitney Co.*, 119 N. E. 855. **Mich.**—*Lyon v. Clark*, 124 Mich. 100, 82 N. W. 1058, 83 N. W. 694. **Minn.**—*Hunt v. Hauser Malting Co.*, 90 Minn. 282, 96 N. W. 85. **Miss.**—*Illinois Cent. R. Co. v. Rogers*, 116 Miss. 99, 76 So. 686. **Mo.**—*Smith v. Lusk* (Mo. App.), 198 S. W. 434. **Mont.**—*Wall v. Northern Pac. R. Co.*, 53 Mont. 81, 161 Pac. 518, L. R. A. 1917C, 433. **Neb.**—*Jones Nat. Bank v. Yates*, 93 Neb. 121, 139 N. W. 844, 1135. **Nev.**—*Nash v. McNamara*, 30 Nev. 114, 93 Pac. 405, 133 Am. St. Rep. 694, 16 L. R. A. (N. S.) 168. **N. J.**—*Robt. H. Ingersoll & Bro. v. Hahne & Co.*, 88 N. J. Eq. 222, 101 Atl. 1030. **N. Y.**—*People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274. **N. C.**—*Hollingsworth v. Supreme Council*, 175 N. C. 615, 96 S. E. 81, Ann. Cas. 1918E, 401; *Bryan v. Louisville & N. R. Co.*, 174 N. C. 177, 93 S. E. 750. **N. D.**—*Beggs v. Paine*, 15 N. D. 436, 109 N. W. 322. **Okla.**—*Ex parte Owen*, 10 Okla. Crim. 284, 136 Pac. 197, Ann. Cas. 1916A, 522. **Ore.**—*Montgomery v. Southern Pac. Co.*, 64 Ore. 597, 131 Pac. 507, 47 L. R. A. (N. S.) 13. **Pa.**—*Hogarty v. Philadelphia & R. R. Co.*, 255 Pa. 236, 99 Atl. 741. **S. C.**—*McSwain v. Adams G. & P. Co.*, 93 S. C. 103, 76 S. E. 117, Ann. Cas. 1914D, 981. **S. D.**—*Polluck v. Minneapolis & St. L. R. Co.*, 166 N. W. 641. **Tenn.**—*Toneray v. Toneray*, 123 Tenn. 476, 131 S. W. 977, Ann. Cas. 1912C, 284, 34 L. R. A. (N. S.) 1106. **Tex.**—*Houston, E. & W. T. Ry. Co. v. Houston Pkg. Co.* (Tex. Civ. App.), 203 S. W. 1140; *Kansas City, M. & O. Ry. Co. v. Harral*

as illustrated by rulings construing the federal constitution,<sup>87</sup> and statutes,<sup>88</sup> or a state statute involving a federal question,<sup>89</sup> and decisions on a question of federal jurisdiction,<sup>90</sup> due process of law,<sup>91</sup> the federal banking act,<sup>92</sup> the federal employers' liability act,<sup>93</sup> and interstate commerce.<sup>94</sup>

Decisions by other federal courts on federal questions, while not strictly precedents in state courts, are entitled to respect and earnest consideration,<sup>95</sup> and are generally followed when there is no controlling decision by the federal supreme court,<sup>96</sup> and in the effort to

(Tex. Civ. App.), 199 S. W. 659. **Utah.** Kuchenmeister *v.* Los Angeles & S. L. R. Co., 172 Pac. 725. **Vt.**—State *v.* Scampini, 77 Vt. 92, 59 Atl. 201. **Va.** Chesapeake & O. Ry. Co. *v.* National Bank, 95 S. E. 454; *Com. v. Atlantic C. L. R. Co.*, 106 Va. 61, 55 S. E. 572, 117 Am. St. Rep. 983, 7 L. R. A. (N. S.) 1086. **Wash.**—Horton *v.* Oregon-Wash. R. & N. Co., 72 Wash. 503, 130 Pac. 897, 47 L. R. A. (N. S.) 8. **Wis.**—Great Northern R. Co. *v.* King, 165 Wis. 159, 161 N. W. 371.

[a] **Even Though Previous State Decisions Be Contrary.**—Rothschild & Co. *v.* Steger & Sons Piano Mfg. Co., 256 Ill. 196, 99 N. E. 920, Ann. Cas. 1913E, 276, 42 L. R. A. (N. S.) 793.

[b] **Validity and effect of divorce in another state on substituted service, the federal supreme court is the ultimate authority.** Schenker *v.* Schenker, 181 App. Div. 621, 169 N. Y. Supp. 35.

[c] **Where there are no controlling federal decisions a state court will follow its own decisions construing the common law in cases involving federal law.** Williams *v.* Pryor, 272 Mo. 613, 200 S. W. 53.

87. Harmon *v.* Bolley (Ind.), 120 N. E. 33.

88. Barnet *v.* New York Cent. & H. R. R. Co., 222 N. Y. 195, 118 N. E. 625; State *v.* Hyde, 88 Ore. 1, 169 Pac. 757, 171 Pac. 582, Ann. Cas. 1918E, 688.

89. State *v.* Warburton, 97 Wash. 242, 166 Pac. 615.

[a] **State Legislation in Conflict With the Constitution of the United States.**—Cook *v.* Moffat, 5 How. (U. S.) 295, 12 L. ed. 159; Zancanelli *v.* Central C. & C. Co., 25 Wyo. 511, 173 Pac. 981.

[b] **Where state court decisions violate the federal constitution or statutes, as by a certain construction of**

a state statute, a decision of the federal supreme court construing the same statute is paramount. **Ind.**—Richey *v.* Cleveland C. C. & St. L. R. Co., 47 Ind. App. 123, 93 N. E. 1022. **Minn.**—State *ex rel.* Smith *v.* Daniels, 118 Minn. 527, 136 N. W. 587. **N. Y.**—People *v.* Budd, 117 N. Y. 1, 22 N. E. 670, 15 Am. St. Rep. 460, 5 L. R. A. 559.

90. United Land Assn. *v.* Abrahams, 208 U. S. 614, 28 Sup. Ct. 569, 52 L. ed. 645, *affirming* 139 Cal. 370, 69 Pac. 1125, 72 Pac. 988.

91. Hyatt *v.* Blackwell Lumb. Co., 31 Idaho 452, 173 Pac. 1083.

92. Cooper *v.* National Bank, 21 Ga. App. 356, 94 S. E. 611.

93. Ft. Worth & R. G. Ry. Co. *v.* Bird (Tex. Civ. App.), 196 S. W. 597.

[a] **Assumption of Risk Under the Federal Employer's Liability Act.** Roberts *v.* Cleveland C. C. & St. L. Ry. Co., 202 Ill. App. 480, *affirmed*, 279 Ill. 493, 117 N. E. 97.

94. Peck-Williamson H. & Vent. Co. *v.* McKnight, 140 Tenn. 563, 205 S. W. 419.

[a] **Construction of Contract of Interstate Shipment.**—Midland Linseed Co. *v.* American Liquid Fireproofing Co. (Iowa), 166 N. W. 573.

[b] **On question of proximate cause, when considering interstate shipment.** Barnet *v.* New York Cent. & H. R. R. Co., 222 N. Y. 195, 118 N. E. 625.

[c] **Negligent delay in transmitting interstate message, liability for.** Diefenderffer *v.* Western U. Tel. Co., 199 Mo. App. 48, 200 S. W. 706.

95. **Ia.**—Wells *v.* Western U. Tel. Co., 144 Iowa 605, 123 N. W. 371, 24 L. R. A. (N. S.) 1045. **Neb.**—Franklin *v.* Kelley, 2 Neb. 79. **Pa.**—Ascherson *v.* Bethlehem Iron Co., 2 Pa. Dist. 597. **Tex.**—Western U. Tel. Co. *v.* Sloss, 45 Tex. Civ. App. 153, 100 S. W. 354.

96. Sloan *v.* Martin, 145 N. Y. 524, 40 N. E. 217, 45 Am. St. Rep. 630, 28



conform to a common standard on questions of law applicable to the several states.<sup>97</sup>

A territorial court, in matters unaffected by statute, should follow the decisions of the federal courts to which an appeal may be taken from it.<sup>98</sup>

**5. Decisions of Courts of Foreign Countries.**—The decisions of courts of foreign countries are not within the rule of stare decisis,<sup>99</sup> being considered as merely guides to the law,<sup>1</sup> but in case of adoption, or separation from a parent country, prior cases interpreting the law as it existed before such adoption<sup>2</sup> or separation<sup>3</sup> have been regarded as precedents.

**III. LIMITATIONS UPON THE DOCTRINE.**—A. IN GENERAL. Whether the rule of stare decisis shall be followed is discretionary

L. R. A. 347; *Stuart v. Farmers' Bank*, 137 Wis. 66, 117 N. W. 820.

97. **U. S.**—*Johnson v. Chas. D. Norton Co.*, 159 Fed. 361, 86 C. C. A. 361. **Ark.**—*Exchange Nat. Bank v. Coe*, 94 Ark. 387, 127 S. W. 453, 31 L. R. A. (N. S.), 287. **Colo.**—*Hayden v. Aurora*, 57 Colo. 389, 142 Pac. 183. **Pa.**—*American Ins. Co. v. Insley*, 7 Pa. 223, 47 Am. Dec. 509. **Tenn.**—*Pickle v. Muse*, 88 Tenn. 380, 12 S. W. 919, 17 Am. St. Rep. 900, 7 L. R. A. 93.

[a] **On Banking and Commercial Questions Generally.**—*Sims v. American Nat. Bank*, 98 Ark. 1, 135 S. W. 356.

98. **Alaska.**—*Qualley v. Aitken*, 4 Alaska 291. **Ariz.**—*Kroeger v. Twin Buttes R. Co.*, 13 Ariz. 348, 114 Pac. 553, Ann. Cas. 1913E, 1229. **Haw.**—*Kapiolani v. Atcherley*, 21 Haw. 441. **Okla.**—*Stanford v. National Drill & Mfg. Co.*, 28 Okla. 441, 114 Pac. 734; *Mollhoff v. Chicago, R. I. & P. R. Co.*, 15 Okla. 540, 82 Pac. 733. **Tex.**—*Missouri, K. & T. R. Co. v. Wise*, 101 Tex. 459, 109 S. W. 112; *Missouri, K. & T. R. Co. v. Rogers*, 60 Tex. Civ. App. 544, 128 S. W. 711. **Utah.**—*People v. Ritchie*, 12 Utah 180, 42 Pac. 209.

[a] **Circuit court of appeals** to which appeal might be taken. *Western Union Tel. Co. v. White* (Tex. Civ. App.), 162 S. W. 905.

[b] **Where a territorial statute is copied from another state**, prior decisions from that state construing are followed in preference to contrary decisions of the United States supreme court, particularly where the latter merely follows the controlling decisions of the state from which the appeal to it came. *People v. Ritchie*, 12 Utah 180, 42 Pac. 209.

99. *Cordova v. Folgueras y Rijos*, 227 U. S. 375, 33 Sup. Ct. 350, 57 L. ed. 556.

[a] **English decisions** (1) are not controlling in the United States (*People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211), but (2) are frequently referred to and consulted and are entitled to great respect. *Cathcart v. Robinson*, 5 Pet. (U. S.) 264, 8 L. ed. 120.

[b] **Porto Rican courts** not bound by Spanish decisions rendered subsequent to Porto Rico becoming a part of the United States. *Cordova v. Folgueras y Rijos*, 227 U. S. 375, 33 Sup. Ct. 350, 57 L. ed. 556.

[c] **In admiralty** the federal courts follow very closely, in appropriate cases, the decisions of the higher English courts. *The Gov. Ames*, 187 Fed. 40, 109 C. C. A. 94.

1. *Badische Anilin & S. Fabrik v. Kalle*, 94 Fed. 163; *In re Hock's Will*, 129 N. Y. Supp. 196.

2. *Kealoha v. Castle*, 210 U. S. 149, 28 Sup. Ct. 684, 52 L. ed. 998, construction of an old Hawaiian statute.

3. *In re Swartz's Will*, 139 N. Y. Supp. 1105. See *Cordova v. Folgueras y Rijos*, 227 U. S. 375, 33 Sup. Ct. 350, 57 L. ed. 556, Spanish law in Porto Rico.

[a] **Where the common law of England has been adopted**, the English cases interpreting such law are generally followed. **Cal.**—See *Johnson v. Fall*, 6 Cal. 359, 65 Am. Dec. 518. **Ga.**—*Chapman v. Gray*, 8 Ga. 341. **Ill.**—*Wren v. Dooley*, 97 Ill. App. 88. **N. Y.**—See *Matter of Swartz*, 79 Misc. 388, 139 N. Y. Supp. 1105.

[b] **When statutes affirm the com-**

with a court of last resort;<sup>4</sup> but even if the correctness of a decision is questionable, if long established, recognized and conformed to, and property rights acquired thereunder, it will not generally be disturbed,<sup>5</sup> except upon the most urgent reasons,<sup>6</sup> and only when public

mon law, merely, common law decisions are precedents. *Jennings v. State*, 13 Kan. 80.

4. **U. S.**—*Sioux Remedy Co. v. Cope*, 235 U. S. 197, 35 Sup. Ct. 57, 59 L. ed. 193; *Hertz v. Woodman*, 218 U. S. 205, 30 Sup. Ct. 621, 54 L. ed. 1001. **Cal.**—*Welch v. Sullivan*, 8 Cal. 165. **Colo.**—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209. **Del.**—*Daniels v. State*, 2 Penne. 586, 48 Atl. 196, 54 L. R. A. 286. **Idaho.** *Parke v. Boulware*, 9 Idaho 225, 73 Pac. 19. **Ind.**—*Haskett v. Maxey*, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379. **Ia.**—*Davidson v. Biggs*, 61 Iowa 309, 16 N. W. 135. **Mich.**—*McCutcheon v. Homer*, 43 Mich. 483, 5 N. W. 668, 38 Am. Rep. 212. **Miss.**—*Adams v. Yazoo & M. V. R. Co.*, 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33. **Neb.**—*State v. Savage*, 64 Neb. 684, 90 N. W. 898, 91 N. W. 557. **N. Y.** *North River S. B. Co. v. Livingston*, 3 Cow. 713. **Ore.**—*Paulson v. Portland*, 16 Ore. 450, 19 Pac. 450, 1 L. R. A. 673. **Pa.**—*Callender's Admr. v. Keystone Mut. L. Ins. Co.*, 23 Pa. 471. **Tex.** *Higgins v. Bordages*, 88 Tex. 458, 31 S. W. 52, 803, 53 Am. St. Rep. 770. **Utah.**—*Kimball v. Grantsville*, 19 Utah 368, 57 Pac. 1, 45 L. R. A. 628. **Wis.** *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681.

5. **U. S.**—*Morris v. Hitchcock*, 194 U. S. 384, 24 Sup. Ct. 712, 48 L. ed. 1030; *American Mortg. Co. v. Hopper*, 64 Fed. 553, 12 C. C. A. 293. **Cal.**—*Angus v. Plum*, 121 Cal. 608, 54 Pac. 97. **Colo.** *Harvey v. Travelers' Ins. Co.*, 18 Colo. 354, 32 Pac. 935. **Del.**—*Daniels v. State*, 2 Penne. 586, 48 Atl. 196, 54 L. R. A. 286. **D. C.**—*Ambrose v. Brown*, 42 App. Cas. 25. **Idaho.**—*Parke v. Boulware*, 9 Idaho 225, 73 Pac. 19. **Ill.** *Hopkins v. McCann*, 19 Ill. 113. **Ind.** *Haskett v. Maxey*, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379. **Ia.**—*State v. Silvers*, 82 Iowa 714, 47 N. W. 772. **Kan.**—*Jansen v. Atchison*, 16 Kan. 358. **Ky.**—*South's Heirs v. Thomas' Heirs*, 7 Mon. 59. **Mich.**—*McCutcheon v.*

*Homer*, 43 Mich. 483, 5 N. W. 668, 38 Am. Rep. 212. **Minn.**—*State v. Manford*, 97 Minn. 173, 106 N. W. 907. **Mo.** *State v. Wilder*, 199 Mo. 503, 97 S. W. 864. **Neb.**—*State v. Hill*, 47 Neb. 456, 66 N. W. 541. **N. J.**—*Bowman v. Board of Chosen Freeholders*, 73 N. J. L. 543, 64 Atl. 1010. **N. Y.**—*Williams v. Williams*, 130 N. Y. 193, 29 N. E. 98, 27 Am. St. Rep. 517, 14 L. R. A. 220. **N. C.**—*Hill v. Atlantic & N. C. R. Co.*, 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606. **Ohio.**—*Cincinnati v. Taft*, 63 Ohio St. 141, 58 N. E. 63. **Ore.** *Paulson v. Portland*, 16 Ore. 450, 19 Pac. 450, 1 L. R. A. 673. **Pa.**—*Com. v. National Oil Co.*, 157 Pa. 516, 27 Atl. 374. **S. C.**—*Ex parte Hollman*, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242. **Tenn.**—*Kobbe v. Harriman Land Co.*, 139 Tenn. 251, 201 S. W. 762; *Wilkins v. Chicago, etc. R. Co.*, 110 Tenn. 442, 75 S. W. 1026. **Utah.**—*Kimball v. Grantsville*, 19 Utah 368, 57 Pac. 1, 45 L. R. A. 628. **Wash.**—*Tamblin v. Crowley*, 99 Wash. 133, 168 Pac. 982. **Wis.**—*Brader v. Brader*, 110 Wis. 423, 85 N. W. 681; *Fisher v. Horicon etc. Co.*, 10 Wis. 351.

[a] On questions concerning the rights of property, it is better to adhere to principles once fixed, though, originally they might not have been perfectly free from all objection, than to unsettle the law in order to render it more consistent with the dictates of sound reason. *Marine Ins. Co. v. Tucker*, 3 Cranch (U. S.) 357, 388, 2 L. ed. 466.

6. *Gearheart v. State* (Tex. Crim.), 197 S. W. 187.

[a] "It must be a very strong case indeed, and one where mistake and error had been evidently committed, to justify this court, after the lapse of five years, in reversing its own decision; thereby destroying rights of property which may have been purchased and paid for in the meantime, upon the faith and confidence reposed in the judgment of this court." *Goodtitle v. Kibbe*, 9 How. (U. S.) 471, 478, 13 L. ed. 220.

policy urgently demands a reversal.<sup>7</sup> However, the rule of stare decisis does not preclude a court from the right of examining into the correctness or consistency of its own or another court's decisions,<sup>8</sup> and where erroneous, and a reversal will not disturb any property rights acquired thereunder, they should be overruled,<sup>9</sup> and it has

7. *Hines v. Driver*, 89 Ind. 339; *Hoyt v. Martense*, 16 N. Y. 231.

8. **U. S.**—*Ex parte Bollman*, 4 Cranch 75, 2 L. ed. 554. **Ala.**—*Norton v. Randolph*, 176 Ala. 381, 58 So. 283, Ann. Cas. 1915A, 714, 40 L. R. A. (N. S.) 129. **Cal.**—*Reeve v. Colusa Gas & Elec. Co.*, 151 Cal. 29, 91 Pac. 802. **Del.**—*Truxton v. Fait & S. Co.*, 1 Penne. 483, 42 Atl. 431, 73 Am. St. Rep. 81. **Ind.**—*Jasper v. Allman*, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58. **Kan.**—*Thurston v. Fritz*, 91 Kan. 468, 138 Pac. 625, Ann. Cas. 1915D, 212, 50 L. R. A. (N. S.) 1167. **Ky.**—*Oliver Co. v. Louisville Rlty. Co.*, 156 Ky. 628, 161 S. W. 570, Ann. Cas. 1915C, 565, 51 L. R. A. (N. S.) 293. **Mass.**—*Com. v. Walsh*, 196 Mass. 369, 82 N. E. 19, 124 Am. St. Rep. 559. **Miss.**—*Boon v. Bowers*, 30 Miss. 246, 64 Am. Dec. 159. **Mo.**—*Heiler v. Lutz*, 254 Mo. 704, 164 S. W. 123, L. R. A. 1915B, 191. **N. Y.**—*Glennan v. Rochester Trust & S. D. Co.*, 209 N. Y. 12, 102 N. E. 537, Ann. Cas. 1915A, 441, 52 L. R. A. (N. S.) 302. **N. C.**—*Mason v. Nelson Cotton Co.*, 148 N. C. 492, 62 S. E. 625, 128 Am. St. Rep. 635, 18 L. R. A. (N. S.) 1221. **Ohio.**—*Lewis v. Symmes*, 61 Ohio St. 471, 56 N. E. 194, 76 Am. St. Rep. 428. **S. C.**—*State v. Aiken*, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345. **Tex.**—*Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666. **Utah.**—*Kimball v. Grantsville*, 19 Utah 368, 57 Pac. 1, 45 L. R. A. 628. **Va.**—*Steinman v. Clinch Field Coal Corp.*, 121 Va. 611, 93 S. E. 684. **Wash.**—*Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, Ann. Cas. 1915C, 140, 48 L. R. A. (N. S.) 213. **Wyo.**—*Kelley v. Rhodes*, 7 Wyo. 237, 51 Pac. 593, 75 Am. St. Rep. 904, 39 L. R. A. 594. **Eng.**—*Bright v. Hutton*, 3 H. L. C. 341, 10 Eng. Reprint 133.

[a] **Courts Are Not Absolutely Bound by Prior Decisions.**—*Wood v. Brady*, 150 U. S. 18, 14 Sup. Ct. 6, 37 L. ed. 981.

[b] **Decisions by the great judges of the past will be overruled when they operate to effect injustice or lead to wrong results.** *Brewer v. Browning*,

115 Miss. 358, 76 So. 267, Ann. Cas. 1918B, 1013, L. R. A. 1918F, 1185.

[c] **Intermediate Appellate Courts.** Under some statutes, when a majority of the judges of an intermediate appellate court are of the opinion that a controlling precedent of the court of last resort is erroneous, they must certify the case under consideration to such court with a statement of the reasons for such opinion. *State v. Tuesburg Land Co.*, 61 Ind. App. 555, 109 N. E. 530, 111 N. E. 342.

9. **U. S.**—*Pollock v. Farmers' Loan, etc.*, Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. ed. 759. **Ala.**—*Boyd v. State*, 53 Ala. 601. **Ark.**—*Pitcock v. State*, 91 Ark. 527, 121 S. W. 742, 134 Am. St. Rep. 88. **Cal.**—*See Bohn v. Bohn*, 164 Cal. 532, 129 Pac. 981. **Colo.**—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209. **D. C.**—*Brown v. United States*, 35 App. Cas. 548. **Ga.**—*Ellison v. Georgia R. & Bkg. Co.*, 87 Ga. 691, 13 S. E. 809. **Idaho.**—*Walling v. Bown*, 9 Idaho 740, 76 Pac. 318. **Ind.**—*Moore-Mansfield Const. Co. v. Indianapolis N. & T. R. Co.*, 179 Ind. 356, 101 N. E. 296, Ann. Cas. 1915D, 917, 44 L. R. A. (N. S.) 816. **Ia.**—*Remey v. Iowa Cent. R. Co.*, 116 Iowa 133, 89 N. W. 218. **Kan.**—*Crigler v. Shepler*, 79 Kan. 834, 101 Pac. 619, 23 L. R. A. (N. S.) 500. **Ky.**—*Kentland C. & C. Co. v. Keen*, 168 Ky. 836, 183 S. W. 247. **La.**—*Griffin v. His Creditors*, 6 Rob. 216, 225. **Mass.**—*Com. v. Walsh*, 196 Mass. 369, 82 N. E. 19, 124 Am. St. Rep. 559. **Mich.**—*McEvoy v. Sault Ste. Marie*, 136 Mich. 172, 98 N. W. 1006. **Miss.**—*State ex rel. Collins v. Jones*, 106 Miss. 522, 64 So. 241. **Mo.**—*Greene County v. Lydy*, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274. **Neb.**—*Logan v. Carnahan*, 66 Neb. 685, 92 N. W. 984, 95 N. W. 812. **N. Y.**—*Rumsey v. New York, & N. E. R. Co.*, 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L. R. A. 618. **N. C.**—*Wilson v. Leary*, 120 N. C. 90, 26 S. E. 630, 58 Am. St. Rep. 778, 38 L. R. A. 240. **Okla.**—*Frick Co. v. Oats*, 20 Okla. 473, 94 Pac.



been said to be the court's duty to do so.<sup>10</sup> So it has been held that decisions should not be adhered to which were based on a repealed statute,<sup>11</sup> or which erroneously construe a statute,<sup>12</sup> or are antagonistic to express provisions of the state constitution,<sup>13</sup> or state laws,<sup>14</sup> or when there have arisen conditions which could not be foreseen at the time the decision was rendered,<sup>15</sup> or when the reasons upon which it was founded no longer exist.<sup>16</sup>

**B. SINGLE DECISIONS.**—The rule of stare decisis is universally observed when there has been, on a point of law, a series of adjudications all to the same effect,<sup>17</sup> and a single case is sufficient to invoke the rule,<sup>18</sup> especially when long acquiesced in.<sup>19</sup> And, of course, a single decision is binding on a lower court.<sup>20</sup> But where important rights are involved, a single decision which has not been long acquiesced in and is not a rule of property, will not prevent a re-examination by the court rendering it of the legal questions involved.<sup>21</sup>

682. **Pa.**—Kellerman's Estate, 21 Pa. Dist. 521. **S. D.**—Elfring v. New Birdsall Co., 17 S. D. 350, 96 N. W. 703. **Tenn.**—State v. Nashville Baseball Club, 127 Tenn. 292, 154 S. W. 1151, Ann. Cas. 1914B, 1243. **Tex.**—Storrie v. Cortes, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666. **Utah.**—Law v. Smith, 34 Utah 394, 98 Pac. 300. **Wash.**—State ex rel. American Freehold L. Mtg. Co. v. Tanner, 45 Wash. 348, 88 Pac. 321. **Wis.**—Lonstorf v. Lonstorf, 118 Wis. 159, 95 N. W. 961.

[a] **When Decision Based on an Error.**—Wharton v. Wise, 153 U. S. 155, 176, 14 Sup. Ct. 783, 38 L. ed. 669; Steinman v. Clinchfield Coal Corp., 121 Va. 611, 93 S. E. 684.

[b] **When Question Solely One of Jurisdiction.**—The Genesee Chief v. Fitzhugh, 12 How. (U. S.) 443, 13 L. ed. 1058.

[c] **Where the constitutionality of a law is determined,** the decision will not be followed if the court afterward decides that it was wrong. State v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L. R. A. 345.

10. Pitcock v. State, 91 Ark. 527, 121 S. W. 742, 134 Am. St. Rep. 88; Leavitt v. Blatchford, 17 N. Y. 521; Baker v. Lorillard, 4 N. Y. 257.

11. Elfring v. New Birdsall Co., 17 S. D. 350, 96 N. W. 703.

12. Remey v. Iowa Cent. R. Co., 116 Iowa 133, 89 N. W. 218.

13. Storrie v. Cortes, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666.

14. Cal.—Duff v. Fisher, 15 Cal. 375,

statute overlooked. **Ia.**—Lemp v. Hastings, 4 G. Gr. 448. **Mo.**—Heller v. Lutz, 254 Mo. 704, 164 S. W. 123, L. R. A. 1915B, 191.

15. The Genesee Chief, 12 How. (U. S.) 443, 455, 13 L. ed. 1058.

16. **U. S.**—Garland v. Washington, 232 U. S. 642, 34 Sup. Ct. 456, 58 L. ed. 772. **Mass.**—Old Dominion Copper Min. & S. Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314. **Okla.**—Caples v. State, 3 Okla. Crim. 72, 104 Pac. 493.

17. Griffin v. His Creditors, 6 Rob. (La.) 216. See also the cases cited *infra*, this section.

18. **U. S.**—Wilson v. Ward Lumb. Co., 67 Fed. 674. **Mo.**—Verdin v. St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52. **N. Y.**—Rumsey v. New York & N. E. R. Co., 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L. R. A. 618; In re Meyer, 72 Misc. 566, 131 N. Y. Supp. 27.

But see Quaker Rlty. Co. v. Labasse, 131 La. 996, 60 So. 661, Ann. Cas. 1914A, 1073.

19. Long v. Long, 79 Mo. 644; State v. Taylor, 68 N. J. L. 276, 53 Atl. 392. [a] **When Not Cited or Referred to for Many Years.**—Ford v. Dilley, 174 Iowa 243, 156 N. W. 513.

20. See *supra*, II, A, 4; II, B, 1.

21. **Ind.**—Jackson v. State, 155 Ind. 604, 58 N. E. 1037. **Ky.**—Montgomery Co. Fiscal Ct. v. Trimble, 104 Ky. 629, 47 S. W. 773, 42 L. R. A. 738. **Ia.**—Smith v. Smith, 13 La. 441. **Mo.**—Young v. Downey, 150 Mo. 317, 51 S. W. 751.

C. **UNREPORTED DECISIONS.**—An unreported case, on matters considered and decided, is regarded as a precedent.<sup>22</sup>

D. **MATTERS SUBSEQUENT TO DECISION.**—The force of a decision as a precedent, as a general rule, is not affected by the lapse of time,<sup>23</sup> change in the court's organization<sup>24</sup> or personnel,<sup>25</sup> or criticism by text writers,<sup>26</sup> but, in certain clear cases involving necessary deductions, its effect may be made more comprehensive by judicial interpretation.<sup>27</sup>

**IV. EFFECT OF OVERRULING DECISIONS.**—When no vested rights are involved, it is a general rule that the last ruling of a court having final jurisdiction is merely a declaration of what the law always was and therefore relates back to the time of the overruled decision;<sup>28</sup> but a decision which was made expressly with reference to

**Pa.**—Callender's Admr. v. Keystone Mut. L. Ins. Co., 23 Pa. 471. **S. C.** State v. Williams, 13 S. C. 546. **Utah.** Kimball v. Grantsville, 19 Utah 368, 57 Pac. 1, 45 L. R. A. 628. **Va.**—Postal Tel. Ca. Co. v. Farmville, etc. R. Co., 96 Va. 661, 32 S. E. 468. **Wash.**—McDonald v. Davey, 22 Wash. 366, 60 Pac. 1116. **Wis.**—Pratt v. Brown, 3 Wis. 603.

22. Daniel's Devisees v. Daniel, 5 Ky. Op. 676; Goodwin v. Mass. Mut. L. Ins. Co., 73 N. Y. 480.

But see *supra*, note 37 [a].

23. New York Cent. Trust Co. v. Falck, 177 App. Div. 501, 164 N. Y. Supp. 473.

As to changed conditions as reason for reversal, see *supra*, III, A.

[a] **Construction of statutes gains in force by long acquiescence.** Pouch v. Prudential Ins. Co., 204 N. Y. 281, 97 N. E. 731, Ann. Cas. 1913C, 1191.

24. Davis v. San Francisco Super. Ct., 63 Cal. 581.

25. McCutcheon v. Homer, 43 Mich. 483, 5 N. W. 668, 38 Am. Rep. 212.

26. Bennett v. Gulf, etc. R. Co. (Tex. Civ. App.), 159 S. W. 132.

27. Matheson's Heirs v. Hearin, 29 Ala. 210; *In re Meyer*, 72 Misc. 566, 131 N. Y. Supp. 27.

[a] **A court of first instance, in so far as possible, is bound to give effect to even the implications contained in the decisions of the superior courts of its own jurisdiction.** Therefore, in a probate proceeding, a controlling decision to the effect that a will is entitled to probate when the statute has been complied with notwithstanding the fact that the sole beneficiary and executor is dead, should be extended as author-

ity for the conclusion that before probate the internal conditions of a will or its external operations on property should not be considered. *In re Meyer*, 72 Misc. 566, 131 N. Y. Supp. 27.

[b] **Construction of Statutes.**—The rule that a judicial construction of a statute becomes a part of it, should not be applied to constructions that can only be implied from something that was actually decided. *Broadwater v. Wabash R. Co.*, 212 Mo. 437, 110 S. W. 1084.

[c] **Any decision on a constitutional question will not be extended** if (1) the court is convinced that error in principle might supervene. *Pollock v. Farmers L. & T. Co.*, 157 U. S. 429, 576, 15 Sup. Ct. 673, 39 L. ed. 759. (2) So a case is not a precedent on the constitutionality of a statute merely because the court assumed jurisdiction of the case under the act. *Rourke v. Holmes St. R. Co.*, 257 Mo. 555, 571, 166 S. W. 272.

28. **Ala.**—*Boyd v. State*, 53 Ala. 601. **Cal.**—*Allen v. Allen*, 95 Cal. 184, 27 Pac. 30. **Ind.**—*Center School Tp. v. State ex rel. Board of School Comrs.*, 150 Ind. 168, 49 N. E. 961. **Kan.** *Criger v. Shepler*, 79 Kan. 834, 101 Pac. 619, 23 L. R. A. (N. S.) 500. **Mo.** *Sedalia v. Gold*, 91 Mo. App. 32. **N. J.** *Ross v. Bd. of Chosen Freeholders*, 90 N. J. L. 522, 102 Atl. 397. **N. Y.**—*In re Tod*, 85 Misc. 298, 147 N. Y. Supp. 161. **N. C.**—*Mason v. Nelson Cotton Co.*, 148 N. C. 492, 62 S. E. 625, 128 Am. St. Rep. 635, 18 L. R. A. (N. S.) 1221. **Ohio.**—*Lewis v. Symmes*, 61 Ohio St. 471, 56 N. E. 194, 76 Am. St. Rep. 428. **Tex.**—*Storrie v. Cortes*, 90 Tex. 283, 38 S. W. 154, 35 L. R. A. 666. **W. Va.**

future cases,<sup>29</sup> or which changes the construction of a criminal statute,<sup>30</sup> or overrules a precedent which established a rule of property, under which property rights were acquired and contracts entered into, is not retroactive in its effect.<sup>31</sup>

*Harbert v. Monongahela River R. Co.*, 50 W. Va. 253, 40 S. E. 377. **Wyo.** *Kelley v. Rhoads*, 7 Wyo. 237, 51 Pac. 593, 75 Am. St. Rep. 904, 39 L. R. A. 594.

[a] A change in the construction of a civil statute relates back to the time of its enactment, when no vested rights are involved. *Byrum v. Henderson*, 151 Ind. 102, 51 N. E. 94; *Pierce v. Pierce*, 46 Ind. 86.

29. *People v. Ryan*, 152 Cal. 364, 92 Pac. 853.

[a] Thus when it is held that in all future cases where a trial judge charges on matters of fact it shall be considered prejudicial error calling for a reversal, this ruling does not apply to a case already heard and pending an appeal. *People v. Ryan*, 152 Cal. 364, 92 Pac. 853.

30. *State v. O'Neil*, 147 Iowa 513, 126 N. W. 454, Ann. Cas. 1912B, 691, 33 L. R. A. (N. S.) 788; *State v. Longino*, 109 Miss. 125, 67 So. 902, Ann. Cas. 1916E, 371.

31. **U. S.**—*Douglass v. Pike County*,

101 U. S. 677, 25 L. ed. 968; *Kenosha v. Lamson*, 9 Wall. 477, 19 L. ed. 725. **Ala.**—*Cowley v. Shields*, 180 Ala. 48, 60 So. 267. **Ind.**—*Haskett v. Maxey*, 134 Ind. 182, 33 N. E. 358, 19 L. R. A. 379. **Ky.**—*Oliver Co. v. Louisville Rlty. Co.*, 156 Ky. 628, 161 S. W. 570, Ann. Cas. 1915C, 565, 51 L. R. A. (N. S.) 293. **La.**—*State v. Thompson*, 10 La. Ann. 122. **Mich.**—*Pittsburgh & L. A. Iron Co. v. Lake S. Iron Co.*, 118 Mich. 109, 76 N. W. 395. **Minn.**—*Hollinshead v. Von Glahn*, 4 Minn. 190. **Miss.**—See *State v. Longino*, 109 Miss. 125, 67 So. 902, Ann. Cas. 1916E, 371. **Mo.**—*Abington v. Townsend*, 271 Mo. 602, 197 S. W. 253. **N. J.**—*Stockton v. Dundee Mfg. Co.*, 22 N. J. Eq. 56. **N. Y.**—*Miller v. Tyler*, 58 N. Y. 477. **N. C.**—*S. R. Fowle & Son v. O'Ham*, 96 S. E. 639. **Ohio.**—*Lewis v. Symmes*, 61 Ohio St. 471, 56 N. E. 194, 76 Am. St. Rep. 423. **Pa.**—*Geddes v. Brown*, 5 Phila. 180. **Tenn.**—*Richardson v. Marshall County*, 100 Tenn. 346, 45 S. W. 440. **Wash.** *Gibson v. Cleary*, 77 Wash. 683, 138 Pac. 269. **W. Va.**—*McMaster v. Dyer*, 44 W. Va. 644, 29 S. E. 1016.



# STATEMENT AND ABSTRACT OF CASE

By the Editorial Staff.

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## CROSS-REFERENCES:

Appeals;	Review;
Bills of Exceptions;	Stenographers.
Case on Appeal;	

Appealability of order striking out statement on new trial, see 2 STANDARD PROC. 182, note 29, and supplement thereto.

Statement of facts in brief, see 4 STANDARD PROC. 578.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

## I. STATEMENT OF FACTS AND STATEMENT OF CASE.

A. STATEMENT OF THE CASE. — 1. Generally. — In some states, matters not a part of the record proper may for purposes of review be made a part thereof by a statement of the case.<sup>1</sup> Sometimes there are two statements provided for, a statement on new trial,<sup>2</sup> and a statement on appeal.<sup>3</sup>

2. Statement on New Trial. — Statutes sometimes provide that applications for new trial on certain grounds, such as excessive damages, insufficiency of the evidence to sustain the verdict, or error in law

1. Cal.—*Abbott v. Douglass*, 28 Cal. 295, but the present code does not provide for statements of the case. Dak. *Saint Croix Lumb. Co. v. Pennington*, 2 Dak. 467, 476, 11 N. W. 497. Idaho. *Van Camp v. Comrs. Custer Co.*, 2 Idaho 29, 2 Pac. 721. Mont.—*Manuel v. Scott*, 37 Mont. 29, 94 Pac. 487. N. D. *State v. Scholfield*, 13 N. D. 664, 102 N. W. 878.

[a] Interlocutory orders, not to be considered when not incorporated in a statement. *Abbott v. Douglass*, 28 Cal. 295.

[b] Where the answer admits the facts in the complaint, no statement is necessary. *McHenry v. Roper*, 7 N. D. 584, 75 N. W. 903.

[c] An assignment of errors cannot be received as a statement of facts. *Fleeson v. Savage S. Min. Co.*, 3 Nev. 157.

[d] A transcript containing an abstract of the minutes, must be disregarded because not a statement. *Irwin v. Samson*, 10 Nev. 282.

[e] A paper simply reciting the progress of the trial in narrative form

is not a statement. *Corbett v. Job*, 5 Nev. 201.

2. *Bradbury v. Idaho & O. L. I. Co.*, 2 Idaho 239, 10 Pac. 620.

[a] The office of a statement on new trial is to bring into the record those matters arising during the progress of the trial constituting a basis of the motion and which a party desires to have reviewed on appeal. *Harper v. Minor*, 27 Cal. 107.

[b] On appeal from an order granting a nonsuit, a statement on new trial is improper, but the evidence can be brought up either by a bill of exceptions or statement on appeal. *Kleinschmidt v. McAndrews*, 4 Mont. 8, 34, 5 Pac. 281.

3. *Elder v. Frevert*, 18 Nev. 278, 3 Pac. 237, holding the statement in question must be disregarded as a statement on new trial but as it purported to be a statement on appeal, it might be so considered. But see *Harding v. McLaughlin*, 23 Mont. 334, 58 Pac. 865, statements on appeal are no longer recognized in Montana, but statements on new trial are. See Rev. Code §6799.

occurring at the trial, may be made either upon a statement of the case or the minutes of the court.<sup>4</sup> This statement is prepared and filed after the service of the notice of intention to move for a new trial,<sup>5</sup> and before hearing and determination of the motion, unless waived.<sup>6</sup> When the motion is made on the minutes of the court, some statutes provide for a statement to be prepared subsequent to the determination of the motion to be used as a part of the record on appeal.<sup>7</sup>

**3. Statement on Appeal.**—Some statutes provide for a statement of the case as part of the record on appeal.<sup>8</sup> And it is sometimes expressly provided that any statement used on a motion for new trial,<sup>9</sup> or settled after such motion when the motion is made on the minutes of the court,<sup>10</sup> may be used on appeal from a final judgment,<sup>11</sup> as well as on an appeal from an order granting or denying a new trial.<sup>12</sup> But the appellant is not limited to the use of such state-

On appeals from justice's court, see 18 STANDARD PROC. 274.

[a] **The office of a statement on appeal** is to bring into the record those orders, with the facts necessary to explain them, made during the progress of the trial which are not part of the judgment roll or record proper. *Harper v. Minor*, 27 Cal. 107.

**4. Cal.**—*Dyer v. Placer County*, 90 Cal. 276, 27 Pac. 197; *White v. Superior Court*, 72 Cal. 475, 14 Pac. 87; *Northwestern Redwood Co. v. Dicken*, 13 Cal. App. 689, 110 Pac. 591. But see present code. **Dak.**—*Saint Croix Lumb. Co. v. Pennington*, 2 Dak. 467, 476, 11 N. W. 497. **Idaho.**—*Steve v. Bonners Ferry Lumb. Co.*, 13 Idaho 384, 391, 92 Pac. 363. **Nev.**—*State v. Central Pac. R. Co.*, 17 Nev. 259, 30 Pac. 887; *Whitmore v. Shiverick*, 3 Nev. 288. But see present code.

**As part of the record on appeal**, see *infra*, this section.

**5.** *Jue Fook Sam v. Lord*, 83 Cal. 159, 23 Pac. 225.

**6.** *Plano Mfg. Co. v. Jones*, 8 N. D. 315, 79 N. W. 338.

**7.** *Wall v. Mines*, 128 Cal. 136, 60 Pac. 682; *Jue Fook Sam v. Lord*, 83 Cal. 159, 23 Pac. 225.

**8.** *Vinson v. Los Angeles Pac. R. Co.*, 141 Cal. 151, 74 Pac. 757; *Wall v. Mines*, 128 Cal. 136, 60 Pac. 682 (the appellant must furnish the appellate court with "any bill of exceptions or statement in the case" on which he relies, but see present statute); *Steve v. Bonners Ferry Lumb. Co.*, 13 Idaho 384, 394, 92 Pac. 363.

**9.** *Jue Fook Sam v. Lord*, 83 Cal. 159, 23 Pac. 225; *Young v. Tiner*, 4

Idaho 269, 38 Pac. 697; *Bradbury v. Idaho & O. L. Imp. Co.*, 2 Idaho 221, 10 Pac. 620.

[a] **Need Not Be Literally "Used."** *Kelly v. Ning Yung etc. Assn.*, 138 Cal. 602, 72 Pac. 148; *Quayle v. Ream*, 17 Idaho 545, 106 Pac. 610. But see *Jue Fook Sam v. Lord*, 83 Cal. 159, 23 Pac. 225. See *Brandt v. Clark*, 81 Cal. 634, 22 Pac. 863. And see cases in next note following.

[b] **It will be presumed**, in the absence of contrary showing, that the statement was actually used on the motion, when it appears a decision on the motion was made. *Mahoney v. Dixon*, 31 Mont. 107, 77 Pac. 519. See also *Richardson v. Eureka*, 96 Cal. 443, 31 Pac. 458.

**10.** *Vinson v. Los Angeles Pac. R. Co.*, 141 Cal. 151, 74 Pac. 757.

**11.** See *infra*, this note.

[a] **Although there is no appeal from the order on motion for new trial**, the statement may be used. *Vinson v. Los Angeles Pac. R. Co.*, 141 Cal. 151, 74 Pac. 757; *Jue Fook Sam v. Lord*, 83 Cal. 159, 23 Pac. 225.

[b] **But the court cannot consider any questions raised in a statement on motion for new trial which it could not consider on a bill of exceptions regularly in the record on appeal from a judgment**, when the appeal is from a judgment. *Mahoney v. Dixon*, 31 Mont. 107, 77 Pac. 519; *Withers v. Kemper*, 25 Mont. 432, 65 Pac. 422.

**12.** *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224, 3 Am. Rep. 245.

[a] **Statement on Hearing of Motion Constitutes Part of Record on**



ments settled in the course of proceedings for a new trial.<sup>13</sup> In the absence of such statute, a statement on new trial cannot be used on appeal from the judgment,<sup>14</sup> except by stipulation.<sup>15</sup>

**Necessity of.**—A statement of case (or some equivalent) is necessary on appeal to procure a review of matters not appearing on the judgment roll.<sup>16</sup>

**4. Contents of.**—The statement of case is required to specify the particular errors or grounds of objection relied on,<sup>17</sup> and is required

**Appeal.**—Adams v. Dohrmann, 63 Cal. 417.

13. Vinson v. Los Angeles Pac. R. Co., 141 Cal. 151, 74 Pac. 757.

14. Thompson v. Connolly, 43 Cal. 636; Nesbitt v. Chisholm, 16 Nev. 39. See present statutes and see cases in next note following.

15. Cardinell v. O'Dowd, 43 Cal. 586; Gamble v. Hanchett, 34 Neb. 351, 453, 126 Pac. 111.

16. Cal.—Solomon v. Reese, 34 Cal. 28 (no statement is required when the appeal goes up on the judgment roll); Abbott v. Douglass, 28 Cal. 295; Harper v. Minor, 27 Cal. 107; Karth v. Orth, 10 Cal. 192. Idaho.—Williams v. Boise Basin Min. & D. Co., 11 Idaho 233, 81 Pac. 646; Van Camp v. Comrs. Custer Co., 2 Idaho 29, 2 Pac. 721. Mont. Taney v. Vollenweider, 24 Mont. 367, 62 Pac. 413; Fant v. Tandy, 7 Mont. 443, 17 Pac. 560. Nev.—Werner v. Babcock, 34 Nev. 42, 116 Pac. 357; Peers v. Reed, 23 Nev. 404, 48 Pac. 897; Corbett v. Job, 5 Nev. 201. N. D.—Savold v. Baldwin, 27 N. D. 342, 146 N. W. 544; Mooney v. Donovan, 9 N. D. 93, 81 N. W. 50.

[a] On simple appeal from a judgment, there is no statement. Harper v. Minor, 27 Cal. 107; Bradbury v. Idaho & O. L. I. Co., 2 Idaho 239, 10 Pac. 620.

[b] On appeal from an order refusing a new trial, errors of fact or law reviewable on appeal are such as appear in a bill of exceptions or "statement of the case." Thompson v. Patterson, 54 Cal. 542. See Keating v. Keating, 23 Cal. App. 384, 138 Pac. 118.

17. Cal.—Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Thompson v. Patterson, 54 Cal. 542; Pease v. Fink, 3 Cal. App. 371, 85 Pac. 657. Idaho.—Warren v. Stoddart, 6 Idaho 692, 59 Pac. 540. Nev.—Rosina v. Trowbridge, 20 Nev. 105, 17 Pac.

751; Rose v. Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105; Corbett v. Job, 5 Nev. 201. N. D.—McLaughlin v. Thompson, 19 N. D. 34, 120 N. W. 554; Mooney v. Donovan, 9 N. D. 93, 81 N. W. 50.

[a] Whether in law or equity, the grounds of objection must be stated. Barrett v. Tewksbury, 15 Cal. 354.

[b] If not specified, the statement will be disregarded on the hearing. Crane v. Gladding, 59 Cal. 303; Thompson v. Patterson, 54 Cal. 542.

[c] Specification of errors is not excused by (1) specification in notice of intention to move for a new trial (Leonard v. Shaw, 114 Cal. 69, 45 Pac. 1012) or (2) by an assignment of errors filed in the case afterwards and included in the transcript. Butterfield v. Central Pac. R. Co., 37 Cal. 381.

[d] Specification should conform to the notice of intention to move for a new trial. Pico v. Cohn, 78 Cal. 384, 20 Pac. 706.

[e] General specification (1) is insufficient. Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 Pac. 151; Joyce v. White, 95 Cal. 236, 30 Pac. 524 (a specification that the court erred in giving instructions asked by plaintiff is too general); Shepherd v. Jones, 71 Cal. 223, 16 Pac. 711. (2) But a specification of error in the giving of each of the instructions requested is sufficient. McCreery v. Everding, 44 Cal. 246.

[f] Specification of error in ruling on motion for nonsuit need not restate evidence. Donahue v. Gallavan, 43 Cal. 573.

[g] A specification of the insufficiency of the evidence (1) to justify the verdict or decision is required to specify the particulars in which the evidence is insufficient. Cal.—Bell v. Staaeke, 141 Cal. 186, 74 Pac. 774; De Molera v. Martin, 120 Cal. 544, 52 Pac. 825; Hastaran v. Marchand, 23

to contain so much of the evidence as may be necessary to explain the errors or grounds specified, and no more.<sup>18</sup> And it has been held it may contain other matter necessary for an explanation of the grounds of error, when not made part of the judgment or minutes.<sup>19</sup> Documents and documentary evidence to be used on appeal must be incorporated in the statement.<sup>20</sup> Instructions must be set out when error in giving or refusing them is relied on.<sup>21</sup> In some states it is held that the notice of intention to move for a new trial need not be

Cal. App. 126, 137 Pac. 297. **Idaho.** Robson v. Colson, 9 Idaho 215, 72 Pac. 951. **Nev.**—Rosina v. Trowbridge, 20 Nev. 105, 17 Pac. 751; Dick v. Bird, 14 Nev. 161. **N. D.**—Smith v. Kunert, 17 N. D. 120, 115 N. W. 76. (2) "Whenever there is a reasonably successful effort to state the particulars and they are such as may have been sufficient to inform the opposing counsel and the court of the grounds" the specification will be held sufficient. Porter v. Counts, 6 Cal. App. 550, 92 Pac. 655.

18. **Cal.**—Barrett v. Tewksbury, 15 Cal. 354. **Mont.**—Hickey v. Anaconda C. Min. Co., 33 Mont. 46, 56, 81 Pac. 806, all the evidence necessary to make the statement truly represent the case should be stated. **Nev.**—Rose v. Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105. **N. D.**—Smith v. Kunert, 17 N. D. 120, 115 N. W. 76.

[a] On appeal from order on motion to strike out and amend judgment, testimony on the trial should not be included. State ex rel. Equitable Gold M. Co. v. Murphy, 29 Nev. 247, 88 Pac. 335.

[b] Where it is claimed verdict is contrary to the evidence, all the evidence should be set forth. Dawley v. Hovious, 23 Cal. 103.

[c] Brief statement of the substance of the evidence bearing on the point specified, instead of setting it out in full, is proper. Ross v. Roadhouse, 36 Cal. 580.

[d] Literal transcript of testimony (1) is not proper (Smith v. Kunert, 17 N. D. 120, 115 N. W. 76), except (2) under statute where appellant specifies he desires to review entire case. Blessett v. Turcotte, 20 N. D. 151, 127 N. W. 505; Hilde v. Nelson, 19 N. D. 634, 125 N. W. 474.

[e] Where the question is as to the sufficiency of evidence to sustain a finding, it is sufficient to insert a sufficient amount of evidence on each side

of the question to show a substantial conflict. Vatcher v. Wilbur, 144 Cal. 536, 78 Pac. 14.

[f] **Testimony To Be in Narrative Form.**—Friel v. Kimberly-Montana Gold Min. Co., 34 Mont. 54, 85 Pac. 734; Fant v. Tandy, 7 Mont. 443, 17 Pac. 560.

[g] A settled statement is presumed to contain all the evidence given (1) which is necessary to be stated in order to explain the specified point though it does not contain an express statement to that effect. Abbey Homestead Assn. v. Willard, 48 Cal. 614; Gamble v. Hanchett, 34 Nev. 351, 453, 126 Pac. 111. (2) This rule does not apply where the contrary appears from the statement itself. Poujade v. Ryan, 21 Nev. 449, 33 Pac. 659.

[h] A statement that a party "proved" certain facts is not objectionable where there is no contest as to the facts. Wilson v. Hill, 17 Nev. 401, 30 Pac. 1076.

19. Corbett v. Job, 5 Nev. 201, such as the verdict.

20. Wheeler v. Farmer, 38 Cal. 203; Stickney v. Hanrahan, 7 Idaho 424, 63 Pac. 189.

[a] Brief statement of instruments is sufficient where no point is made as to the construction of the language. Conroy v. Duane, 45 Cal. 597; Knowles v. Inches, 12 Cal. 212.

[b] May be incorporated by reference, (1) if on file. Lake Shore Cattle Co. v. Modoc Land & L. Co., 127 Cal. 37, 59 Pac. 206; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; Wheeler v. Farmer, 38 Cal. 203; Moore v. Taylor, 1 Idaho 583. (2) But documents referred to should be set out in the transcript. Lake Shore Cattle Co. v. Modoc Land & L. Co., 127 Cal. 37, 59 Pac. 206.

21. Moore v. Gilson, 23 Cal. App. 169, 137 Pac. 268; Sears v. Lydon, 5 Idaho 358, 49 Pac. 122.

included in the statement,<sup>22</sup> unless assailed as being insufficient,<sup>23</sup> even though the appeal is from the order on the motion.<sup>24</sup> But the order of the lower court denying the motion for new trial, or the minute entry, must be embodied in the statement.<sup>25</sup> Orders of the trial judge extending the time for preparation of the statement and service need not be included,<sup>26</sup> though orders overruling objections that the statement was not presented in time, should be.<sup>27</sup>

**Matters of Record.** — Whatever would be a matter of record without the statement, need not be included in the statement of the case.<sup>28</sup>

Exceptions may be saved in a statement of case as well as in a bill of exceptions.<sup>29</sup>

The insertion of improper matters in a statement of case does not vitiate it.<sup>30</sup>

A statement should not be stricken out for mere defects or omissions where it is properly authenticated and rightfully brought up to the appellate court,<sup>31</sup> though for such defects it will be disregarded.<sup>32</sup>

22. *Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706; *Steve v. Bonners Ferry Lumb. Co.*, 13 Idaho 384, 92 Pac. 363. See *Butterfield v. Central Pac. R. Co.*, 37 Cal. 381, when a part of record, it should not be included. But see *Carr Ryder & Adams Co. v. Closser*, 27 Mont. 94, 69 Pac. 560.

[a] **Notice of intention is not a part of the record** by statute, and is not to be brought up at all. If notice is not given or is given too late, this must be shown against settlement of the statement or in opposition to the motion. If an adverse ruling is made, necessary facts must be stated in the statement or bill of exceptions. *Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706. But see *Carr, Ryder & Adams Co. v. Closser*, 27 Mont. 94, 69 Pac. 560, if the notice of intention is not included in the statement and the objection is not waived, the order will be reversed.

23. *Steve v. Bonners Ferry Lumb. Co.*, 13 Idaho 384, 92 Pac. 363.

24. See the next two preceding notes.

25. *In re Cook's Estate*, 34 Nev. 217, 117 Pac. 27; *Kirman v. Johnson*, 30 Nev. 146, 93 Pac. 500, 96 Pac. 1057, to clothe the appellate court with jurisdiction.

26. *Steve v. Bonners Ferry Lumb. Co.*, 13 Idaho 384, 92 Pac. 363.

27. *Steve v. Bonners Ferry Lumb. Co.*, 13 Idaho 384, 92 Pac. 363. See *infra*, I, E.

28. *Reynolds v. Harris*, 8 Cal. 617;

*Mooney v. Donovan*, 9 N. D. 93, 81 N. W. 50, order denying motion to quash alternative writ of mandamus is not part of record.

[a] **Judgment Roll.**—*Butterfield v. Central Pac. R. Co.*, 37 Cal. 381.

[b] **Pleadings.**—*Bliss v. Grayson*, 24 Nev. 422, 56 Pac. 231. But on appeal from an order denying costs, pleadings cannot be considered unless embodied in a statement. *Glock v. Elges*, 39 Nev. 415, 159 Pac. 629.

[c] **The findings of the court** where a part of the judgment roll, *Reynolds v. Harris*, 8 Cal. 617. But see *Werner v. Babcock*, 34 Nev. 42, 116 Pac. 357; *Peers v. Reed*, 23 Nev. 404, 48 Pac. 897; *Corbett v. Job*, 5 Nev. 201.

29. **Cal.**—*Kelly v. Ning Yung Ben. Assn.*, 138 Cal. 602, 72 Pac. 148, "if the statement contains exceptions to rulings." **Idaho.**—*Steve v. Bonners Ferry Lumb. Co.*, 13 Idaho 384, 395, 92 Pac. 363; *Warren v. Stoddart*, 6 Idaho 692, 59 Pac. 540, the statement should contain all the exceptions taken by the party. **Mont.**—*Bass v. Buker*, 6 Mont. 442, 12 Pac. 922, where the statement contains no exceptions, errors in admission of testimony cannot be considered.

30. *Butterfield v. Central Pac. R. Co.*, 37 Cal. 381.

31. *Beach v. Spokane R. & W. Co.*, 27 Mont. 367, 65 Pac. 106, for such defects as an omission to specify errors.

32. *Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 65 Pac. 106.



**5. Compared With Bills of Exceptions.**—A statement of case, though usually more full and complete than a bill of exceptions,<sup>33</sup> has been held to be about equivalent thereto for some purposes,<sup>34</sup> and may be considered as such when necessary.<sup>35</sup>

**B. STATEMENT OF FACTS.**—**1. Generally.**—Statutes in some states provide for a statement of facts on appeal,<sup>36</sup> whose purpose<sup>37</sup> is

**33.** *Warren v. Stoddart*, 6 Idaho 692, 59 Pac. 540.

**34. Cal.**—*Hastaran v. Marchand*, 23 Cal. App. 126, 137 Pac. 297. **Dak.** *Saint Croix Lumb. Co. v. Pennington*, 2 Dak. 467, 476, 11 N. W. 497. **Idaho.** *Steve v. Bonners Ferry Lumb. Co.*, 13 Idaho 384, 395, 92 Pac. 363; *Bradbury v. Idaho & O. L. Imp. Co.*, 2 Idaho 221, 10 Pac. 620. **Mont.**—*Granite Mountain Min. Co. v. Weinstein*, 7 Mont. 440, 17 Pac. 113.

*Compare* *Boettcher v. Thompson*, 21 S. D. 169, 110 N. W. 108.

[a] There is no substantial difference (1) between a bill of exceptions and statement of the case when settled; the only substantial difference being that in the latter in addition to setting forth the exceptions taken at the trial, the moving party must also specify the particular ones relied on in support of his motion for new trial. *Pease v. Fink*, 3 Cal. App. 371, 85 Pac. 657. See also *Kelly v. Ning Yung etc. Assn.*, 138 Cal. 602, 72 Pac. 148; *Warren v. Stoddart*, 6 Idaho 692, 59 Pac. 540. (2) A bill of exceptions sets forth particular rulings with the evidence or offer on which they were made. But a statement of the case shows, in substance, the whole evidence, enabling the court to review the findings of the jury as well as the rulings of the judge. *Saint Croix Lumb. Co. v. Pennington*, 2 Dak. 467, 476, 11 N. W. 497. (3) A bill of exceptions may not be a statement of the case, but a statement usually contains all the exceptions that can be saved by a bill of exceptions. *Steve v. Bonners Ferry Lumb. Co.*, 13 Idaho 384, 395, 92 Pac. 363. (4) "If such statement be considered a bill of exceptions (as may be done) specifications of error would not be necessary to review any alleged errors of law appearing therein." *Hastaran v. Marchand*, 23 Cal. App. 126, 135, 137 Pac. 297.

**35.** *Dennis v. Gordon*, 163 Cal. 427, 125 Pac. 1063; *People v. Crane*, 60 Cal. 279; *Pease v. Fink*, 3 Cal. App. 371, 85

Pac. 657; *Quayle v. Ream*, 17 Idaho 545, 106 Pac. 610.

**36. Ill.**—*Illinois B. & M. Co. v. Ilmberger*, 155 Ill. App. 417, on appeals from municipal courts, the judge shall prepare a statement of facts which with the judgment is certified to the appellate court as the record. **La.** *Fletcher v. Ozone Lumb. Co.*, 123 La. 514, 49 So. 158; *Lobe & Co. v. Reinaeh & Co.*, 2 McGloin 82. **Tex.**—*Jamison v. Dooley*, 98 Tex. 206, 82 S. W. 780. **Wash.**—*Michaelson v. Overmeyer*, 77 Wash. 110, 137 Pac. 332, statute as to service of abstract of record and of statement does not obviate statement of facts.

[a] When appeal is based on insufficiency of complaint, a statement of facts is not required. *Benjamin v. Ernst*, 83 Wash. 59, 145 Pac. 79.

[b] When all the evidence legally appears of record, a statement of facts is not required. *State v. Connor*, 86 Tex. 133, 23 S. W. 1103 (where agreed statement of facts on which trial is had is in record); *Salinas v. Wright*, 11 Tex. 572, 578.

[c] Recitals in the judgment, of conclusions of fact, do not supply the place of a statement. *Wallace & Co. v. Bogel & Bro.*, 62 Tex. 636. See *Craxton Wood & Co. v. Ryan*, 3 White & W. Civ. Cas. (Tex.) §367, 369.

[d] No motion for new trial is necessary to authorize preparation of statement. *Greer v. Featherston*, 95 Tex. 654, 69 S. W. 69.

[e] Affidavits of witness on probate of will cannot be treated as a statement of facts. *Walker v. Boyd* (Tex. Civ. App.), 48 S. W. 602.

[f] Statement is not made for the purpose of a new trial and cannot be used as evidence. *Wootters v. Kauffman*, 67 Tex. 488, 3 S. W. 465.

**37.** *Jamison v. Dooley*, 98 Tex. 206, 82 S. W. 780; *Stephens v. Bowerman's Heirs*, 27 Tex. 18.

[a] When a reversal because of the exclusion of evidence is sought, a statement of facts which were in evidence

to make the evidence in the case a part of the record on appeal. This statement is different from a bill of exceptions in its character, purpose and manner of preparation,<sup>38</sup> though often considered in connection with a bill of exceptions in the case.<sup>39</sup> In the absence of a statement of facts only such assignments of error<sup>40</sup> as are based on

below must be presented so that the materiality of the evidence may be seen. *Cottrell v. Teagarden*, 25 Tex. 317.

38. *Lobe & Co. v. Reinach & Co.*, 2 McGloin (La.) 82; *Roundtree v. Galveston*, 42 Tex. 612.

[a] **Distinguished From Bill of Exceptions.**—(1) "A bill of exceptions and statement of facts are alike intended to be incorporated into and become parts of the record of the case. Still they are altogether different in their character and purposes, as well as in the manner of their preparation and authentication. The first serves to perpetuate in the record the ruling of the court to which the party presenting the bill excepts. Only such facts are set out in it as are necessary for the proper understanding of the action of the court to which the exception is taken. In its preparation and completion the opposite party has no necessary connection, and is frequently not even cognizant of its contents until it has become a part of the record. While the latter is intended to embody in the record all the evidence introduced on the trial as agreed to by the parties and approved by the court; or if the parties fail to agree, as certified to by the court after examining the statements prepared by them respectively." *Roundtree v. Galveston*, 42 Tex. 612. See also *Lobe & Co. v. Reinach & Co.*, 2 McGloin (La.) 82. (2) The statement may be made to serve the purpose of a bill of exceptions also but a bill of exceptions not authenticated in the manner required for a statement cannot be regarded as a statement. *Roundtree v. Galveston*, 42 Tex. 612. See *Dull v. Drake*, 63 Tex. 205, 4 S. W. 364; *Holmes v. Coalson* (Tex. Civ. App.), 178 S. W. 628. (3) A statement to be used as a bill of exceptions must be filed within the time required for bills. *Gulf, C. & S. F. Ry. Co. v. Eddins*, 60 Tex. 656; *Lockett v. Schurenberg*, 60 Tex. 610.

**Reservation of exceptions in statement**, see *infra*, I, B, 2.

39. *Jamison v. Dooley*, 93 Tex. 206, 82 S. W. 780. But see *St. Louis S. W. R. Co. v. Demsey*, 40 Tex. Civ. App. 398, 89 S. W. 786; *Jones v. Jenkins*, 3 Wash. 17, 22, 27 Pac. 1022.

[a] **Where bill of exceptions and statement of facts conflict**, the latter controls. *Swearingen v. Bray* (Tex. Civ. App.), 157 S. W. 953.

40. *Webster v. International & G. N. Ry. Co.* (Tex. Civ. App.), 193 S. W. 179; *First State Ins. Co. v. Sharp* (Tex. Civ. App.), 192 S. W. 792, only assignments needing no reference to facts may be considered. See *Roundtree v. Galveston*, 42 Tex. 612, 623. Compare *Chicago, R. I. & G. Ry. Co. v. Barrett*, 45 Tex. Civ. App. 73, 100 S. W. 800.

[a] **In the absence of a statement of facts**, (1) judgment will be affirmed unless record contains fundamental error. *Lauraine v. Masterson* (Tex. Civ. App.), 193 S. W. 708; *Missouri, K. & T. Ry. Co. v. Stafford*, 13 Tex. Civ. App. 192, 35 S. W. 48. (2) In the absence of a statement or bill of exceptions, the only question reviewable is whether the findings sustain the judgment. *McMillan v. Stone*, 79 Wash. 119, 139 Pac. 753.

[b] **Assignments based on exclusion of evidence** are (1) rarely considered in the absence of a statement. *Cook v. Hardin* (Tex. Civ. App.), 174 S. W. 633; *Drummond v. Allen Nat. Bank* (Tex. Civ. App.), 152 S. W. 739. (2) As to exceptions to rule, see *Lockett v. Schurenberg*, 60 Tex. 610; *Tarlton v. Daily*, 55 Tex. 92; *Castellano v. Marks*, 37 Tex. Civ. App. 273, 83 S. W. 729.

[c] **Sufficiency of evidence not reviewable in absence of statement of facts.** *Missouri, K. & T. R. Co. v. Waggoner* (Tex. Civ. App.), 109 S. W. 971.

[d] **Errors in giving or refusing charges** are (1) not reviewable in absence of statement (*Osborne v. Prather*, 83 Tex. 208, 18 S. W. 613; *Fulgham v. Bendy*, 23 Tex. 64), unless, (2) under no facts which could have been proved under the pleadings, the charge given could not be correct. *Endick v. En-*

the record can be considered, but the right to appeal is not affected.<sup>41</sup>

**2. Contents.**—It is provided by statute that the statement of facts shall embody all the facts given in evidence;<sup>42</sup> but it has been held that it may include a reservation of exceptions.<sup>43</sup> In some jurisdictions the statement of facts contains the rulings, decisions, evidence, papers and exceptions in a case or so much as is material and not already a part of the record.<sup>44</sup>

dick, 61 Tex. 559; *Bast v. Alford*, 22 Tex. 399.

[e] **The findings of fact are conclusive** in the absence of a statement of facts. *Holloway v. Hall* (Tex. Civ. App.), 151 S. W. 895; *Cofield v. Supreme Camp* (Tex. Civ. App.), 151 S. W. 341.

[f] **The refusal of the trial judge to file his findings** usually necessitates a reversal in the absence of a statement. *Werner Stove Co. v. Smith* (Tex. Civ. App.), 120 S. W. 247.

41. *Lauraine v. Masterson* (Tex. Civ. App.), 193 S. W. 708.

42. *Roundtree v. Galveston*, 42 Tex. 612, 627; *Davis v. Farwell Co.* (Tex. Civ. App.), 49 S. W. 656.

[a] **Appellate court cannot dictate** what shall be incorporated within statement. *Perry v. Turner* (Tex. Civ. App.), 108 S. W. 194.

[b] **"The statement of facts should contain substantially all the material facts necessary for a determination of the issues involved."** *Davis v. Farwell Co.* (Tex. Civ. App.), 49 S. W. 656.

[c] **Should show that it contains all the facts proved** either by express statement or necessary implication. *Barnhart v. Clark*, 59 Tex. 552.

[d] **Only material part of instruments** on which action is based need be copied. *Runck v. Timon*, 47 Tex. Civ. App. 435, 105 S. W. 224.

[e] **Instruments inserted should be incorporated before statement is signed** by judge. *Mason v. Rodgers*, 83 Tex. 389, 18 S. W. 811.

[f] **Evidence Should Be Reduced to Narrative Form.**—*Hornbeck v. Barker* (Tex. Civ. App.), 192 S. W. 276; *Albrecht v. Lignoski* (Tex. Civ. App.), 151 S. W. 886; *Gulf, C. & S. F. Ry. Co. v. Mitchell*, 21 Tex. Civ. App. 463, 51 S. W. 662.

[g] **Copy of stenographer's notes** cannot (1) be filed as a statement (*East Line & Red River R. Co. v. Culberson*, 68 Tex. 664, 5 S. W. 820), except (2)

by statute. *Lobe & Co. v. Reinach & Co.*, 2 McGloin (La.) 82.

[h] **References to other parts of the record** for any portion of the evidence should indicate with certainty the evidence intended. *Stephens v. Bowerman's Heirs*, 27 Tex. 18.

43. *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326; *Texarkana & Ft. Smith Ry. Co. v. Rosebrook-Josey Grain Co.*, 52 Tex. Civ. App. 156, 114 S. W. 436.

44. *Puget Sound Iron Co. v. Worthington*, 2 Wash. Ter. 472, 7 Pac. 882, 886, the statement may include everything material that transpired in a case not otherwise a part of the record. See *Morgan v. Bankers Trust Co.*, 63 Wash. 476, 115 Pac. 1047.

[a] **Stenographer's longhand notes** are sufficient without a statement. *Bash v. Culver Gold Min. Co.*, 7 Wash. 122, 34 Pac. 462.

[b] **Points relied on as error to be indicated.** *Jones v. Jenkins*, 3 Wash. 17, 22, 27 Pac. 1022.

[c] **Affidavits** must be brought up on appeal by a statement of facts or bill of exceptions. *State v. Wood*, 33 Wash. 290, 74 Pac. 380.

[d] **Although a question of fact** should become a matter of record during the pendency of the case, it should be incorporated in the statement. *Jones v. Jenkins*, 3 Wash. 17, 22, 27 Pac. 1022.

[e] **Only such facts as are material** to the matters to be presented on appeal are to be included. *Jones v. Jenkins*, 3 Wash. 17, 27 Pac. 1022.

[f] **In equity, all the testimony** must be included. *Smith v. State*, 5 Wash. 273, 31 Pac. 865; *Wheeler v. Lager*, 3 Wash. 732, 29 Pac. 453.

[g] **Testimony of witnesses, not conclusions** as to effect of testimony, must be stated. *Morgan v. Chittenden Land Co.*, 92 Wash. 364, 159 Pac. 129.

[h] **Attaching exhibits**, see *Douthitt v. McCulsky*, 11 Wash. 601, 40 Pac. 186.

[i] **Affidavit to be considered** must



C. PREPARATION AND SERVICE. — Statutes require the moving party to prepare a draft of the statement,<sup>45</sup> within a specified time,<sup>46</sup> file it with the clerk under some statutes,<sup>47</sup> and serve it or a copy thereof on the adverse party.<sup>48</sup>

In Texas, it is provided that if the statement of facts is agreed to by the parties, they shall sign it,<sup>49</sup> and submit it to the judge for his

be included in statement. *State v. Hooker*, 99 Wash. 661, 170 Pac. 374; *State v. Moran*, 66 Wash. 588, 120 Pac. 86.

[j] Instructions in writing, not to be included. *Tergeson v. Robinson Mfg. Co.*, 48 Wash. 294, 93 Pac. 428.

45. *Adams v. Dohrmann*, 63 Cal. 417; *Baum v. Meyer*, 16 Nev. 91.

[a] In Texas after trial (1) either party may make out a written statement of facts given in evidence on the trial and submit it to the opposite party. He may use the stenographer's transcript (*Kelso v. Townsend*, 13 Tex. 140; *Hermann v. Bailey* [Tex. Civ. App.], 174 S. W. 865 [timely submission]; *Rader v. Galveston H. & S. A. R. Co.* [Tex. Civ. App.], 137 S. W. 718), or (2) the stenographer may be requested to prepare the statement. *Elliott v. Ferguson*, 100 Tex. 418, 100 S. W. 911.

[b] One who does not appeal may propose and procure certification of statement of facts in the event he should appeal. *Lauridsen v. Lewis*, 47 Wash. 594, 92 Pac. 440.

46. *Codd v. Von Der Ahe*, 92 Wash. 529, 159 Pac. 686; *Michaelson v. Overmeyer*, 77 Wash. 110, 137 Pac. 332.

[a] Time may be (1) extended (*State ex rel. Sefrit v. Superior Court*, 74 Wash. 601, 134 Pac. 183 [abuse of discretion in refusing extension]), on (2) application on notice. *Michaelson v. Overmeyer*, 77 Wash. 110, 137 Pac. 332; *McQuesten v. Morrill*, 12 Wash. 335, 41 Pac. 56.

[b] Supreme court cannot extend time. *Aultman-Taylor M. Co. v. Clausen*, 18 N. D. 483, 121 N. W. 64.

[c] A failure to prepare the statement within the prescribed time is (1) a waiver of the statement (*Johnson v. Wells Fargo & Co.*, 6 Nev. 224, 3 Am. Rep. 245), unless (2) the adverse party waives this waiver. *Sweeney v. Great Falls & Canada Ry. Co.*, 11 Mont. 34, 27 Pac. 347; *Goldfield-Mohawk Min. Co. v. Frances-Mohawk M. & L. Co.*, 31 Nev. 348, 102 Pac. 963; *Johnson v.*

*Wells Fargo & Co.*, 6 Nev. 224, 3 Am. Rep. 245.

[d] Party may propose amendments without waiving objection as to time by a statement reserving his right to object. *Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 65 Pac. 106; *Sweeney v. Great Falls & Canada Ry. Co.*, 11 Mont. 34, 27 Pac. 347.

[e] Remedy Where Statement Is Tardy.—(1) A motion to strike out a certified statement on new trial because tardy, is irregular. *Quivey v. Gambert*, 32 Cal. 304; *Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 374, 65 Pac. 106. Compare *Howard v. Bussell Land Co.*, 74 Wash. 331, 133 Pac. 596. (2) The proper practice is to refuse a settlement, or to grant a settlement and deny the motion for new trial on this ground. *Ryer v. Rio Land & Imp. Co.*, 147 Cal. 462, 82 Pac. 62; *Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 375, 65 Pac. 106; *Sweeney v. Great Falls & Canada Ry. Co.*, 11 Mont. 34, 27 Pac. 347. Incorporating objections in statement, see *infra*, I, E.

[f] Order on Motion To Strike Out Is Not Appealable.—*Quivey v. Gambert*, 32 Cal. 304.

47. *Glock v. Elges*, 39 Nev. 415, 159 Pac. 629; *Baum v. Meyer*, 16 Nev. 91; *State ex rel. Palmer Mt. Tunnel & P. Co. v. Superior Court*, 63 Wash. 442, 115 Pac. 845, filing to precede service.

48. Mont.—*Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 65 Pac. 106. Nev.—*Baum v. Meyer*, 16 Nev. 91. Wash.—*State ex rel. Palmer Mt. Tunnel & P. Co. v. Superior Court*, 63 Wash. 442, 115 Pac. 845, service by mail.

[a] Service on co-party of statement of facts is unnecessary. *Mogelberg v. Calhoun*, 94 Wash. 662, 163 Pac. 29.

49. See *Houston Oil Co. v. Myers* (Tex. Civ. App.), 150 S. W. 762.

[a] Presumed to have been agreed to, when certified by the judge as an agreed statement, though signed by one party only. *Schneider v. Stephens*, 60 Tex. 419. But compare *Houston Oil Co.*

approval, and signature,<sup>50</sup> and then file it with the clerk<sup>51</sup> within the statutory period,<sup>52</sup> unless an extension of time is granted by the judge.<sup>53</sup> If they do not agree on such statement or if the judge does not approve or sign it the judge is required to prepare a correct statement,<sup>54</sup> and to sign,<sup>55</sup> and file it.<sup>56</sup>

**D. AMENDMENTS.**—If the proposed statement is not agreed to by the adverse party, he may suggest amendments,<sup>57</sup> which he is required to serve on the moving party.<sup>58</sup> If the amendments be adopted, the statement shall be amended, and then presented for settlement.<sup>59</sup>

**E. SETTLEMENT.**—Unless agreed to by the parties, the statement of the case or statement of facts must be settled by the judge or it will not be considered on appeal.<sup>60</sup> On the settlement, the judge should

*v. Myers* (Tex. Civ. App.), 150 S. W. 762.

50. *Watson v. Birdwell & Son* (Tex. Civ. App.), 98 S. W. 407; *Watkins v. Hale*, 37 Tex. Civ. App. 243, 84 S. W. 386.

[a] **Approval cannot be waived or the time therefor extended by agreement of the parties.** *Johnson v. Blount*, 48 Tex. 38; *Watkins v. Hale*, 37 Tex. Civ. App. 243, 84 S. W. 386.

[b] **Judge may correct statement before approving it.** *King v. Russell*, 40 Tex. 124.

[c] **Where statement, not agreed to by the parties, is approved by the judge through mistake, it may be stricken out on motion.** *Corralitos Co. v. Mackay*, 31 Tex. Civ. App. 316, 72 S. W. 624.

[d] **Successor of judge cannot furnish transcript.** *Paddock-Hawley Iron Co. v. Gideumb & Co.*, 26 Tex. Civ. App. 211, 62 S. W. 1091.

[e] **Mandamus to compel approval proper.** *Reagan v. Copeland*, 78 Tex. 551, 14 S. W. 1031; *First Nat. Bank v. Herrell* (Tex. Civ. App.), 190 S. W. 797.

[f] **Certiorari not proper remedy to compel signing and approval of statement of facts.** *Galveston, H. & S. A. Ry. Co. v. Perkins* (Tex. Civ. App.), 73 S. W. 1067.

51. *Watkins v. Hale*, 37 Tex. Civ. App. 243, 84 S. W. 386.

[a] **File mark is conclusive as to time of filing.** *Brown v. Durham* (Tex. Civ. App.), 41 S. W. 369.

52. *Palmo v. Slayden & Co.*, 100 Tex. 13, 92 S. W. 796, judgment nunc pro tunc justifying making statement after judgment entered is authorized.

53. *Dobie v. Scott* (Tex. Civ. App.), 188 S. W. 286, discretion as to. See

*Ball v. Collins*, 66 Tex. 467, 17 S. W. 371; *Blum v. Neilson*, 59 Tex. 378.

54. *Middlehurst v. Collins-Gunther Co.*, 100 Tex. 349, 99 S. W. 1025; *Houston Oil Co. v. Myers* (Tex. Civ. App.), 150 S. W. 762; *Mayo v. Goldman*, 44 Tex. Civ. App. 80, 97 S. W. 1061.

[a] **Disagreement presumed, when judge makes out statement.** *McManus v. Wallis*, 52 Tex. 534; *Kelso v. Townsend*, 13 Tex. 140.

[b] **Mandamus lies to enforce duty.** *Middlehurst v. Collins-Gunther Co.*, 100 Tex. 349, 99 S. W. 1025.

[c] **Bases of statement by judge are statements prepared by each of the parties respectively, and his own knowledge.** *Roundtree v. Galveston*, 42 Tex. 612; *McManus v. Wallis*, 52 Tex. 534. See *Kelso v. Townsend*, 13 Tex. 140.

55. *Serop v. State*, 69 Tex. Crim. 399, 154 S. W. 557.

[a] **Signature of counsel unnecessary.** *Serop v. State*, 69 Tex. Crim. 399, 154 S. W. 557.

56. *Mayo v. Goldman*, 44 Tex. Civ. App. 80, 97 S. W. 1061, it is duty of judge to file it.

57. **Cal.**—*Butterfield v. Central Pac. R. Co.*, 37 Cal. 381; *Quivey v. Gambert*, 32 Cal. 304. **Mont.**—*Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106. **Wash.** *State ex rel. Hofstetter v. Sheeks*, 63 Wash. 408, 115 Pac. 859.

58. *Stickney v. Hanrahan*, 7 Idaho 424, 63 Pac. 189.

59. *Spokane Int. R. Co. v. Dunn*, 19 Idaho 734, 115 Pac. 501, proposed statement and amendments must be engrossed and then presented for settlement. See *infra*, I, F.

60. **Ariz.**—*Myers v. Farmers' & M. Bank*, 7 Ariz. 67, 60 Pac. 880; *Smith*

strike out all redundant matter,<sup>61</sup> and make the statement truly represent the case,<sup>62</sup> despite the assent of the parties to inaccurate statements.<sup>63</sup> But he should permit the incorporation of any objections to the settlement, together with matter in support thereof.<sup>64</sup>

**Time for Settlement.**—The statutes usually specify the time within which the statement must be settled,<sup>65</sup> and such provisions are mandatory and must be duly regarded.<sup>66</sup> On failure to do so, the statement cannot be considered either by the trial court on the hearing of the motion for new trial or by the appellate court on appeal,<sup>67</sup> and may

*v. Blackmore*, 3 Ariz. 348, 29 Pac. 15 (agreed statement must be allowed by judge); *Tietjen v. Snead*, 3 Ariz. 195, 24 Pac. 324. **Cal.**—*Yount v. Arakalian Bros. Co.*, 26 Cal. App. 472, 147 Pac. 467. **Idaho.**—*Stickney v. Hanrahan*, 7 Idaho 424, 63 Pac. 189. **Mont.**—*Friel v. Kimberly-Montana Gold Min. Co.*, 34 Mont. 54, 85 Pac. 734; *Fant v. Tandy*, 7 Mont. 443, 17 Pac. 560. **Nev.**—*Yori v. Cohn*, 26 Nev. 206, 228, 65 Pac. 945, 67 Pac. 212; *Hayes v. Davis*, 23 Nev. 233, 45 Pac. 466. **Wash.**—*Heath v. Seattle Taxi. Co.*, 69 Wash. 69, 124 Pac. 217, as to limitations on power of judge.

In Texas, see *supra*, I, C.

[a] **Perfection of appeal does not deprive judge of jurisdiction to settle statement.** *James v. Leport*, 19 Nev. 174, 8 Pac. 47.

[b] **Successor of judge may settle.** *Edwards v. Tracy*, 2 Mont. 22; *Gray's Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267. *Contra*, *Northwestern Port Huron Co. v. Zickrick*, 22 S. D. 89, 115 N. W. 525.

[c] **A reference to another judge to report the facts to the appellate court will be directed where there is an issue of fact as to proceedings on trial, there being no amendments proposed.** *Heath v. Seattle Taxi. Co.*, 69 Wash. 69, 124 Pac. 217.

61. *Vatcher v. Wilbur*, 144 Cal. 536, 78 Pac. 14; *Hickey v. Anaconda C. Min. Co.*, 33 Mont. 46, 81 Pac. 806.

62. *Warner v. Thomas P. D. & C. Works*, 105 Cal. 409, 38 Pac. 960; *Gorman v. Madden*, 37 S. D. 42, 156 N. W. 598.

[a] **Judge must rely on his own memory and cannot have a second trial out of court to ascertain what transpired in court.** *Hale v. Park Ditch Co.*, 2 Mont. 498.

63. See cases in next preceding note.

64. *Ryer v. Rio Land & Imp. Co.*,

147 Cal. 462, 82 Pac. 62; *Henry v. Merguire*, 106 Cal. 142, 39 Pac. 599; *Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 65 Pac. 106; *Sweeney v. Great Falls & Canada Ry. Co.*, 11 Mont. 34, 27 Pac. 347.

[a] **On objection that settlement is too late, appellant should incorporate matters excusing his apparent delay.** *Connor v. Southern Cal. Motor R. Co.*, 101 Cal. 429, 35 Pac. 990; *Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 65 Pac. 106.

[b] **A bill of exceptions showing court's refusal to incorporate objections in statement is improper.** *Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 376, 65 Pac. 106.

65. *Henry v. Merguire*, 106 Cal. 142, 39 Pac. 599; *Connor v. Southern California Motor Road Co.*, 101 Cal. 429, 35 Pac. 990; *Cooney v. Furlong*, 66 Cal. 520, 6 Pac. 388; *Stevens v. Northwestern Stage Co.*, 1 Idaho 604.

[a] **In vacation, settlement may be made.** *Edwards v. Tracy*, 2 Mont. 22.

66. **Cal.**—*Henry v. Merguire*, 106 Cal. 142, 39 Pac. 599; *McIntire v. Southern California Motor Road Co.*, 101 Cal. xviii, 35 Pac. 991; *Connor v. Southern California Motor Road Co.*, 101 Cal. 429, 35 Pac. 990; *Chase v. Evoy*, 58 Cal. 348; *Le Roy v. Rassette*, 32 Cal. 171. **Idaho.**—*Hoehnan v. New York Dry Goods Co.*, 8 Idaho 66, 67 Pac. 796. **Mont.**—*State ex rel. Walkerville v. District Court*, 29 Mont. 176, 74 Pac. 414.

67. **Ariz.**—*Daze v. Ketchum*, 18 Ariz. 31, 155 Pac. 964; *Lemon v. Ward*, 3 Ariz. 219, 73 Pac. 443. **Cal.**—*Henry v. Merguire*, 106 Cal. 142, 39 Pac. 599; *Connor v. Southern Cal., etc. Co.*, 101 Cal. 429, 35 Pac. 990; *Bunnel v. Stockton*, 83 Cal. 319, 23 Pac. 301. **Tex.** *Cofield v. Supreme Camp (Tex. Civ. App.)*, 151 S. W. 341.

[a] **The right to new trial is waived**



be stricken out on motion.<sup>68</sup> For good and sufficient reasons, however, the time may be extended, in some jurisdictions, in the discretion of the court,<sup>69</sup> but the moving party is limited to the provisions of such extension.<sup>70</sup> The statute may also provide for an extension of the time by agreement of the attorneys.<sup>71</sup>

**Notice of settlement** is sometimes required.<sup>72</sup>

**Remedies Where Judge Refuses To Settle.** — On refusal to settle a statement, mandamus is the proper,<sup>73</sup> and it has been held, the exclusive remedy, where the moving party has fully complied with the statute.<sup>74</sup> Under a statute relating to relief from "proceedings," the judge may relieve a party from an order refusing to settle, on motion upon the ground of inadvertence, excusable neglect, etc.<sup>75</sup> A refusal to do so is an appealable order.<sup>76</sup> But a refusal to settle and certify is not appealable.<sup>77</sup> Some statutes authorize a petition to the supreme court where a judge dies, refuses to settle, or is absent from the state, etc.<sup>78</sup>

by failing to observe statutory time. *Cooney v. Furlong*, 66 Cal. 520, 6 Pac. 388; *Elder v. Frevert*, 18 Nev. 278, 3 Pac. 237.

68. *Featherstone v. Keane*, 18 Idaho 24, 108 Pac. 337.

69. Cal.—*Bryant v. Sternfeld*, 89 Cal. 611, 26 Pac. 1091; *Bunnell v. Stockton*, 83 Cal. 319, 23 Pac. 301; *Curtis v. Superior Court*, 70 Cal. 390, 11 Pac. 652; *Matthews v. Superior Court*, 68 Cal. 638, 10 Pac. 128. Idaho. *Hoehnan v. New York Dry Goods Co.*, 8 Idaho 66, 67 Pac. 796; *Miller v. Hunt*, 7 Idaho 486, 63 Pac. 803. Mont. *Walsh v. Mueller*, 14 Mont. 76, 35 Pac. 226. N. D.—*Guild v. More*, 30 N. D. 248, 152 N. W. 275. S. D.—*Thomson v. Meridian L. Ins. Co.*, 36 S. D. 175, 153 N. W. 993. Utah.—*Elliot v. Whitmore*, 10 Utah 253, 37 Pac. 463.

[a] **To a Certain Day.**—An extension "to" a certain day includes the day so specified. *Penn Placer Min. Co. v. Schreiner*, 14 Mont. 121, 35 Pac. 878.

[b] **Sunday.**—If the last day specified falls on Sunday that day will be excluded from the computation. *Muir v. Galloway*, 61 Cal. 498.

70. *Jenkins v. Frink*, 27 Cal. 337.

71. *Simpson v. Budd*, 91 Cal. 488, 27 Pac. 758; *Bunnell v. Stockton*, 83 Cal. 319, 23 Pac. 301; *Curtis v. Superior Court*, 70 Cal. 390, 11 Pac. 652.

72. *Henry v. Merguire*, 106 Cal. 142, 39 Pac. 599; *Mellor v. Crouch*, 76 Cal. 594, 18 Pac. 685; *Young v. Updike*, 29 Nev. 303, 89 Pac. 457.

[a] **No notice is required** (1) if the proposed amendments are adopted (see *Spokane Int. R. Co. v. Dunn*, 19 Idaho 734, 115 Pac. 501), or (2) if no amendments are proposed. *Edwards v. Tracy*, 2 Mont. 22; *Bruce v. Foley*, 18 Wash. 96, 50 Pac. 935.

[b] **The statement or a copy need not accompany the notice of settlement.** *Puget Sound Iron Co. v. Worthington*, 2 Wash. Ter. 472, 7 Pac. 882, 886.

73. Cal.—*Henry v. Merguire*, 106 Cal. 142, 146, 39 Pac. 599; *Hearst v. Dennison*, 72 Cal. 227, 13 Pac. 628. Mont.—*State ex rel. Walkerville v. District Ct.*, 29 Mont. 176, 74 Pac. 414; *Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 65 Pac. 106. N. D.—*Cedar Rapids Nat. Bank v. Coffey*, 25 N. D. 457, 141 N. W. 997; *Tuttle v. Pollock*, 19 N. D. 308, 123 N. W. 399. Wash. *State ex rel. Hofstetter v. Sheeks*, 63 Wash. 408, 115 Pac. 859; *State ex rel. Roberts v. Clifford*, 55 Wash. 440, 104 Pac. 631.

74. *Murphy v. Stelling*, 138 Cal. 641, 72 Pac. 176.

75. *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935.

76. *Murphy v. Stelling*, 138 Cal. 641, 72 Pac. 176.

77. *Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 65 Pac. 106.

78. *Miller v. Miller*, 36 Nev. 115, 134 Pac. 100; *Northwestern Port Huron Co. v. Zieckrick*, 22 S. D. 89, 115 N. W. 525, to obtain a settlement in such manner as the supreme court "may by its order or rules direct."

**Appeal From Settlement.** — An improper settlement is not an appealable order.<sup>79</sup> But the objection may be urged as a reason why the motion for new trial should be denied both in the trial and appellate courts.<sup>80</sup>

**F. ENGROSSING STATEMENT.** — When amendments to a proposed statement are allowed, the statement as amended must be engrossed before it is settled as a complete record;<sup>81</sup> though it has been held that by stipulation, the engrossment may be waived.<sup>82</sup>

**G. AUTHENTICATION.** — The statement must be certified to in some appropriate manner,<sup>83</sup> unless waived by the parties under statute.<sup>84</sup> Unless authenticated as prescribed by statute, the motion for new trial should be denied,<sup>85</sup> and on an appeal, the statement will be disregarded<sup>86</sup> and may be stricken out.<sup>87</sup> But a substantial compliance with the statute is sufficient.<sup>88</sup> The statement when settled must be signed by the judge or referee<sup>89</sup> with his certificate that the same has been allowed and is correct.<sup>90</sup> But a certification that the statement contains all the evidence is not necessary,<sup>91</sup> unless the statute

79. *Henry v. Merguire*, 106 Cal. 142, 39 Pac. 599 (not a special order after judgment); *Beach v. Spokane R. & W. Co.*, 25 Mont. 367, 65 Pac. 106.

80. *Henry v. Merguire*, 106 Cal. 142, 39 Pac. 599.

81. *Smith v. Davis*, 55 Cal. 26; *Marlow v. Marsh*, 9 Cal. 259; *Doust v. Rocky Mountain Bell T. Co.*, 14 Idaho 677, 95 Pac. 209; *Hattabaugh v. Vollmer*, 5 Idaho 23, 46 Pac. 831, where amendments are allowed, trial judge should not settle statement until after engrossment.

[a] **Not duty of clerk to engross statement.** *People v. Bartlett*, 40 Cal. 142.

82. *Thompson v. Connolly*, 43 Cal. 636.

83. *Collins v. Nat. C. Goodwin & Co.*, 32 Nev. 342, 108 Pac. 4.

In *Texas*, see *supra*, I, C.

[a] **Certificate of stenographer insufficient.** *Conklin v. Cullen*, 25 Mont. 214, 64 Pac. 502.

84. *Collins v. Nat. C. Goodwin & Co.*, 32 Nev. 342, 108 Pac. 4. See *infra*, this section.

85. *Jones v. Adams*, 18 Nev. 60, 8 Pac. 798; *White v. White*, 6 Nev. 20.

86. *Jones v. Adams*, 18 Nev. 60, 8 Pac. 798.

87. *Conklin v. Cullen*, 25 Mont. 214, 64 Pac. 502.

88. *Overman Silver Min. Co. v. American Min. Co.*, 7 Nev. 312.

89. *Cal.—Adams v. Dohrmann*, 63

Cal. 417. **Mont.**—*Conklin v. Cullen*, 25 Mont. 214, 64 Pac. 502. **Nev.**—*Hayes v. Davis*, 23 Nev. 233, 45 Pac. 466. **Wash.**—*Morgan v. Chittenden Land Co.*, 92 Wash. 364, 159 Pac. 129; *State ex rel. Orr v. Fawcett*, 17 Wash. 188, 49 Pac. 346. See *State v. Baxter*, 78 Wash. 405, 139 Pac. 196, agreed statement must be certified.

[a] **The duty of the judge when the engrossed statement is presented for signature and certification is to see that it embodies all the court decided at the settlement should be incorporated. The party cannot insist on incorporating objections independent of and subsequent to the settlement.** *Ryer v. Rio Land & Imp. Co.*, 147 Cal. 462, 82 Pac. 62.

90. **Cal.**—*Adams v. Dohrmann*, 63 Cal. 417. **Idaho.**—*Peace v. Lemp*, 4 Idaho 526, 43 Pac. 75. **Mont.**—*Manuel v. Scott*, 37 Mont. 29, 94 Pac. 487; *Conklin v. Cullen*, 25 Mont. 214, 64 Pac. 502. **Nev.**—*Caples v. Central Pac. R. Co.*, 6 Nev. 265.

[a] **A certification of correctness according to recollection of judge is insufficient.** *Van Pelt v. Littler*, 14 Cal. 194.

[b] **Certificate Imports Verity.** *Hickey v. Anaconda Copper Min. Co.*, 33 Mont. 46, 56, 81 Pac. 806.

91. *Richardson v. Eureka*, 96 Cal. 443, 31 Pac. 458; *Gamble v. Hanchett*, 34 Nev. 351, 126 Pac. 111; *Caples v. Central Pac. R. Co.*, 6 Nev. 265.

requires it.<sup>92</sup> Under some statutes the statement may be authenticated by the signature and certificate of the parties when agreed upon by them,<sup>93</sup> or by the certificate of the clerk when no amendments are filed.<sup>94</sup>

H. FILING AND ANNEXATION TO JUDGMENT ROLL. — When settled and certified or agreed upon, the statement shall be filed with the clerk,<sup>95</sup> who is required to annex it to the judgment roll.<sup>96</sup> In Texas the original statement of facts is sent up as part of the record on appeal.<sup>97</sup>

I. AMENDMENTS AND RESETTLEMENT. — The trial judge has power to cancel his certificate and amend or resettle the statement of case under statute authorizing amendment of any "proceedings"<sup>98</sup> but the appellate court has no power to alter or amend it.<sup>99</sup>

II. REPORTER'S TRANSCRIPT.<sup>1</sup> — It has been held proper, sometimes under express statute, to make the reporter's transcript a part of the record by incorporating it in or otherwise making it part of the bill of exceptions.<sup>2</sup> And statutes sometimes provide that a

92. *Collins v. Seattle*, 2 Wash. Ter. 354, 7 Pac. 857.

93. *Idaho*.—*Moore v. Taylor*, 1 Idaho 583, sufficient authentication. *Mont.* *Conklin v. Cullen*, 25 Mont. 214, 64 Pac. 502. But this provision is omitted from present code. *Nev.*—*Hayes v. Davis*, 23 Nev. 233, 45 Pac. 466.

94. *Collins v. Nat C. Goodwin & Co.*, 32 Nev. 342, 108 Pac. 4; *Hayes v. Davis*, 23 Nev. 233, 45 Pac. 466, this applies only to statements on new trial.

95. *Cal.*—*Mix v. San Diego & C. R. R. Co.*, 86 Cal. 235, 24 Pac. 1027. *Idaho.* *Steve v. Bonners Ferry Lumb. Co.*, 13 Idaho 384, 92 Pac. 363. *Nev.*—*Irwin v. Samson*, 10 Nev. 282.

In Texas, see *supra*, I, C.

As to what constitutes a filing, see the title "Filing."

96. *Harper v. Minor*, 27 Cal. 107; *Kirman v. Johnson*, 30 Nev. 146, 93 Pac. 500, 96 Pac. 1057; *Irwin v. Samson*, 10 Nev. 282. See *Thompson v. Patterson*, 54 Cal. 542.

97. *Royal Ins. Co. v. Texas & G. R. Co.*, 102 Tex. 306, 116 S. W. 46 (holding objection to copy is waived); *Rice v. Reese* (Tex. Civ. App.), 110 S. W. 502.

98. *Fountain Water Co. v. Superior Court*, 139 Cal. 648, 73 Pac. 590; *Warner v. F. Thomas P. D. & C. Works*, 105 Cal. 409, 38 Pac. 960; *Flynn v. Cottle*, 47 Cal. 526; *Yori v. Cohn*, 26 Nev. 206, 65 Pac. 945, 67 Pac. 212.

[a] Presentation and settlement of statement is a "proceeding" within

statute as to amendment. *Fountain Water Co. v. Superior Court*, 139 Cal. 648, 73 Pac. 590; *Sprigg v. Barber*, 118 Cal. 591, 50 Pac. 682.

[b] The proper course is to move to vacate the settlement and allowance, with leave either to reingross the same and place the proposed amendments therein or have them deemed to be so reingrossed, settled and allowed. *Estate of Thomas*, 155 Cal. 488, 101 Pac. 798.

[c] Application may be made after the transcript is filed (1) 'in the appellate court. But the appeal stands. *Baker v. Borello*, 131 Cal. 615, 63 Pac. 914; *Flynn v. Cottle*, 47 Cal. 526. (2) But a statement prepared before a motion for new trial to be used on the motion cannot be amended after appeal from the order on the motion. *Baker v. Borello*, 131 Cal. 615, 63 Pac. 914; *Preston v. Hearst*, 54 Cal. 595. See *Adams v. Dohrmann*, 63 Cal. 417.

99. *Gardner v. Brown*, 22 Nev. 156, 37 Pac. 240.

[a] Appellate court cannot return record to supply a statement when that filed is legally insufficient. *Adams v. Dohrmann*, 63 Cal. 417.

1. Reference to stenographer's notes on hearing of a motion for new trial, see 20 STANDARD PROC. 614.

Reporter's transcript as basis of statement of facts, see *supra*, I, C.

2. U. S.—*Samuel H. Cottrell & Son v. Smokeless Fuel Co.*, 148 Fed. 594, 78 C. C. A. 366, 9 L. R. A. (N. S.)



transcript of the reporter's notes of the trial,<sup>3</sup> obtained in the manner indicated in the statute,<sup>4</sup> settled,<sup>5</sup> and certified by the judge<sup>6</sup> may be

1187. **Ark.**—*Snyder v. State*, 86 Ark. 456, 111 S. W. 465, statute provides transcript shall be filed as part of the record and used as part of the bill of exceptions, when approved. **Ind.** See *Hinesley v. Sheets*, 18 Ind. App. 612, 48 N. E. 802, 63 Am. St. Rep. 356; *Taylor v. Reger*, 18 Ind. App. 466, 48 N. E. 262, 63 Am. St. Rep. 352. **Ky.** *Louisville & A. R. Co. v. Phillips*, 148 Ky. 49, 145 S. W. 1105; *Knecht v. Louisville Home Tel. Co.*, 121 Ky. 492, 89 S. W. 508, statute provides the transcript shall be filed with the papers to be used in making up the bill of exceptions. **Ohio.**—*Newark Natural Gas & F. Co. v. Newark*, 92 Ohio St. 393, 111 N. E. 150.

[a] Only by being made part of the bill of exceptions is the transcript of the reporter's notes available on appeal. *Snyder v. State*, 86 Ark. 456, 111 S. W. 465.

3. **Cal.**—*Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981; *Clemens v. Gregg*, 34 Cal. App. 272, 167 Pac. 299. **Idaho.**—*Boise-Payette Lumb. Co. v. McCarthy*, 31 Idaho 305, 170 Pac. 920; *Kelly v. Clark*, 21 Idaho 231, 121 Pac. 95. **Kan.**—*Bliss v. Brown*, 78 Kan. 467, 96 Pac. 945.

But see *Lippett v. Bidwell*, 87 Conn. 608, 89 Atl. 347.

[a] Record must show appointment of stenographer pursuant to statute or his transcript has no value. *Rose v. Fitzgerald*, 90 N. J. L. 717, 101 Atl. 202.

[b] All the evidence taken must be included. *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981.

[c] Specifications wherein evidence is insufficient to support the verdict need not be made in reporter's transcript. *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981; *Kelly v. Clark*, 21 Idaho 231, 121 Pac. 95.

[d] Where separate appeals are taken by different parties, one refusing to pay his share of fees for the transcript cannot base his appeal on the transcript procured by the other. *Morris-Roberts Co. v. Mariner*, 24 Idaho 788, 135 Pac. 1166.

4. *Brought v. Minor*, 17 Ariz. 28, 148 Pac. 294 (as to notice of filing); *Bliss v. Brown*, 78 Kan. 467, 96 Pac.

945, procedure on case-made is not applicable.

[a] **When Made.**—Transcript need not be made and settled before the motion for new trial is heard. *Bohannon Dredg. Co. v. England*, 30 Idaho 721, 168 Pac. 12; *Kelly v. Clark*, 21 Idaho 231, 121 Pac. 95.

[b] **Extension of time** (1) may be granted. See *Bigler v. Welker*, 16 Ariz. 44, 141 Pac. 124. (2) Extension of time may be granted on application of reporter. *Junction Placer Min. Co. v. Reed*, 28 Idaho 219, 153 Pac. 564; *Fischer v. Davis*, 24 Idaho 216, 133 Pac. 910.

[c] **An order of the judge** directing (1) the preparation of the transcript within a specified time must be secured. *Fischer v. Davis*, 24 Idaho 216, 133 Pac. 910. (2) Appellant must file a praecipe for the record and transcript or such part as he may desire. *Fischer v. Davis*, 24 Idaho 216, 133 Pac. 910.

[d] **Service on the adverse party** is required by statute. *Bohannon Dredg. Co. v. England*, 30 Idaho 721, 168 Pac. 12.

5. **Ariz.**—*Leatherwood v. Richardson*, 11 Ariz. 163, 89 Pac. 503. **Cal.** *Williams v. Lane*, 158 Cal. 39, 109 Pac. 873. **Idaho.**—*Wells v. Culp*, 30 Idaho 438, 166 Pac. 218; *Chapman v. A. H. Averill Mach. Co.*, 28 Idaho 121, 152 Pac. 573, 27 Idaho 213, 147 Pac. 785; *Edwards v. Anderson*, 23 Idaho 508, 130 Pac. 1001. **Kan.**—*Bliss v. Brown*, 78 Kan. 467, 96 Pac. 945.

[a] **If not settled and certified**, transcript cannot be considered on appeal. *Wells v. Culp*, 30 Idaho 438, 166 Pac. 218.

6. **Ariz.**—*Hamilton v. State*, 17 Ariz. 483, 154 Pac. 1039; *Reiniger v. Besley*, 16 Ariz. 161, 141 Pac. 574; *Leatherwood v. Richardson*, 11 Ariz. 278, 94 Pac. 1110. **Cal.**—*Williams v. Lane*, 158 Cal. 39, 109 Pac. 873; *Lapique v. Superior Court*, 18 Cal. App. 50, 122 Pac. 80. **Idaho.**—*Wells v. Culp*, 30 Idaho 438, 166 Pac. 218. **Kan.**—*Bliss v. Brown*, 78 Kan. 467, 474, 96 Pac. 945. **Ky.**—*Graves' Committee v. Lyons*, 166 Ky. 446, 179 S. W. 413.

[a] **Certificate of stenographer only** is insufficient. *Lane v. Tanner*, 156 Cal.

used in lieu of a bill of exceptions or statement of the case.<sup>7</sup> After settlement and certification, the reporter's transcript is filed with the clerk,<sup>8</sup> and by him included in his transcript on appeal properly authenticated by him and the seal of the court.<sup>9</sup> The trial judge has authority to control the preparation of the transcript, and make all orders in relation thereto.<sup>10</sup> If the reporter's transcript is not properly prepared, it may be stricken on motion,<sup>11</sup> or disregarded on the appeal,<sup>12</sup> and the case will be considered as an appeal from the judgment upon the judgment roll alone,<sup>13</sup> but the appeal will not be dismissed.<sup>14</sup>

**III. ABSTRACT OF RECORD. — A. GENERALLY.** — Instead of a full transcript of the record, statutes and rules of court sometimes authorize and require an abstract of record.<sup>15</sup> In the absence of such

125, 103 Pac. 846. See *Bliss v. Brown*, 78 Kan. 467, 96 Pac. 945.

7. See *infra*, this note.

[a] Transcript has the force and effect of a bill of exceptions or statement of case. *Fischer v. Davis*, 24 Idaho 216, 133 Pac. 910; *Strand v. Crooked River Min. & Mill. Co.*, 23 Idaho 577, 131 Pac. 5; *Grisinger v. Hubbard*, 21 Idaho 469, 122 Pac. 853, Ann. Cas. 1913E, 87.

8. *Robinson v. Sawyer*, 23 N. M. 688, 170 Pac. 881.

9. *Robinson v. Sawyer*, 23 N. M. 688, 170 Pac. 881.

As to clerk's transcript, see 2 STANDARD PROC. 366.

10. *Junction Placer Min. Co. v. Reed*, 28 Idaho 219, 153 Pac. 564; *Fischer v. Davis*, 24 Idaho 216, 133 Pac. 910.

[a] But after expiration of time for filing, an order extending the time for filing cannot be legally made. *Southern Pac. Co. v. Pender*, 14 Ariz. 573, 134 Pac. 289.

11. *Chapman v. A. H. Averill Mach. Co.*, 28 Idaho 121, 152 Pac. 573; *Strand v. Crooked River Min. & Mill. Co.*, 23 Idaho 577, 131 Pac. 5.

12. *Hamilton v. State*, 17 Ariz. 483, 154 Pac. 1039.

13. *Bigler v. Welker*, 16 Ariz. 44, 141 Pac. 124; *Chapman v. A. H. Averill Mach. Co.*, 28 Idaho 121, 152 Pac. 573.

14. *Chapman v. A. H. Averill Mach. Co.*, 28 Idaho 121, 152 Pac. 573; *Strand v. Crooked River Min. & Mill. Co.*, 23 Idaho 577, 131 Pac. 5. *Contra*, *Edwards v. Anderson*, 23 Idaho 508, 130 Pac. 1001.

[a] Failure of reporter to prepare a transcript cannot result in dismissal

unless appellant is guilty of laches or contributes to the delay or failure to act. *Fischer v. Davis*, 24 Idaho 216, 133 Pac. 910.

15. Ark.—*St. Louis, I. M. & S. R. Co. v. Craft*, 115 Ark. 483, 171 S. W. 1185; *Neal v. Brandon*, 74 Ark. 320, 85 S. W. 776. Ill.—*Simmons Motor Co. v. Dudley*, 196 Ill. App. 329. Kan.—*Atchison, T. & S. F. R. Co. v. Conlon*, 77 Kan. 324, 94 Pac. 148. Mo.—*McGrath v. Heman Const. Co.*, 165 Mo. App. 184, 196, 145 S. W. 875. Utah.—*Whipple v. Preece*, 18 Utah 454, 56 Pac. 296.

[a] Definition.—An abstract of record is "a complete history in short abbreviated form of the case as found in the record." *Harding v. Bedoll*, 202 Mo. 625, 630, 100 S. W. 638. See *Harrison v. Southern Porcelain Mfg. Co.*, 10 S. C. 278, 283.

[b] Opinion of counsel in his statement of case as to what record is, does not constitute an abstract. *Whiting v. Big River Lead Co.*, 195 Mo. 509, 92 S. W. 883.

[c] Where a transcript is sent up, an abstract is not required. *Neal v. Brandon*, 74 Ark. 320, 85 S. W. 776. *Contra*, *Crothers v. La Force*, 241 Mo. 365, 145 S. W. 99; *Whiting v. Big River Lead Co.*, 195 Mo. 509, 92 S. W. 883. Compare *Freeborn v. Chewelah C. K. Min. Co.*, 89 Wash. 519, 154 Pac. 1095, where transcript is less than one hundred pages, an abstract is not required.

[d] The record will not be examined, but the appellate court will rely on the abstract. *Atchison, T. & S. F. R. Co. v. Conlon*, 77 Kan. 324, 94 Pac. 148; *Craig v. Scudder*, 98 Mo. 664, 12 S. W. 341.

abstract, when required, the appeal will be dismissed,<sup>16</sup> or the judgment affirmed.<sup>17</sup> It is assumed that matters not set up in the abstract are not relied upon as error.<sup>18</sup>

**B. PREPARATION AND FILING OF ABSTRACT AND ADDITIONAL ABSTRACTS.**—By statute and rule of court it is made the duty of the appellant or plaintiff in error,<sup>19</sup> to file in the appellate court<sup>20</sup> an abstract of the entire record of the cause,<sup>21</sup> and to deliver a copy to the respondent or defendant in error.<sup>22</sup> If dissatisfied with the abstract of the appellant, he may file an abstract of his own or an additional abstract,<sup>23</sup> serving the appellant with a copy.<sup>24</sup> The appellant may file objections thereto,<sup>25</sup> in writing,<sup>26</sup> whereupon a certified transcript will be resorted to.<sup>27</sup>

16. *St. Louis v. Vaughn*, 273 Mo. 582, 201 S. W. 524.

17. *Bradford v. Bradford*, 131 Ark. 594, 200 S. W. 132.

18. *Brock v. Schradsky*, 6 Colo. App. 402, 41 Pac. 512; *Kinney v. Brotherhood of American Yeomen*, 15 N. D. 21, 106 N. W. 44.

19. *Ariz.*—*Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87. *Colo.* *Grant v. Leach*, 8 Colo. App. 261, 45 Pac. 510. *Ill.*—*Laird v. Dickerson*, 241 Ill. 380, 89 N. E. 795; *Inman v. Miller*, 234 Ill. 356, 84 N. E. 935. *Kan.*—*Madison Bank v. Price*, 79 Kan. 283, 98 Pac. 222.

[a] Where there are several appellants, only one abstract is required. *Gregory v. Kansas City*, 244 Mo. 523, 149 S. W. 466; *Badger Lumb. Co. v. Knights of Pythias*, 157 Mo. 366, 57 S. W. 1059.

20. *Grubbs v. Watkins*, 142 Mo. App. 11, 125 S. W. 214; *Quartz Gold M. Co. v. Patterson*, 53 Ore. 85, 96 Pac. 551.

21. **As to contents**, see *infra*, this section.

22. See *Chismore v. Van Roden*, 151 Iowa 240, 130 N. W. 1090.

23. *Ark.*—*St. Louis, I. M. & S. R. Co. v. Day*, 86 Ark. 104, 110 S. W. 220; *Beavers v. Security Mut. Ins. Co.*, 76 Ark. 138, 88 S. W. 848. *Colo.*—*Reyer v. Teare*, 22 Colo. App. 172, 122 Pac. 1127. *Ill.*—*People ex rel. Smith v. Meerts*, 267 Ill. 210, 108 N. E. 57. *Ia.* *Barber v. Scott*, 55 N. W. 502. *Kan.* *Atchison, T. & S. F. R. Co. v. Conlon*, 77 Kan. 324, 94 Pac. 148. *Mo.*—*Berry v. Rood*, 209 Mo. 662, 108 S. W. 22; *Gooden v. Modern Woodmen*, 194 Mo. App. 666, 189 S. W. 394. *Neb.*—*Modesitt v. St. Joseph & G. I. R. Co.*, 90 Neb. 133, 132 N. W. 929. *Ore.*—*Bailey*

*v. Benton Co.*, 61 Ore. 390, 111 Pac. 376, 122 Pac. 755. *S. D.*—*Grigsby v. Wopschall*, 25 S. D. 564, 127 N. W. 605, 37 L. R. A. (N. S.) 206. *Wash.* *Kranzusch v. Trustee Co.*, 93 Wash. 629, 161 Pac. 492.

[a] It will be assumed (1) the additional abstract supplies all omissions in the original (*Barber v. Scott*, 55 N. W. 502; *Joy v. Bitzer*, 77 Iowa 73, 41 N. W. 575, 3 L. R. A. 184), and (2) is correct (*Spicer v. Spicer*, 249 Mo. 582, 155 S. W. 832, Ann. Cas. 1914D, 238; *Woods v. St. Louis & S. F. R. Co.* [Mo.], 187 S. W. 11; *Badger v. Stephens*, 61 Mo. App. 387), unless (3) denied or objected to. See *infra*, this section. (4) In the case of a conflict between the appellant's and respondent's abstracts, the court may examine the record. *Wood v. Saginaw Gold M. & M. Co.*, 20 S. D. 161, 105 N. W. 101.

24. See generally the statutes.

25. *Briggs v. Coffin*, 91 Iowa 329, 59 N. W. 259 (may file printed denial in nature of a reply); *Joy v. Bitzer*, 77 Iowa 73, 41 N. W. 575, 3 L. R. A. 184; *Strother v. McMullen Lumb. Co.*, 200 Mo. 647, 98 S. W. 34.

[a] Motion to strike out additional abstract because not justified by the record is not the proper remedy. *Briggs v. Coffin*, 91 Iowa 329, 59 N. W. 259.

[b] A denial of correctness in appellant's reply brief is not proper. *Downing v. Anders* (Mo. App.), 202 S. W. 297.

26. *Strother v. McMullen Lumb. Co.*, 200 Mo. 647, 98 S. W. 34.

27. *Loan v. Hiney* (Iowa), 1 N. W. 587; *Strother v. McMullen Lumb. Co.*, 200 Mo. 647, 664, 98 S. W. 34. See *Hobbie v. Andrews*, 111 Ala. 176, 19 So. 974.



An agreed abstract is proper in some jurisdictions.<sup>28</sup>

C. REQUISITES OF ABSTRACT. — The abstract must comply with the rules of court and the statutes.<sup>29</sup> It should set forth so much of the record as is necessary to a complete understanding of the questions presented,<sup>30</sup> eliminating everything except matters of substance.<sup>31</sup> The abstract must be so complete in itself that a reference to the record is unnecessary,<sup>32</sup> and consequently it is insufficient merely to refer<sup>33</sup> to

28. *Kail v. Bell*, 88 Kan. 666, 129 Pac. 1135.

29. *Gibler v. Mattoon*, 167 Ill. 18, 47 N. E. 319; *Webster v. Berry*, 140 Mo. App. 385, 124 S. W. 1078.

[a] **Substantial Compliance.** — *Nepach v. Jones*, 28 Ore. 286, 39 Pac. 999, 42 Pac. 519.

[b] **Chronological order of events** should be followed. *Atchison, T. & S. F. R. Co. v. Conlon*, 77 Kan. 324, 94 Pac. 148.

[c] **Should Be Indexed.** — *Washburn v. Scott*, 231 Ill. 393, 83 N. E. 192; *Scott v. Ramey* (Mo. App.), 183 S. W. 656.

[d] **Numbering of lines**, see *Wilbur v. Buckingham*, 153 Iowa 194, 132 N. W. 960, Ann. Cas. 1913E, 210.

[e] **Abstract may be stricken out** on motion for failure to comply with the rules. *Leathers v. Oberlander*, 139 Iowa 179, 117 N. W. 30. And counsel will be given an opportunity to prepare a proper abstract. *Marks Hat Co. v. Slatnik* (Iowa), 154 N. W. 757. See *infra*, III, D.

[f] **A dismissal of the appeal** (1) will not be ordered because of a defective or insufficient abstract (*Epoch Prod. Corp. v. Schuettler*, 280 Ill. 310, 117 N. E. 479; *Kranzusch v. Trustee Co.*, 93 Wash. 629, 161 Pac. 492. *Contra*, *Ph. Zang Brew. Co. v. Howlett*, 6 Colo. App. 558, 42 Pac. 186), at least, where (2) the pleadings and judgment are set up as this is sufficient to obtain a review of the record proper. *Robertson v. Robertson*, 178 Mo. App. 478, 163 S. W. 266.

[g] **Judgment may be affirmed** for failure to regard rules of court in preparing abstract. *Hurley v. Hurley*, 117 Iowa 621, 91 N. W. 895.

30. **Ark.** — *Neal v. Brandon*, 74 Ark. 320, 85 S. W. 776. **Ill.** — *Laird v. Dickirson*, 241 Ill. 380, 89 N. E. 795. **Kan.** *Atchison, T. & S. F. R. Co. v. Conlon*, 77 Kan. 324, 94 Pac. 148. **Mo.** — *Clements v. Turner*, 162 Mo. 466, 63 S. W. 84; *Pittsburg Steel Co. v. Cottengin*,

179 Mo. App. 392, 165 S. W. 391. **N. D.** *Sternberg Weil & Co. v. James A. Larson & Co.*, 20 N. D. 635, 127 N. W. 993.

[a] **The Abstract Should Contain Concise Statements of the Record.** *Badger Lumb. Co. v. Knights of Pythias*, 157 Mo. 366, 57 S. W. 1059.

[b] **Should fully present every error and exception** relied upon. **Colo.** — *Erie Min. & Mill. Co. v. Gearing*, 43 Colo. 181, 95 Pac. 300. **Ill.** — *People ex rel. Smith v. Meerts*, 267 Ill. 210, 108 N. E. 57; *Love v. Dick*, 177 Ill. App. 98; *First State Bank v. Noser*, 128 Ill. App. 157. **Neb.** — *Dillenberg v. Snyder*, 94 Neb. 44, 142 N. W. 527.

[c] **Prejudicial remarks of the court** not shown by the abstract cannot be reviewed. *Says v. Yangas*, 191 Ill. App. 31.

31. **Marks Hat Co. v. Slatnik** (Iowa), 154 N. W. 757; *Atchison, T. & S. F. R. Co. v. Conlon*, 77 Kan. 324, 94 Pac. 148.

[a] **Only that which is material** should appear. **Ariz.** — *Kinney v. Neis*, 14 Ariz. 318, 127 Pac. 719. **Kan.** *Atchison, T. & S. F. R. Co. v. Conlon*, 77 Kan. 324, 94 Pac. 148. **N. D.** *Cysewski v. Fried*, 24 N. D. 152, 139 N. W. 104, Ann. Cas. 1915C, 579. **S. D.** *Bedford v. Kissick*, 8 S. D. 586, 67 N. W. 609.

32. **Colo.** — *Brennan Merc. Co. v. Vickers*, 31 Colo. 324, 73 Pac. 46. **Fla.** *Allen v. Lewis*, 38 Fla. 115, 135, 20 So. 821. **Ill.** — *Inman v. Miller*, 234 Ill. 356, 84 N. E. 935; *Love v. Dick*, 177 Ill. App. 98. **Kan.** — *Atchison, T. & S. F. R. Co. v. Conlon*, 77 Kan. 324, 94 Pac. 148.

33. **Ala.** — *Hobbie v. Andrews*, 111 Ala. 176, 19 So. 974. **Ill.** — *Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. (N. S.) 215, 236. **Mo.** — *Jenkins v. Shannon Co.*, 226 Mo. 187, 125 S. W. 1100; *Pittsburg Steel Co. v. Cottengin*, 179 Mo. App. 392, 165 S. W. 391.

the record. Orders of court,<sup>34</sup> and record entries,<sup>35</sup> need not be copied, but enough should be stated to show the act and that it is of record.<sup>36</sup> In some states, matters of exception must be distinguished from matters of record proper.<sup>37</sup>

The abstract should be entitled in the cause,<sup>38</sup> should show on whose behalf it is made,<sup>39</sup> and the court in which the case was tried,<sup>40</sup> should conclude with a statement that it is a correct abstract of the record,<sup>41</sup> and should be signed by counsel.<sup>42</sup>

The abstract of record should set out the substance of the pleadings,<sup>43</sup> and show they were filed;<sup>44</sup> should contain an abstract of the evidence pertaining to the issues on appeal, when necessary to the determination of the grounds assigned as error;<sup>45</sup> should contain the

34. *Harding v. Bedoll*, 202 Mo. 625, 630, 100 S. W. 638.

35. *Proctor v. Board of Trustees*, 225 Mo. 51, 123 S. W. 862; *Harding v. Bedoll*, 202 Mo. 625, 630, 100 S. W. 638.

36. *Vance v. Monroe Drug Co.*, 149 Ill. App. 499; *Harding v. Bedoll*, 202 Mo. 625, 630, 100 S. W. 638.

37. *Grossman v. United Rys. Co.*, 248 Mo. 152, 154 S. W. 66. See *Keaton v. Weber*, 233 Mo. 691, 136 S. W. 342; *State ex rel. Caruthers v. Drainage Dist.*, 271 Mo. 429, 196 S. W. 1115, where the appeal is by short form of transcript.

[a] Matters of record proper cannot properly appear in the abstract of the bill of exceptions, and (1) matters of exception cannot properly appear in the abstract of the record proper. *Keaton v. Weber*, 233 Mo. 691, 136 S. W. 342; *Pippert v. Cook* (Mo. App.), 203 S. W. 236. (2) But by rule of court, if the abstract of the bill shows the filing of a motion for new trial, the abstract is sufficient. *Robertson v. Robertson*, 178 Mo. App. 478, 163 S. W. 266.

38. *Atchison, T. & S. F. R. Co. v. Conlon*, 77 Kan. 324, 94 Pac. 148.

39. *Atchison, T. & S. F. R. Co. v. Conlon*, 77 Kan. 324, 94 Pac. 148.

40. *First State Bank v. Noser*, 128 Ill. App. 157.

[a] Name of trial judge must be shown. *Pitkin v. Peet*, 96 Iowa 748, 64 N. W. 793.

41. *Avery Planter Co. v. Martz*, 96 Iowa 747, 65 N. W. 989; *Atchison, T. & S. F. R. Co. v. Conlon*, 77 Kan. 324, 94 Pac. 148.

42. *Atchison, T. & S. F. R. Co. v. Conlon*, 77 Kan. 324, 94 Pac. 148, should

be signed individually. Firm names are not permissible.

43. Ala.—*Hobbie v. Andrews*, 111 Ala. 176, 19 So. 974. Ark.—*Neal v. Brandon*, 74 Ark. 320, 85 S. W. 776. Ill.—*Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. (N. S.) 215. Kan.—*Hunnicut v. Oren*, 84 Kan. 460, 114 Pac. 1059. Mo.—*Harding v. Bedoll*, 202 Mo. 625, 630, 100 S. W. 638.

[a] The formal parts as well as separate paragraphs not involved in the assignment of errors should be omitted. *Hunnicut v. Oren*, 84 Kan. 460, 114 Pac. 1059.

[b] Where sufficiency of complaint is questioned, it should be set out in full. *Ward v. Harr*, 66 Ark. 646, 50 S. W. 452; *Tarabino v. Nicoli*, 5 Colo. App. 545, 39 Pac. 362.

44. *Harding v. Bedoll*, 202 Mo. 625, 630, 100 S. W. 638.

45. Ark.—*St. Louis, I. M. & S. R. Co. v. Craft*, 115 Ark. 483, 171 S. W. 1185 (failure to abstract evidence on points not assigned as error is not ground for dismissal); *Foster v. Luck*, 112 Ark. 118, 165 S. W. 267; *Jett v. Crittenden*, 89 Ark. 349, 116 S. W. 665, "abridgment of testimony." Colo.—*Johnson v. Spohr*, 12 Colo. App. 317, 56 Pac. 63. Conn.—*New Haven Water Co. v. Wallingford*, 72 Conn. 293, 44 Atl. 235. Ill.—*In re Foster's Estate*, 197 Ill. App. 374; *White v. Coal Co. v. Worthington*, 188 Ill. App. 567; *Love v. Dick*, 177 Ill. App. 98. Kan.—*Hunnicut v. Oren*, 84 Kan. 460, 114 Pac. 1059. Mo.—*Jenkins v. Shannon Co.*, 226 Mo. 187, 125 S. W. 1100; *McGrath v. Heman Const. Co.*, 165 Mo. App. 184, 196, 145 S. W. 875. Neb.—*Arapaho State Bank v. McKenna*, 94

instructions if errors relating thereto are relied on;<sup>46</sup> should show the

Neb. 50, 142 N. W. 531. **S. D.**—Edson *v.* Poppe, 24 S. D. 466, 124 N. W. 441, 26 L. R. A. (N. S.) 534.

[a] Where unnecessary to a full understanding of the question presented, the evidence need not be set up. Pitkin *v.* Peet, 96 Iowa 748, 64 N. W. 793 (on appeal from decree in accord with procedendo); McArthur *v.* Schultz, 78 Iowa 364, 43 N. W. 223, equity case.

[b] Presumed that instructions and findings are supported by evidence where latter is not set out. Smith *v.* Scott, 92 Ark. 143, 122 S. W. 501; Dobbins *v.* Little Rock R. & E. Co., 79 Ark. 85, 95 S. W. 794; Neal *v.* Brandon, 74 Ark. 320, 85 S. W. 776.

[c] An abridgment of the testimony is (1) required except when its sufficiency is questioned (Beavers *v.* Security Mut. Ins. Co., 76 Ark. 138, 88 S. W. 848; Hurley *v.* Hurley, 117 Iowa 621, 91 N. W. 895), or (2) when counsel feels it necessary to set it out in full. Jacks *v.* Reeves, 78 Ark. 426, 95 S. W. 781.

[d] Evidence as to immaterial matters must be excluded. **Ia.**—Marks Hat Co. *v.* Slatnik, 154 N. W. 757. **Kan.**—Hunnicut *v.* Oren, 84 Kan. 460, 114 Pac. 1059. **S. D.**—Brummell *v.* Ede, 35 S. D. 293, 152 N. W. 108.

[e] The substance of all the testimony is necessary to determine correctness of instructions. Beavers *v.* Security Mut. Ins. Co., 76 Ark. 138, 88 S. W. 848.

[f] In equity cases, (1) all the evidence must be set up (Collier *v.* Catherine Lead Co., 203 Mo. 246, 106 S. W. 971. See Britton *v.* Central R. Co., 39 Iowa 390), except (2) where unnecessary to determination of questions presented. See *supra*, this note.

[g] Testimony which is merely repetition should be omitted. Mercer *v.* Morrison, 83 Kan. 489, 112 Pac. 106.

[h] Evidence not made of record should not be abstracted. Mudge *v.* Agnew, 56 Iowa 297, 9 N. W. 230.

[i] Evidence must be stated in narrative form, (1) except under certain circumstances (**Ind.**—Jennings *v.* Shertz, 45 Ind. App. 120, 88 N. E. 729. **Mo.** Clements *v.* Turner, 162 Mo. 466, 63 S. W. 84; Halstead *v.* Stone, 147 Mo.

649, 49 S. W. 850; Danglade & R. M. Co. *v.* Mexico-Joplin Land Co. [**Mo.** App.], 190 S. W. 35. **Wash.**—Soboda *v.* Frederick Nolf & Co., 91 Wash. 446, 157 Pac. 1100, failure to do so is not ground for dismissal), as (2) where error is assigned on a ruling as to a question. Hunnicutt *v.* Oren, 84 Kan. 460, 114 Pac. 1059.

[j] Conclusions as to effect of evidence are improper. Jett *v.* Crittenden, 89 Ark. 349, 116 S. W. 665; Hunnicutt *v.* Oren, 84 Kan. 460, 114 Pac. 1059.

[k] Exhibits must be abstracted. Love *v.* Dick, 177 Ill. App. 98; Thompson *v.* Illinois Cent. R. Co. (Iowa), 153 N. W. 174.

[l] Offer and exclusion of evidence must be shown when relied on as error. Priddy *v.* Boice, 201 Mo. 309, 99 S. W. 1055, 119 Am. St. Rep. 762, 9 L. R. A. (N. S.) 718.

[m] Misrepresenting evidence is improper. Christy *v.* Elliott, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. (N. S.) 215, 236.

**46. Ark.**—Cooper *v.* Lyman, 128 Ark. 640, 194 S. W. 3; St. Louis, I. M. & S. R. Co. *v.* Raines, 90 Ark. 398, 119 S. W. 665, 17 Ann. Cas. 1; Emerson *v.* McNeil, 84 Ark. 552, 106 S. W. 479, 15 L. R. A. (N. S.) 715. **Mo.** Craig *v.* Scudder, 98 Mo. 664, 12 S. W. 341. **N. D.**—Kelly *v.* Pierce, 16 N. D. 234, 112 N. W. 995, 12 L. R. A. (N. S.) 180.

[a] All instructions must be abstracted in order that error in the giving or refusal may be reviewed. Reavely *v.* Harris, 239 Ill. 526, 88 N. E. 238.

[b] Instructions refused (1) should be set out (Molina Lumb. Co. *v.* Valley Plan. M. Co., 101 Ark. 294, 142 S. W. 161; Otto *v.* Hill, 11 Colo. App. 431, 53 Pac. 614), as well as (2) the instructions given (St. Louis, I. M. & S. R. Co. *v.* Boyles, 78 Ark. 374, 95 S. W. 783; Otto *v.* Hill, 11 Colo. App. 431, 53 Pac. 614), and (3) the evidence. Otto *v.* Hill, 11 Colo. App. 431, 53 Pac. 614. See next preceding note.

[c] Should be set out in full always. Jacks *v.* Reeves, 78 Ark. 420, 95 S. W. 781; Freet *v.* American Electrical S. Co., 171 Ill. App. 512.



rendition and entry of judgment.<sup>47</sup> The abstract should contain abstracts of the record entries of the filing of motions in the cause, when rulings thereon are assigned as error;<sup>48</sup> and it should show the fact of the filing of motion for new trial,<sup>49</sup> and the time thereof,<sup>50</sup> and the ruling on the motion,<sup>51</sup> if errors not in the record proper are relied on.<sup>52</sup> It has been held that the findings of fact and conclusions of law need not be included.<sup>53</sup>

Objections and exceptions to the rulings of the trial court are sometimes required to appear in the abstract.<sup>54</sup>

With respect to the taking of the appeal, the affidavit for appeal,<sup>55</sup> and the order granting the appeal<sup>56</sup> should be incorporated in the abstract, except when dispensed with by the filing of a certified copy of the order, under rule of court.<sup>57</sup> But in some states the notice of ap-

47. *First State Bank v. Noser*, 128 Ill. App. 157; *State ex rel. M. W. of A. v. Broadus*, 239 Mo. 359, 143 S. W. 455; *Mulliken v. Manning* (Mo. App.), 133 S. W. 136.

[a] Should contain a concise statement of the judgment. *Burnett v. Prince*, 272 Mo. 68, 197 S. W. 241; *Harding v. Bedoll*, 202 Mo. 625, 630, 100 S. W. 638; *Lukich v. Utah Const. Co.*, 48 Utah 452, 160 Pac. 270.

[b] Date of rendition must be shown. *Harding v. Bedoll*, 202 Mo. 625, 630, 100 S. W. 638.

48. *State ex rel. Wayne County v. Woods*, 234 Mo. 16, 136 S. W. 337; *Harding v. Bedoll*, 202 Mo. 625, 630, 100 S. W. 638, motion in arrest.

49. *St. Louis, I. M. & S. R. Co. v. Boyles*, 78 Ark. 374, 95 S. W. 783; *Harding v. Bedoll*, 202 Mo. 625, 630, 100 S. W. 638; *Chandler v. Western Union Tel. Co.* (Mo. App.), 195 S. W. 540; *Cross v. Henderson*, 129 Mo. App. 537, 107 S. W. 1107. But see *State ex rel. Caruthers v. Drainage Dist.*, 271 Mo. 429, 196 S. W. 1115, where appeal is on short form of transcript.

[a] Statement that the motion was filed on all the statutory grounds is sufficient instead of setting out the motion. *Hull v. Prairie Queen Mfg. Co.*, 92 Kan. 538, 141 Pac. 592.

50. *Harding v. Bedoll*, 202 Mo. 625, 630, 100 S. W. 638; *In re Campbell's Est.* (Mo. App.), 203 S. W. 659.

51. *Harding v. Bedoll*, 202 Mo. 625, 630, 100 S. W. 638; *Robertson v. Robertson*, 178 Mo. App. 478, 163 S. W. 266, may be shown by abstract of bill of exceptions.

52. *Love v. Cowger*, 130 Ark. 445, 197 S. W. 853 (errors as to admission

of evidence cannot be reviewed, if motion is not abstracted); *Wilson v. Reed*, 270 Mo. 400, 193 S. W. 819; *Mason v. Hutchinson* (Mo. App.), 201 S. W. 593.

[a] On appeal from the judgment, an abstract of the proceedings on motion for new trial need not be made if deemed proper. *Ramsdell v. Duxberry*, 14 S. D. 222, 85 N. W. 221.

53. *O'Connor v. Towey*, 70 Ore. 399, 140 Pac. 625.

54. Colo.—*East Denver Mun. Irr. Dist. v. Altura Farms Co.*, 60 Colo. 452, 154 Pac. 100; *Roberson v. Wilmoth*, 40 Colo. 74, 90 Pac. 95; *McPhee v. Fowler*, 36 Colo. 202, 85 Pac. 421; *Auckland v. Lawrence*, 19 Colo. App. 291, 74 Pac. 794. Ill.—*Tebow v. Wiggins Ferry Co.*, 241 Ill. 582, 89 N. E. 658; *Stout v. Taylor*, 168 Ill. App. 410. S. D.—*Brewster v. Miller*, 31 S. D. 613, 141 N. W. 778.

[a] Where the bill of exceptions shows the exception, it need not appear in the abstract. *McKinney v. McKinney* (Mo. App.), 203 S. W. 229.

55. *Harding v. Bedoll*, 202 Mo. 625, 630, 100 S. W. 638.

[a] Time of filing must be shown. *Keaton v. Weber*, 233 Mo. 691, 136 S. W. 342.

[b] Contents need not be shown. *Campbell v. Boyers*, 241 Mo. 421, 145 S. W. 807.

56. *Harding v. Bedoll*, 202 Mo. 625, 100 S. W. 638; *Floyd v. Modern Woodmen* (Mo. App.), 137 S. W. 12.

[a] When order was granted must be shown. *Keaton v. Weber*, 233 Mo. 691, 136 S. W. 342.

57. *Robertson v. Robertson*, 178 Mo. App. 478, 163 S. W. 266.

peal<sup>58</sup> and the undertaking on appeal,<sup>59</sup> need not be abstracted. Leave to file bills of exceptions,<sup>60</sup> and the filing of such bills<sup>61</sup> signed and sealed as required by law,<sup>62</sup> should be shown by the abstract of record. In some states it is required to contain a formal statement of errors.<sup>63</sup>

D. AMENDED AND SUPPLEMENTAL ABSTRACT. — Amended or supplemental abstracts may be filed, under proper circumstances for good cause shown,<sup>64</sup> on leave of court,<sup>65</sup> although in some states leave of court is not required.<sup>66</sup> The amended abstract must be served on the adverse party.<sup>67</sup>

58. *Fisher v. Spillman*, 85 Kan. 552, 118 Pac. 65; *Smith v. Kinney*, 72 Ore. 514, 143 Pac. 901, 1126; *O'Connor v. Towey*, 70 Ore. 399, 140 Pac. 625.

59. *Smith v. Kinney*, 72 Ore. 514, 143 Pac. 901, 1126; *O'Connor v. Towey*, 70 Ore. 399, 140 Pac. 625.

60. *Burnett v. Prince*, 272 Mo. 68, 197 S. W. 241; *Harding v. Bedoll*, 202 Mo. 625, 630, 100 S. W. 638.

61. *Langstaff v. Webster Groves*, 246 Mo. 223, 151 S. W. 456; *Harding v. Bedoll*, 202 Mo. 625, 630, 100 S. W. 638; *Pippert v. Cook* (Mo. App.), 203 S. W. 236; *Blumer v. Loevenhart* (Mo. App.), 188 S. W. 1131, must appear in abstract of record proper.

[a] That there is a record entry must be shown. *Keaton v. Weber*, 233 Mo. 691, 136 S. W. 342.

[b] Substance of order extending time for filing is sufficient. *Orchard v. Wright-Dalton-Bell-Anchor Store Co.*, 225 Mo. 414, 125 S. W. 486, 20 Ann. Cas. 1072.

[c] That exceptions and motions are preserved in a bill of exceptions must be shown. *St. Louis v. Henning*, 235 Mo. 44, 138 S. W. 5.

62. *First State Bank v. Noser*, 128 Ill. App. 157; *Keaton v. Weber*, 233 Mo. 691, 136 S. W. 342.

63. *Neppach v. Jones*, 28 Ore. 286, 39 Pac. 999, 42 Pac. 519, appeal will not be dismissed for omission.

64. Colo.—*Reyer v. Teare*, 22 Colo. App. 172, 122 Pac. 1127. Ia.—*Collins v. Collins*, 139 Iowa 703, 117 N. W. 1089, 18 L. R. A. (N. S.) 1176; *Frost v. Parker*, 65 Iowa 178, 21 N. W. 507. Mo.—*Everett v. Butler*, 192 Mo. 564, 91 S. W. 890. Wash.—*Kranzusch v. Trustee Co.*, 93 Wash. 629, 161 Pac. 492.

[a] Application Must Be Timely. *Grigsby v. Wopschall*, 25 S. D. 564, 127 N. W. 605, 37 L. R. A. (N. S.) 206, 218, too late after argument.

[b] When adverse party has served his brief calling attention to material defects in the abstract, leave to file a supplemental abstract will be denied. *Harding v. Bedoll*, 202 Mo. 625, 637, 100 S. W. 638; *Everett v. Butler*, 192 Mo. 564, 91 S. W. 890.

65. State *ex rel.* *M. W. of A. v. Broadus*, 239 Mo. 359, 143 S. W. 455; *Harding v. Bedoll*, 202 Mo. 625, 637, 100 S. W. 638; *Sutton v. Consolidated Apex Min. Co.*, 12 S. D. 576, 82 N. W. 188.

66. *Frost v. Parker*, 65 Iowa 178, 21 N. W. 507.

67. *Chismore v. Van Roden*, 151 Iowa 270, 130 N. W. 1090.

# STATEMENT BY ACCUSED

By the Editorial Staff.

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## I. RIGHT TO MAKE, 48

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### CROSS-REFERENCES:

Arguments;

Instructions:

Opening and Closing;

Preliminary Examination;

Trial.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. RIGHT TO MAKE.**—The defendant in any criminal prosecution,<sup>1</sup> in jurisdictions where the practice has not become obsolete,<sup>2</sup> and where permitted by statute,<sup>3</sup> may make an unsworn statement to the jury in his own behalf.<sup>4</sup>

1. *Williams v. Hazelhurst*, 11 Ga. App. 194, 74 S. E. 1039.  
2. *Green v. State*, 40 Fla. 191, 23 So. 851.

3. See the statutes and the following: *Ala.*—*Blackburn v. State*, 71 Ala. 319, 46 Am. Rep. 323. *Ga.*—*Williams v. Hazelhurst*, 11 Ga. App. 194, 74 S. E. 1039; *Brown v. State*, 10 Ga. App. 50, 72 S. E. 537. *Mich.*—*Burden v. People*, 26 Mich. 162.

4. *Dixon v. State*, 12 Ga. App. 17, 76 S. E. 794; *King v. State*, 9 Ga. App. 609, 71 S. E. 943.



**II. NATURE, RESTRICTIONS AND WEIGHT.**—The statement must relate to the facts of the case,<sup>5</sup> and if the accused makes unwarranted digressions relating to wholly irrelevant circumstances the court may interrupt him and insist upon a closer adherence to the material facts,<sup>6</sup> but it is error to interrupt the defendant if the facts being stated by him are in truth connected with those facts upon which he bases his defense.<sup>7</sup> The statement though in the nature of evidence,<sup>8</sup> is not strictly evidence,<sup>9</sup> and the jury may give it the weight they think it deserves,<sup>10</sup> and the accused, in making it, is not restricted or controlled by the rules of evidence.<sup>11</sup>

[a] As supplemental to the closing argument of defendant's counsel, and before the final argument by the prosecution, (1) the accused is sometimes permitted to make an unsworn statement to the jury, but the practice seems to be limited, and its application is not uniform, applying in some jurisdictions to prosecutions for high treason (*Reg. v. Millhouse*, 15 Cox C. C. 622; *Rex v. Watson*, 32 How. Eng. St. Ir. 1, 538), (2) in others to capital cases generally (*Com. v. McConnell*, 162 Mass. 499, 39 N. E. 107), but (3) to nothing less than capital cases (*Com. v. Burrough*, 162 Mass. 513, 39 N. E. 184), while (4) in some jurisdictions the practice seems to apply to all criminal prosecutions. See *Jones v. State*, 181 Ala. 63, 61 So. 434; *Blackburn v. State*, 71 Ala. 319, 46 Am. Rep. 323; *Palmer v. People*, 43 Mich. 414, 5 N. W. 450; *Burden v. People*, 26 Mich. 162.

[b] The constitutional right of the accused to be heard "by himself and his counsel" does not give any right to make a statement except as a witness. *Jones v. State*, 181 Ala. 63, 61 So. 434. See *Williams v. State* (Ark.), 16 S. W. 816.

5. *Nero v. State*, 126 Ga. 554, 55 S. E. 404; *King v. State*, 9 Ga. App. 609, 71 S. E. 943.

6. *Richardson v. State*, 3 Ga. App. 313, 59 S. E. 916; *Sutton v. State*, 2 Ga. App. 417, 58 S. E. 544.

7. *Woodall v. State*, 4 Ga. App. 783, 62 S. E. 485; *Richardson v. State*, 3 Ga. App. 313, 59 S. E. 916.

8. *Blackburn v. State*, 71 Ala. 319, 46 Am. Rep. 323 (is subject to the ordinary tests of credibility); *Burden v. People*, 26 Mich. 162, may be rebutted as such.

[a] "The statement of a defendant on his trial on a charge of crime is in

the nature of evidence, and is required to be submitted to the jury as of that character." *People v. Arnold*, 40 Mich. 710.

9. *Chappell v. State*, 71 Ala. 322; *Fite v. State*, 16 Ga. App. 22, 84 S. E. 485.

10. Ala.—*Blackburn v. State*, 71 Ala. 319, 46 Am. Rep. 323. Fla.—See *Hart v. State*, 38 Fla. 39, 20 So. 805. Ga.—*Bragg v. State*, 15 Ga. App. 623, 84 S. E. 82. Mich.—*People v. Arnold*, 40 Mich. 710.

[a] Because it is not supported by other testimony they cannot arbitrarily reject it and refuse to consider it. *People v. Arnold*, 40 Mich. 710. See also *Blackburn v. State*, 71 Ala. 319, 46 Am. Rep. 323.

[b] **Usual Tests of Credibility.** "Such statement is subject, in our opinion, at least to the ordinary intrinsic tests of credibility governing the sworn testimony of witnesses. The character of the defendant, if legitimately in evidence, may be considered, his demeanor on the stand, his intelligence, the accuracy of his memory, the inherent probability of his statement, its consistency with itself and the other circumstances of the case, or the lack of these elements of veracity, together with many other considerations liable to affect the credibility of the statement, or afford any reasonable presumption of its probability or improbability." *Blackburn v. State*, 71 Ala. 319, 46 Am. Rep. 323. See also *Chappell v. State*, 71 Ala. 322; *People v. Jones*, 24 Mich. 215.

Cross-examination, rebuttal and impeachment, see *infra*, IV.

11. *Tiget v. State*, 110 Ga. 244, 34 S. E. 1023; *Dixon v. State*, 12 Ga. App. 17, 76 S. E. 794; *Woodall v. State*, 4 Ga. App. 783, 62 S. E. 485. See *Hart v. State*, 38 Fla. 39, 20 So. 805, does

**III. HOW AND WHEN MADE, ASSISTANCE.**—The defendant is not sworn before giving his statement.<sup>12</sup> The making of the statement is strictly a personal privilege which may be read or spoken by the accused, but not by his attorney;<sup>13</sup> nor can a co-defendant make a statement on behalf of the accused.<sup>14</sup> But the defendant's counsel may be permitted, upon motion duly made in open court,<sup>15</sup> or in some other appropriate way,<sup>16</sup> to call the defendant's attention to a material omission. However, without permission, questions directed to the accused by his counsel while he is making his statement, are improper.<sup>17</sup> Whether a suggestion may be made or question asked rests in the court's discretion.<sup>18</sup> The statement may be made before<sup>19</sup> or after the close of the evidence<sup>20</sup> but the right must be claimed before the prosecution has closed its final argument to the jury.<sup>21</sup>

**IV. CROSS-EXAMINATION, REBUTTAL AND IMPEACHMENT.**—Unless the statute otherwise provides,<sup>22</sup> the accused is not

not become a witness nor subject to the rules applicable to witnesses.

[a] But see *Burek v. State*, 71 Ala. 377, containing dictum to the effect that defendant's unsworn statement is governed by the same rules as his sworn testimony, which forbid testimony directly as to his intention or motives.

[b] **Reading Documents, Letters, etc.**—The accused cannot make documentary evidence relating to the case a part of his statement without preliminary proof of its genuineness. *Nero v. State*, 126 Ga. 554, 55 S. E. 404; *Montross v. State*, 72 Ga. 261, 53 Am. Rep. 840; *Woodard v. State*, 5 Ga. App. 447, 63 S. E. 573.

[c] **Statement as Foundation for Incompetent Evidence.**—While great latitude is given the accused in making a statement, he cannot be permitted by such statement to lay a foundation for introducing in his favor evidence otherwise inadmissible. *Baker v. State*, 142 Ga. 619, 83 S. E. 531. See also *Wiggins v. State*, 16 Ga. App. 477, 85 S. E. 674.

12. *Chappell v. State*, 71 Ala. 322. But see *Hart v. State*, 38 Fla. 39, 20 So. 805, as to former statute.

13. *Brown v. State*, 10 Ga. App. 50, 72 S. E. 537; *Bass v. State*, 4 Ga. App. 844, 62 S. E. 540.

14. *Grimm v. People*, 14 Mich. 300.

15. *Story v. State*, 145 Ga. 43, 88 S. E. 548; *Robinson v. State*, 129 Ga. 336, 58 S. E. 842; *Whitley v. State*, 14 Ga. App. 577, 81 S. E. 797; *Roberson v. State*, 12 Ga. App. 102, 76 S. E. 752.

16. See *infra*, this note.

[a] It is error for the court to refuse to allow accused's counsel to call his attention by a written suggestion made through the court, to a material omission. *People v. Annis*, 13 Mich. 511.

17. *Bass v. State*, 4 Ga. App. 844, 62 S. E. 540. See *Chappell v. State*, 71 Ala. 322; *People v. Annis*, 13 Mich. 511.

18. *Echols v. State*, 109 Ga. 508, 34 S. E. 1038. But see *People v. Annis*, 13 Mich. 511.

[a] The court should, *sua sponte*, prevent any interference with the accused while making his statement, either by questions or suggestions from the jury, the state's attorney, the accused's counsel, or anyone else. *Hawkins v. State*, 29 Fla. 554, 10 So. 822.

19. *Dixon v. State*, 12 Ga. App. 17, 76 S. E. 794. See *Burden v. People*, 26 Mich. 162.

20. See cases in following note.

[a] **After Rebuttal Evidence by State.**—Though defendant has declined to make a statement after the close of the evidence in chief, it is error to refuse him the privilege after the state has introduced further evidence in rebuttal. *King v. State*, 99 Ga. 52, 25 S. E. 613.

21. Ala.—*Jones v. State*, 181 Ala. 63, 61 So. 434; *State v. McCall*, 4 Ala. 643, 39 Am. Dec. 314. Ark.—*Williams v. State*, 16 S. W. 816. Mich.—*Palmer v. People*, 43 Mich. 414, 5 N. W. 450.

22. See the statute of Michigan.

subject to cross-examination on his statement without his consent,<sup>23</sup> though he may waive this right and submit to cross-examination,<sup>24</sup> in which event the general rules relating to cross-examination of witnesses generally will be observed.<sup>25</sup>

The prosecution may properly be allowed to introduce evidence in rebuttal of new matter contained in the statement.<sup>26</sup> But the defendant, it seems, cannot be impeached for the purpose of counteracting his statement,<sup>27</sup> nor does it furnish sufficient ground, as might his testimony as a witness, to justify proof of his violent and dangerous character.<sup>28</sup>

**V. COMMENT.**—While the failure of accused to make a statement cannot be commented on<sup>29</sup> the statement itself, being in the nature of evidence, is the legitimate subject of comment.<sup>30</sup>

**VI. SUPPLEMENTARY STATEMENT.**—The defendant is not entitled, as a matter of right, to make more than one statement,<sup>31</sup> and this rule is not changed by the subsequent introduction of material evidence against him.<sup>32</sup> Permission to make an additional statement may be granted in the discretion of the trial court.<sup>33</sup>

**23.** *Whizenant v. State*, 71 Ala. 383; *Chappell v. State*, 71 Ala. 322; *Blackburn v. State*, 71 Ala. 319, 46 Am. Rep. 323; *Nero v. State*, 126 Ga. 554, 55 S. E. 404; *Vaughn v. State*, 88 Ga. 731, 16 S. E. 64; *Wiggins v. State*, 16 Ga. App. 477, 85 S. E. 674; *Fite v. State*, 16 Ga. App. 22, 84 S. E. 485.

[a] **The Court May Not Question Him Without His Consent.**—*Hackney v. State*, 101 Ga. 512, 28 S. E. 1007.

[b] **Court Cannot Order Cross-Examination.**—The defendant cannot be cross-examined, as to a matter to which he refers in his statement contrary to the order of the court, even though the court has informed the defendant that cross-examination will be permitted if he makes such reference. *Walker v. State*, 116 Ga. 537, 42 S. E. 787, 67 L. R. A. 426.

**24.** *Roberson v. State*, 12 Ga. App. 102, 76 S. E. 752; *Williams v. Hazelhurst*, 11 Ga. App. 194, 74 S. E. 1039.

[a] **Examination of accused by his counsel**, after being cross-examined by the prosecution, is within the court's discretion. *Lindsay v. State*, 138 Ga. 818, 76 S. E. 369.

[b] **Defendant Under Oath.**—To be cross-examined the defendant may be (1) sworn (*Roberson v. State*, 12 Ga. App. 102, 76 S. E. 752. But see *Williams v. Hazelhurst*, 11 Ga. App. 194, 74 S. E. 1039), or (2) unsworn. *Lindsay v. State*, 138 Ga. 818, 76 S. E. 369.

**25.** *Roberson v. State*, 12 Ga. App. 102, 76 S. E. 752.

**26.** *Burden v. People*, 26 Mich. 162. See *Goolsby v. State*, 133 Ga. 427, 66 S. E. 159. But see *Chappell v. State*, 71 Ala. 322, containing contrary dictum.

**27.** *Chappell v. State*, 71 Ala. 322, dictum (Somerville, J., reserving any expression of opinion as to proof of bad character) that a defendant cannot be impeached "as witnesses are, by proof of bad character, by cross-examination, nor by proof of extrinsic facts, introduced for such purpose."

**28.** *Hart v. State*, 38 Fla. 39, 20 So. 805.

**29.** See *Blackburn v. State*, 71 Ala. 319, 46 Am. Rep. 323, by statute.

**30.** *Beasley v. State*, 71 Ala. 328 (error to forbid comment by counsel for accused); *Blackburn v. State*, 71 Ala. 319, 46 Am. Rep. 323.

**Comment on failure of accused to testify**, see 2 STANDARD PROC. 773, et seq.

**31.** *Sharp v. State*, 111 Ga. 176, 36 S. E. 633; *Handy v. State*, 16 Ga. App. 341, 85 S. E. 351; *Dixon v. State*, 12 Ga. App. 17, 76 S. E. 794.

**32.** *Williams v. State*, 138 Ga. 825, 76 S. E. 347; *Peavy v. State*, 114 Ga. 260, 40 S. E. 234; *Sharp v. State*, 111 Ga. 176, 36 S. E. 633. But see *Timmons v. State*, 13 Ga. App. 376, 79 S. E. 216.

**33.** *Robinson v. State*, 129 Ga. 336,



**VII. INSTRUCTIONS.**<sup>34</sup> — The court may base its general instructions on the evidence alone, without alluding to the defendant's statement,<sup>35</sup> but at some stage of the charge should instruct the jury on the law applicable to such statement.<sup>36</sup> On the other hand, in the absence of a request, it is not necessary to charge on any theory of defense arising solely from the statement of accused.<sup>37</sup>

**VIII. NEW TRIAL AND APPEAL.** — As a general rule the refusal to permit a supplementary statement is not a sufficient ground for a new trial,<sup>38</sup> nor are inaccurate instructions when the verdict is that which the accused demands in his statement.<sup>39</sup> In accordance with the general rules relating to appeals, a decision of the trial court on matters resting in its discretion will not be reversed in the absence of manifest abuse of discretion.<sup>40</sup>

58 S. E. 842; *August v. State*, 20 Ga. App. 168, 92 S. E. 956; *Handy v. State*, 16 Ga. App. 341, 85 S. E. 351; *Miliken v. State*, 8 Ga. App. 478, 69 S. E. 915.

34. See 13 STANDARD PROC. 912.

35. *Howell v. State*, 124 Ga. 698, 52 S. E. 649, holding it unnecessary to charge on the law applicable to the statement by the accused in connection with the general instructions on conflicting evidence and weighing testimony.

36. *Tolbirt v. State*, 124 Ga. 767, 53 S. E. 327; *Roberts v. State*, 123 Ga. 146, 51 S. E. 374; *Hoxie v. State*, 114 Ga. 19, 39 S. E. 944. See *Barber v. State*, 13 Fla. 675, and also 13 STANDARD PROC. 912.

[a] In the absence of a request, and when no injury to the accused results from its omission, it is not error to fail to allude to the defendant's statement in the charge to the jury. *Barfield v. State*, 105 Ga. 491, 30 S. E. 743.

[b] **Misleading Instruction.** — The instructions must not be so framed as to lead the jury to suppose that they may disregard the statement merely because it is not supported by other evidence to the same points. *People*

*v. Arnold*, 40 Mich. 710. See *Blackburn v. State*, 71 Ala. 319, 46 Am. Rep. 323.

[c] **Instruction should invade province of jury** as to weight to be given the statement. *Blackburn v. State*, 71 Ala. 319, 46 Am. Rep. 323.

[d] **Approved instruction** as to weight and effect, see *People v. Jones*, 24 Mich. 215, *quoted* in *Chappell v. State*, 71 Ala. 322. See also *Blackburn v. State*, 71 Ala. 319, 46 Am. Rep. 323.

37. *Walker v. State*, 117 Ga. 323, 43 S. E. 737; *Bragg v. State*, 15 Ga. App. 623, 84 S. E. 82.

38. *Johnson v. State*, 120 Ga. 509, 48 S. E. 199.

39. *Carpenter v. State*, 122 Ga. 171, 50 S. E. 58.

40. See the title "Appeals."

[a] **Supplementary statement**, refusal of permission to make. *August v. State*, 20 Ga. App. 168, 92 S. E. 956; *Handy v. State*, 16 Ga. App. 341, 85 S. E. 351.

[b] **Suggestions and questions by defendant's counsel** during the making of the statement, refusal to permit. *Whitley v. State*, 14 Ga. App. 577, 81 S. E. 797.

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**STATEMENT OF FACTS.** — See *Agreed Case*; *Bills of Exceptions*; *Statement and Abstract of Case*; *Stipulations*.

# STATEMENT OR AFFIDAVIT OF CLAIM

By the Editorial Staff.

## I. AFFIDAVIT OF CLAIM, 53

## II. STATEMENT OF CLAIM, 54

### CROSS-REFERENCES:

Affidavits of Merits and Defense.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. AFFIDAVIT OF CLAIM.**—By statute, if the plaintiff, in a suit on contract for the payment of money, shall file with his declaration an affidavit of claim, he is entitled to a judgment as in the case of default unless the defendant file with his plea an affidavit of merits.<sup>1</sup> The plaintiff's affidavit must comply with the statute,<sup>2</sup> and

1. **Ark.**—*Floyd v. McDaniel*, 36 Ark. 484. **D. C.**—*Carmody v. Simpson-Sullivan Co.*, 44 App. Cas. 39; *Riley v. Mattingly*, 42 App. Cas. 290; *King v. Curtin*, 31 App. Cas. 23. **Ill.**—*Haggard Bros. v. Smith*, 76 Ill. 507; *Fisher v. Nat. Bank*, 73 Ill. 34; *Kern v. Strasberger*, 71 Ill. 303. **Md.**—*Com. Bank v. Kirkland*, 102 Md. 662, 62 Atl. 799; *Greff v. Fickey*, 30 Md. 75. **Pa.**—*Hall v. Smitheman*, 26 Pa. Dist. 203 (in actions before justices of the peace); *Fire Ins. Co. v. Keller*, 9 Pa. Dist. 61. **Va.**—*Merriman Co. v. Thomas & Co.*, 103 Va. 24, 48 S. E. 490. **W. Va.**—*Vinson v. Norfolk & W. Ry. Co.*, 37 W. Va. 598, 16 S. E. 802.

[a] **Optional with plaintiff** whether to file affidavit. *Kern v. Strasberger*, 71 Ill. 303.

[b] **Need Not Be Sworn to on Day of Filing.**—*Harris v. Leonhardt*, 2 App. Cas. (D. C.) 318; *Fire Ins. Co. v. Keller*, 9 Pa. Dist. 61.

[c] **May Be Made Before a Notary Public.**—*Hutchins v. Maneely*, 11 App. Cas. (D. C.) 88.

[d] **To Be Filed With the Declaration.**—*Honore v. Home Nat. Bank*, 80 Ill. 489; *Goldie v. McDonald*, 78 Ill. 605.

[e] **But Court May Permit Affidavit To Be Filed After Plea Filed.** *Spradling v. Russell*, 100 Ill. 522; *Wells v. Mathews*, 75 Ill. App. 395. See *Healy v. Charnley*, 79 Ill. 592. Compare *Floyd v. McDaniel*, 36 Ark. 484.

[f] **Service of Affidavit on Defendant Not Required.**—*Greff v. Fickey*, 30 Md. 75. But see *Abbey v. Young*, 10 Co. Ct. 476.

[g] **On amending declaration, new affidavit need not be filed.** *Cavanaugh v. Witte Gas & G. E. Co.*, 123 Ill. App. 571.

[h] **Effect of insufficient affidavit,** see 1 STANDARD PROC. 667.

2. See the statute and *Foertsch v.*

must show the nature of the demand,<sup>3</sup> and the amount due after deducting all just credits, deductions, and set-offs,<sup>4</sup> and in some states, that there is no good or valid defense on the merits.<sup>5</sup> Some statutes require it to be accompanied with a copy of the book entries or the instrument on which the action is brought.<sup>6</sup> The affidavit may be made by a party,<sup>7</sup> or by an agent or attorney.<sup>8</sup> Objections to defects in the affidavit must be specific,<sup>9</sup> and must be made before any proceeding is taken on the affidavit.<sup>10</sup> If the affidavit is defective, it may be amended.<sup>11</sup>

**II. STATEMENT OF CLAIM.**—The statute of Pennsylvania<sup>12</sup> provides that in actions of assumpsit and trespass, except libel and slander, the plaintiff's pleading shall consist of his statement of claim.<sup>13</sup> The statement shall be as brief as the nature of the case will admit;<sup>14</sup> but it must aver every ingredient of a good cause of action,<sup>15</sup>

Germuiller, 2 App. Cas. (D. C.) 340.

[a] Identification of claim with that in the declaration should be made. *Vinson v. Norfolk & W. Ry. Co.*, 37 W. Va. 598, 16 S. E. 802.

[b] Entitling as of the term of court unnecessary. *Honore v. Home Nat. Bank*, 80 Ill. 489.

[c] Name of affiant to be shown. *Philadelphia Nat. Bank v. Morgan*, 1 Marv. (Del.) 265, 40 Atl. 1113.

[d] Affidavit by treasurer must contain allegation that affiant is such treasurer. *Saint Joseph's Polish C. B. Soc. v. St. Hedwig's Church*, 3 Penn. 229, 50 Atl. (Del.) 535.

[e] Administrator Need Not Aver That He Is Such.—*Newlin v. Adair*, 3 Boyce (Del.) 441, 84 Atl. 1028.

3. *Fisher v. Nat. Bank*, 73 Ill. 34.

4. *McKenzie v. Penfield*, 87 Ill. 33; *Fisher v. Nat. Bank*, 73 Ill. 34; *Vinson v. Norfolk & W. Ry. Co.*, 37 W. Va. 598, 16 S. E. 802.

5. *Floyd v. McDaniel*, 36 Ark. 484.

6. *Hall v. Smitheman*, 26 Pa. Dist. 203.

7. *Newlin v. Adair*, 3 Boyce (Del.) 441, 84 Atl. 1028; *Gordon v. Frazer*, 13 App. Cas. (D. C.) 382, use plaintiff.

8. Del.—*Philadelphia Nat. Bank v. Morgan*, 1 Marv. 265, 40 Atl. 1113, cashier. D. C.—*Harris v. Leonhardt*, 2 App. Cas. 318. Ill.—*Brigham v. Atha*, 84 Ill. 43; *Honore v. Home Nat. Bank*, 80 Ill. 489; *Loeb v. Loeb*, 170 Ill. App. 492. Va.—*Merriman Co. v. Thomas & Co.*, 103 Va. 24, 48 S. E. 490.

9. *McKenzie v. Penfield*, 87 Ill. 38.

10. *Harris v. Leonhardt*, 2 App. Cas. (D. C.) 318.

11. *McKenzie v. Penfield*, 87 Ill. 33; *Healy v. Charnley*, 79 Ill. 592; *Goldie v. McDonald*, 78 Ill. 605.

12. *Laws of Pa.*, 1915, p. 483.

13. *Edison Gen. Elec. Co. v. Thackara Mfg. Co.*, 167 Pa. 539, 31 Atl. 856. See *Hackney v. Gorley*, 44 Pa. Co. Ct. 273, as to division into paragraphs.

[a] Statute Does Not Apply to Actions Begun by Foreign Attachments. *Paff v. North Bangor Co.*, 1 North. (Pa.) 243.

[b] The Statement Is a Substitute for the Common Law Declaration. *Byrne v. Hayden*, 124 Pa. 170, 177, 16 Atl. 750.

[c] If a declaration be filed, it must contain all the essentials of a statement. *Brennan v. Franey*, 5 Pa. Co. Ct. 212. See also *Smith, Kline & French Co. v. Smith*, 166 Pa. 563, 31 Atl. 343.

14. *Rambo v. Nipple*, 12 Pa. Co. Ct. 516.

[a] A declaration containing different counts will be stricken out. *Rambo v. Nipple*, 12 Pa. Co. Ct. 516. See also *Penn Nat. Bank v. Kopitzsch Soap Co.*, 161 Pa. 134, 28 Atl. 1077.

15. *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606; *Byrne v. Hayden*, 124 Pa. 170, 16 Atl. 750; *Brennan v. Franey*, 5 Pa. Co. Ct. 212.

[a] The precision of averment required in a declaration is not necessary. *Brennan v. Franey*, 5 Pa. Co. Ct. 212. But compare *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606; *Byrne v. Hayden*, 124 Pa. 170, 177, 16 Atl. 750.

[b] But ambiguity and contradiction should be avoided. *Monsarratt v. Trust Co.*, 14 Pa. Super. 541.

[c] A statement of facts so as to



and set forth the names of the parties,<sup>16</sup> and give particular references to the records of any court in the county relied on.<sup>17</sup> In actions on contract it is required to state whether the contract is oral or in writing,<sup>18</sup> and copies of all notes, contracts and book entries are required to be attached.<sup>19</sup> The statement must be sworn to by the plaintiff or some one having knowledge of the facts,<sup>20</sup> must be signed by the attorney if there is one,<sup>21</sup> and must be endorsed as required in the statute.<sup>22</sup> It seems that the signature of the party himself is not required.<sup>23</sup> The statement must be filed,<sup>24</sup> and a copy must be served

leave the plaintiff free to evolve at trial any theory supported by them is permissible. *Gimbel Bros. v. Adams Ex. Co.*, 13 Del. (Pa.) 141.

[d] The common counts have no place in a statement. *Penn Nat. Bank v. Kopitzsch Soap Co.*, 161 Pa. 134, 23 Atl. 1077; *Shaw v. Merrill*, 33 Pa. Co. Ct. 228.

[e] Amount claimed must be shown with certainty. *Ide v. Booth*, 8 Pa. Co. Ct. 499.

[f] General averments of negligence are insufficient. *Rife v. Middletown*, 32 Pa. Super. 68; *Bath Port. Cement Co. v. Horner*, 14 North (Pa.) 39.

[g] Matters of defense not to be stated. *Hendley & Co. v. Bittinger*, 249 Pa. 193, 94 Atl. 831, L. R. A. 1915F, 711, following *Drumgoole v. Lyle*, 30 Pa. Super. 463; *Schaffer v. Short*, 14 North. (Pa.) 46.

16. *Wolf v. Binder*, 10 Pa. Co. Ct. 108.

17. *Campbell v. Pittsb. & W. Ry. Co.*, 137 Pa. 574, 585, 20 Atl. 949; *Siegel v. Haines & Co.*, 15 Pa. Co. Ct. 40.

[a] The record of a court of another county must be exhibited in full. *Campbell v. Pittsb. & W. Ry. Co.*, 137 Pa. 574, 585, 20 Atl. 949.

18. See *American Mfg. Co. v. S. Morgan Smith Co.*, 25 Pa. Super. 176, otherwise under statute of 1887.

19. *Bethlehem Steel Co. v. Topliss*, 249 Pa. 417, 94 Atl. 1099; *Penn. Nat. Bank v. Kopitzsch Soap Co.*, 161 Pa. 134, 28 Atl. 1077; *Newbold v. Pennock*, 154 Pa. 591, 26 Atl. 606; *Blair v. Kingston Mfg. Co.*, 23 Pa. Dist. 1091.

[a] Attaching contract is excused where the date and terms of the contract is not within the plaintiff's knowledge. *Quinn v. Shafto*, 31 W. N. C. (Pa.) 502.

[b] Failure To Attach Copy Does Not Warrant Reversal.—*Hendley & Co.*

*v. Bittinger*, 249 Pa. 193, 94 Atl. 831, L. R. A. 1915F, 711. But it prevents the rendition of judgment for want of an affidavit of defense. *Lee Holland & Co. v. Cooper*, 8 Pa. Co. Ct. 481.

[c] Full copy required. *Lee Holland & Co. v. Cooper*, 8 Pa. Co. Ct. 481.

20. See *Edison Gen. Elec. Co. v. Thackara Mfg. Co.*, 167 Pa. 530, 31 Atl. 856 (the statute of 1887 did not require a verification); *Johnson v. Smith*, 158 Pa. 568, 28 Atl. 144.

[a] The authority to act must be set up where the affidavit is not made by the plaintiff. *Hutchinson v. Woodwell*, 107 Pa. 509.

[b] Reason why plaintiff himself did not make the verification must be stated where another makes it. *Mooney v. Snyder*, 6 North. (Pa.) 349, under statute of 1887.

[c] May be (1) on information and belief (*Grimley v. Receveuve*, 21 W. N. C. [Pa.] 573), unless (2) made by counsel or a person not cognizant of the facts. *Warner v. Railroad Co.*, 1 Pa. Dist. 247.

21. *Kelly v. Herb*, 147 Pa. 563, 23 Atl. 889; *Tombler v. Dinan*, 1 North. (Pa.) 205.

22. See the statute.

23. See *Medler v. Madlinger*, 12 Pa. Co. Ct. 473, statute of 1887, requires signature of party or his attorney.

[a] A signature of the party to the jurat is sufficient signature. *Dilley v. Rowe*, 23 W. N. C. (Pa.) 491.

24. *Weigley v. Teal*, 125 Pa. 498, 17 Atl. 454; *Philadelphia Cloak & S. Co. v. Wilkinson*, 9 Pa. Dist. 40; *Graham v. Blank*, 6 Pa. Dist. 133.

[a] Notice of filing is necessary under the act of 1887 where the statement is filed after the return day. *Sturdevant v. Austin*, 5 Kulp. (Pa.) 26.

on the defendant.<sup>25</sup> The statement may be amended in accordance with the general rules regulating amendments.<sup>26</sup>

[b] **Additional time for filing** may be asked. *Mooney v. Snyder*, 6 North. (Pa.) 349.

[c] **No objection that no statement was filed** can be made where the defendant goes to trial without objection. *Lewis v. Browning*, 32 Pa. Co. Ct. 264.

25. *Sturdevant v. Austin*, 5 Kulp. (Pa.) 26; *Blake v. Pennsylvania R. R. Co.*, 12 Pa. Dist. 661. See 1 STANDARD PROC. 667.

[a] **Time of Service.**—*Watson v. Pennsylvania R. Co.*, 25 Pa. Dist. 1034.

[b] **Copy of affidavit to be served** with copy of statement. *Wolf v. Binder*, 10 Pa. Co. Ct. 108; *Simon v. Edouard Hotel Co.*, 18 Pa. Dist. 209.

26. *Barclay v. Barclay*, 206 Pa. 307, 55 Atl. 985; *Wolf v. Binder*, 10 Pa. Co. Ct. 108; *Kauffman v. Jacobs*, 4 Pa. Co. Ct. 482. See the title "**Amendments and Jeofails.**"

# STATES AND TERRITORIES

By the Editorial Staff.

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Costs;	Officers;
Escheat;	Quo Warranto;
Indictment and Information;	Removal of Causes;
Injunctions;	Review;
Limitation of Actions;	Taxation;
Mandamus;	United States.
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Enforcement of claims for salaries of officers, see the title "Officers."

Garnishment, by state, 10 STANDARD PROC. 381; against state, 10 STANDARD PROC. 398.

Information in civil cases, see 12 STANDARD PROC. 704.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. ACTIONS BY AND AGAINST.** — A. CAPACITY TO SUE AND NECESSITY OF INTEREST. — A state may sue in the courts of a state and of the United States.<sup>1</sup> In actions founded on some pecuniary or

1. See 5 STANDARD PROC. 549.

[a] Statutory authorization of suit is unnecessary. *State v. Duniway*, 63 Ore. 555, 128 Pac. 853; *State v. Delesdenier*, 7 Tex. 76.

[b] State may maintain ejectment only where disseisin is not necessary. *State v. Duniway*, 63 Ore. 555, 128 Pac. 853; *State v. Stark*, 3 Brev. (S. C.) 101.

proprietary right, the state must establish a right to the peculiar relief demanded as in the case of individual suitors.<sup>2</sup> But in actions in the right of some prerogative incident to sovereignty, its obligation to prevent wrongdoing resulting in injury to the general welfare is sufficient to give it a standing in court.<sup>3</sup>

**B. LIABILITY TO BE SUED.**—A state cannot be sued in its own courts,<sup>4</sup> or in the courts of another state,<sup>5</sup> unless its consent has been expressly conferred by constitution or statute,<sup>6</sup> or unless it waives its privilege by voluntary appearance or intervention in a suit otherwise well brought.<sup>7</sup> And by virtue of the eleventh amendment to the federal constitution, it cannot be sued in the federal courts by a citizen of another state or country.<sup>8</sup> This rule forbids suits in which the state is an indispensable party.<sup>9</sup> Nor can a state be sued in the

[c] **An action to set aside judgment admitting alien to citizenship** cannot be brought by the state. *Petersen v. State*, 40 Tex. Civ. App. 175, 89 S. W. 81. Compare 20 STANDARD PROC. 272.

**Recovery of excessive fees paid to an officer**, see the title "Officers."

2. *People v. Ingersoll*, 58 N. Y. 1, 17 Am. Rep. 178; *People v. Canal Board*, 55 N. Y. 390; *State ex rel. Taylor v. Lord*, 28 Ore. 498, 508, 43 Pac. 471, 31 L. R. A. 473; *State v. Penoyer*, 26 Ore. 205, 37 Pac. 906, 41 Pac. 1104, 25 L. R. A. 862.

3. **U. S.**—*In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092. *Mo. State ex rel. Delmar Jockey Club v. Zachritz*, 166 Mo. 307, 314, 65 S. W. 999, 89 Am. St. Rep. 711. **N. Y.**—*People v. Ingersoll*, 58 N. Y. 1, 17 Am. Rep. 178. **Tex.**—See *State v. Farmers' Loan & T. Co.*, 81 Tex. 530, 547, 17 S. W. 60.

4. See 5 STANDARD PROC. 550.

5. *Moore v. Tate*, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712.

6. See 5 STANDARD PROC. 550.

[a] **A constitutional provision directing the legislature to provide in what manner suits against the state may be brought** is not self executing. *Chicago M. & St. P. R. Co. v. State*, 53 Wis. 509, 10 N. W. 560.

[b] **The legislature only can waive the state's immunity from suit.** *Title Guar. & Sur. Co. v. Guernsey*, 205 Fed. 94.

[c] **Statute Abrogating Rule Is Strictly Construed.**—*Miller v. Pillsbury*, 164 Cal. 199, 128 Pac. 327, Ann. Cas. 1914B, 886; *Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382.

[d] **Consent may be withdrawn at**

any time, even though suits against the state are pending. *McDowell v. Warden of Reformatory*, 169 Mich. 332, 135 N. W. 265.

[e] **Failure of the attorney general to object to court's jurisdiction** does not waive the state's immunity from suit. *Title Guar. & Sur. Co. v. Guernsey*, 205 Fed. 94. Compare following note.

7. *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 26 Sup. Ct. 252, 59 L. ed. 477; *Clark v. Barnard*, 108 U. S. 436, 447, 2 Sup. Ct. 878, 27 L. ed. 780. See *infra*, I, G and J.

*Compare Title Guar. & Sur. Co. v. Guernsey*, 205 Fed. 94.

**Waiver of immunity by bringing suit**, see *infra*, I, D.

8. See the 11th amendment, and *Deseret Water Oil & Irr. Co. v. California*, 202 Fed. 498, 120 C. C. A. 641; *Miller v. State Board of Agriculture*, 46 W. Va. 192, 32 S. E. 1007, 76 Am. St. Rep. 811, also the title "United States Courts."

[a] **A suit by one state against another to collect debts owing to its citizens** is within the prohibition of the eleventh amendment. *New Hampshire v. Louisiana*, 108 U. S. 76, 2 Sup. Ct. 176, 27 L. ed. 656.

9. *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. ed. 890, 35 L. R. A. N. S. 243; *Poindexter v. Greenhow*, 114 U. S. 270, 287, 5 Sup. Ct. 903, 962, 29 L. ed. 185.

[a] **A suit to set aside tax sales** cannot be maintained where the property has been bid in by the state, since the state is a necessary party. *Chandler v. Dix*, 194 U. S. 590, 24 Sup. Ct. 766, 48 L. ed. 1129.

federal courts by one of its own citizens on the ground that a question arising under the federal constitution or laws is involved.<sup>10</sup> But a state may be sued by a sister state in the United States supreme court.<sup>11</sup> That a state has consented to be sued in its own courts, however, does not amount to a waiver of its immunity from suit in the federal courts.<sup>12</sup>

Statutes sometimes provide that any person having a claim against the state may bring suit thereon after disallowance by the board of audit or examiners or by the legislature.<sup>13</sup> And some statutes authorize suit against the state for the condemnation of state land for public use.<sup>14</sup>

C. WHAT CONSTITUTES AN ACTION AGAINST A STATE. — 1. **Generally.** — To constitute an action against the state, within the rule forbidding actions against the state, it is not necessary that the state be named as a party of record.<sup>15</sup> The court may consider the nature of

10. *Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. ed. 363; *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. ed. 842.

11. See *infra*, I, F; and the title "United States Courts."

12. *Murray v. State*, 213 U. S. 174, 29 Sup. Ct. 465, 53 L. ed. 752; *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 29 Sup. Ct. 458, 53 L. ed. 742. See *Chandler v. Dix*, 194 U. S. 590, 24 Sup. Ct. 766, 48 L. ed. 1129.

[a] **Conditional Consent.**—A state may couple with its consent to be sued a condition that the suit be brought in its own courts. *Smith v. Reeves*, 178 U. S. 436, 445, 20 Sup. Ct. 919, 44 L. ed. 1140, *affirming* 87 Fed. 964, 31 C. C. A. 328; *Deseret Water, Oil & Irr. Co. v. California*, 202 Fed. 498, 120 C. C. A. 641.

13. See generally the statutes and the following cases: *Idaho*.—*Bragaw v. Goadin*, 14 Idaho 288, 94 Pac. 438; *Geo. H. Fuller Desk Co. v. State*, 6 Idaho 315, 55 Pac. 857. *Ind.*—*State v. Mutual Life Ins. Co.*, 175 Ind. 59, 73, 93 N. E. 213, 42 L. R. A. (N. S.) 256 (claims arising at law or in equity, out of contract express or implied, may be sued on); *May v. State*, 133 Ind. 567, 33 N. E. 352. *Mass.*—*Burroughs v. Com.*, 224 Mass. 28, 112 N. E. 491, Ann. Cas. 1917A, 38. *S. D.*—*Lyman County v. State*, 9 S. D. 413, 69 N. W. 601. *Wis.*—*In re Wausau Inv. Co.*, 163 Wis. 283, 158 N. W. 81.

[a] Where the legislature has adjusted the claim, the courts have no jurisdiction. *Julian v. State*, 140 Ind. 581, 39 N. E. 923; *Julian v. State*, 122 Ind. 68, 23 N. E. 690.

[b] **This statute does not create any liability or cause of action** (1) where none existed before. *Denning v. State*, 123 Cal. 316, 55 Pac. 1000; *Houston v. State*, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39. (2) And it does not refer to equitable claims or claims for tort. *In re Wausau Inv. Co.*, 163 Wis. 283, 158 N. W. 81.

[c] **The word "claim"** is synonymous with "cause of action." *Idaho*. *Davis v. State*, 30 Idaho 137, 163 Pac. 373, Ann. Cas. 1918D, 911. *Wash.* *Riddoch v. State*, 68 Wash. 329, 123 Pac. 450, Ann. Cas. 1913E, 1033, 42 L. R. A. (N. S.) 251; *Northwestern & Pacific Hypotheek Bank v. State*, 18 Wash. 73, 50 Pac. 586, 42 L. R. A. 33. *Wis.*—*Houston v. State*, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 39.

[d] **Only on claims which the auditor has power to audit**, can suit be brought. *Gulf Export Co. v. State*, 112 Miss. 452, 73 So. 281; *State v. Dinkins*, 77 Miss. 874, 27 So. 832.

[e] **Suit Does Not Lie on a War-rant.**—*Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382.

[f] **The word "person"** includes not only human beings but bodies politic and corporate. *Lyman Co. v. State*, 9 S. D. 413, 69 N. W. 601.

14. *Deseret Water Oil & Irr. Co. v. California*, 202 Fed. 498, 120 C. C. A. 641 (under the California law); *Hollister v. State*, 9 Idaho 8, 71 Pac. 541. See generally the title, "Eminent Domain."

15. **U. S.**—*Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. ed. 890, 35 L. R. A. (N. S.) 243; *Pennoyer v. McConaughy*, 140



the case as presented by the whole record in determining whether a particular action is one against the state.<sup>16</sup> And in this connection, the observation of the distinction between the state and the government of the state has been said to be important.<sup>17</sup>

**2. Suits Against State Officers.**—a. *Generally.*—The mere fact that an action is against its officers does not alone make it one against the state.<sup>18</sup> Such an action constitutes an action against the state when it is of such a character that an adjudication against the officer is in effect an adjudication against the state.<sup>19</sup> If the state is the real party in interest, the suit, though against its officers, is against the state and cannot be maintained.<sup>20</sup> Conversely, a suit against a

U. S. 1, 11 Sup. Ct. 699, 35 L. ed. 363; *In re Ayers*, 123 U. S. 443, 487, 8 Sup. Ct. 164, 31 L. ed. 216 (*construing Osborn v. Bank of United States*, 9 Wheat. 738, 857, 6 L. ed. 204); *Hagood v. Sothorn*, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. ed. 805. **Ark.**—*Pitcock v. State*, 91 Ark. 527, 535, 121 S. W. 742, 134 Am. St. Rep. 88. **Fla.**—*Railroad Comrs. v. Pensacola & A. R. Co.*, 24 Fla. 417, 461, 5 So. 129. **Ia.**—*Mills Pub. Co. v. Larrabee*, 78 Iowa 97, 42 N. W. 593. **Mich.**—*McDowell v. Warden of Reformatory*, 169 Mich. 332, 135 N. W. 265. **Mont.**—*State ex rel. Robert Mitchell Furn. Co. v. Toole*, 26 Mont. 22, 66 Pac. 496, 91 Am. St. Rep. 386, 55 L. R. A. 644. **Okla.**—*Love v. Filtsch*, 33 Okla. 131, 124 Pac. 30, 44 L. R. A. (N. S.) 212, note. **W. Va.**—*Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613; *Miller v. State Board of Agriculture*, 46 W. Va. 192, 32 S. E. 1007, 76 Am. St. Rep. 811.

16. *In re Ayers*, 123 U. S. 443, 492, 8 Sup. Ct. 164, 31 L. ed. 216.

17. **U. S.**—*Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. ed. 185. **Tex.**—*Imperial Sugar Co. v. Cabell* (Tex. Civ. App.), 179 S. W. 83. **W. Va.**—*Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 142, 67 S. E. 613.

[a] The maxim that the King can do no wrong has no place in our government. Wrongs attempted in the name of the state are attributable to the government and not to the state itself. *Poindexter v. Greenhow*, 114 U. S. 270, 290, 5 Sup. Ct. 903, 962, 29 L. ed. 185.

18. **U. S.**—*Ex parte Young*, 209 U. S. 123, 155, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. N. S. 932, 14 Ann. Cas. 764; *Gunter v. Atlantic Coast Line Co.*, 200 U. S. 273, 284, 26 Sup. Ct. 252, 50 L. ed. 477. **Ala.**—*Elmore v. Fields*, 153 Ala. 345, 45 So. 66, 127 Am. St. Rep.

31. **Ind.**—*Ex parte Fitzpatrick*, 171 Ind. 557, 86 N. E. 964.

19. **U. S.**—*In re Ayers*, 123 U. S. 443, 487, 8 Sup. Ct. 164, 31 L. ed. 216; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. ed. 805. **Fla.**—*Railroad Comrs. v. Pensacola & A. R. Co.*, 24 Fla. 417, 461, 5 So. 129. **Okla.**—*Love v. Filtsch*, 33 Okla. 131, 124 Pac. 30, 44 L. R. A. (N. S.) 212, note. **Ore.**—*Salem Mills Co. v. Lord*, 42 Ore. 82, 69 Pac. 1033, 70 Pac. 832. **Pa.**—*Cope v. Hastings*, 183 Pa. 300, 38 Atl. 717. **Utah.**—*Wilkinson v. State*, 42 Utah 483, 134 Pac. 626.

[a] Tests for determining where a suit is against the state are: whether the state is named as a party of record; whether the action is directly on contract; whether it is to control the discretion of executive officers or administration of funds in the treasury; whether it seeks to compel performance of the state's contract; and whether the state is a necessary party. *Poindexter v. Greenhow*, 114 U. S. 270, 293, 5 Sup. Ct. 903, 962, 29 L. ed. 185.

20. See *Western Union Tel. Co. v. Andrews*, 154 Fed. 95.

[a] If the result of the action is to appropriate state's funds to satisfy the judgment to be rendered, the action is against the state. *Wilkinson v. State*, 42 Utah 483, 493, 134 Pac. 626.

[b] Suits to compel state officers to do acts imposing a contractual pecuniary liability on the state are against the state. *Farmers Nat. Bank v. Jones*, 105 Fed. 459.

[c] But "the fact that the state voluntarily assumes the defense in the cause or litigation does not make it the real party." *Western Union Tel. Co. v. Andrews*, 154 Fed. 95, 106.

[d] That the state may be consequentially affected is not sufficient to

state officer in which the state has no pecuniary interest or substantive right to protect is not against the state.<sup>21</sup> There is a broad line of demarcation between cases where the decree requires, by affirmative official action, the performance of an obligation to the state in its political capacity and those in which actions are maintained against persons violating personal and property right while acting under color of authority unconstitutional and void.<sup>22</sup>

But affirmative action may be compelled, where the state has given its assent by enjoining certain duties upon its officers.<sup>23</sup>

b. *To Redress and Prevent Unauthorized Acts.*—When officers of a state act under invalid authority or unconstitutional statute,<sup>24</sup> or exceed or abuse their lawful authority,<sup>25</sup> they act as individuals mere-

deprive the court of jurisdiction. *Fowler v. Lindsey*, 3 Dall. (U. S.) 411, 1 L. ed. 658.

[c] *Certiorari to review proceedings* of a state board is not a suit against the state. *Hall v. Bledsoe*, 126 Ark. 125, 189 S. W. 1041.

[f] *A will contest* to which the state or a department is made a defendant because named as a beneficiary therein is not against the state, particularly where the legacies have not been paid, as it is a proceeding in rem. *Hogston v. Bell*, 185 Ind. 536, 112 N. E. 883.

[g] *In an action by the state to recover land*, a defense seeking to protect defendant's possession is not a suit against the state. *Texas Channel & Dock Co. v. State*, 104 Tex. 168, 135 S. W. 522.

[h] *A suit against the governor* in his official capacity is a suit against the state. *Kentucky v. Dennison*, 24 How. (U. S.) 66, 98, 16 L. ed. 717; *Sundry African Slaves v. Madrazo*, 1 Pet. (U. S.) 110, 7 L. ed. 73. *Compare Rolston v. Missouri Fund Comms.*, 120 U. S. 390, 7 Sup. Ct. 599, 30 L. ed. 721, where the governor as a member of the commission was compelled to perform statutory duties.

21. U. S.—*Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 390, 14 Sup. Ct. 1047, 38 L. ed. 1014. Fla.—*Railroad Comms. v. Pensacola & A. R. Co.*, 24 Fla. 417, 464, 5 So. 129. Ind.—*Ex parte Fitzpatrick*, 171 Ind. 557, 86 N. E. 964.

[a] *A mere interest in the just and equal enforcement of the laws* is not a sufficient interest to constitute an action against an officer one against the state. *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 390, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Railroad Comms. v.*

*Pensacola & A. R. Co.*, 24 Fla. 417, 464, 5 So. 129.

22. *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. ed. 890, 35 L. R. A. N. S. 243; *Hagood v. Sothorn*, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. ed. 805; *Herr v. Central Ky. Lunatic Asylum*, 97 Ky. 458, 30 S. W. 971, 53 Am. St. Rep. 414, 28 L. R. A. 394.

23. See *infra*, I, C, 2, c.

24. U. S.—*Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. ed. 890, 35 L. R. A. N. S. 243; *Scully v. Bird*, 209 U. S. 481, 28 Sup. Ct. 597, 52 L. ed. 899; *In re Ayers*, 123 U. S. 443, 8 Sup. St. 164, 31 L. ed. 216; *Western Union Tel. Co. v. Andrews*, 154 Fed. 95, 106. Fla.—*Louisville & N. R. Co. v. Railroad Comrs.*, 63 Fla. 491, 58 So. 543, 44 L. R. A. (N. S.) 189, note. W. Va.—*Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 144, 67 S. E. 613.

[a] *The statute being void*, the act is not that of the state. *Cobb v. Clough*, 83 Fed. 604.

[b] *Rule Is Not Confined to Statutes Void on Their Face.*—*Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 145, 67 S. E. 613.

25. *Louisville & N. R. Co. v. Railroad Comrs.*, 63 Fla. 491, 58 So. 543, 44 L. R. A. (N. S.) 189, note; *Saranac Land & T. Co. v. Roberts*, 195 N. Y. 303, 321, 88 N. E. 753.

[a] *A tort action against a person* for some act injurious to another in regard to person or property, while claiming to act under orders of the government is not a suit against the state. *Stanley v. Schwalby*, 147 U. S. 508, 518, 13 Sup. Ct. 418, 37 L. ed. 259; *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 27 L.

ly, not as state agents, and when they invade private rights or threaten to do so, an action to redress the injuries caused thereby,<sup>26</sup> or for an injunction to prevent the threatened wrong<sup>27</sup> is not a suit against the state. To this class belong actions against officers as individuals who have possession of any property belonging to or under the control of the plaintiff and who justify possession under the authority of the state.<sup>28</sup> Similarly an action against an officer who is clothed with some duty as to the enforcement of laws and who is about to commence proceedings, either civil or criminal, to enforce an unconstitutional law is not a suit against the state.<sup>29</sup> But it is otherwise if he is not charged with any special duty in its enforcement and the suit is brought merely to test the legality of the statute.<sup>30</sup> A suit to

ed. 992; *Western Union Tel. Co. v. Andrews*, 154 Fed. 95, 106; *Salem Mills Co. v. Lord*, 42 Ore. 82, 91, 69 Pac. 1032, 70 Pac. 832.

[b] But an action against a state prison for injury received as a result of negligence of its officers, is a suit against the state. *Moody v. State's Prison*, 128 N. C. 12, 38 S. E. 131, 53 L. R. A. 855.

26. See cases cited in two notes next preceding.

27. **U. S.**—*Belknap v. Schild*, 161 U. S. 10, 81, 16 Sup. Ct. 443, 40 L. ed. 599; *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, 31 L. ed. 216; *Western Union Tel. Co. v. Andrews*, 154 Fed. 95, 106. **Ark.**—*Pitcock v. State*, 91 Ark. 527, 537, 121 S. W. 742, 134 Am. St. Rep. 88. **Fla.**—*Louisville & N. R. Co. v. Railroad Comrs.*, 63 Fla. 491, 58 So. 543, 44 L. R. A. (N. S.) 189, note. Ill. *Joos v. Illinois Nat. Guard*, 257 Ill. 138, 100 N. E. 505, Ann. Cas. 1914A, 862, 43 L. R. A. (N. S.) 1214. **Ind.**—*Welch v. Fisk*, 139 Ind. 637, 38 N. E. 403. **Ky.** *Herr v. Central Ky. Lunatic Asylum*, 97 Ky. 458, 30 S. W. 971, 53 Am. St. Rep. 414, 28 L. R. A. 394. **N. Y.**—*Sanders v. Saxton*, 182 N. Y. 477, 75 N. E. 529, 108 Am. St. Rep. 826, 1 L. R. A. (N. S.) 727. **Ore.**—*Salem Mills Co. v. Lord*, 42 Ore. 82, 69 Pac. 1033, 70 Pac. 832. **Tenn.** *Lynn v. Polk*, 8 Lea 121.

But see *State ex rel. Pierce County v. Superior Court*, 86 Wash. 685, 151 Pac. 108, holding a suit to restrain payment of money on illegal state contract is a suit against the state.

28. **U. S.**—*Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. ed. 535; *Tindal v. Wesley*, 167 U. S. 204, 17 Sup. Ct. 770, 42 L. ed. 137 (ejection); *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 27 L. ed.

992. **Cal.**—See *King v. La Grange*, 61 Cal. 221. **La.**—*Richardson v. Liberty Oil Co.*, 143 La. 130, 78 So. 326. **N. M.** *Locke v. Trustees of New Mexico Re-form School*, 23 N. M. 487, 169 Pac. 304. **N. Y.**—*Saranac Land & T. Co. v. Roberts*, 195 N. Y. 303, 321, 88 N. E. 753. **Ore.**—*Salem Mills Co. v. Lord*, 42 Ore. 82, 69 Pac. 1033, 70 Pac. 832. **S. C.** *Butler v. Ellerbe*, 44 S. C. 256, 22 S. E. 425. **Tex.**—*Imperial Sugar Co. v. Cabell* (Tex. Civ. App.), 179 S. W. 83; *Whately v. Patten*, 10 Tex. Civ. App. 77, 31 S. W. 60.

Compare *infra*, I, C, 2, e.

[a] But a judgment in the suit does not conclude the state unless it becomes a party. *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 27 L. ed. 982.

29. *Western Union Tel. Co. v. Andrews*, 216 U. S. 165, 30 Sup. Ct. 286, 54 L. ed. 430; *Ex parte Young*, 209 U. S. 123, 156, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. N. S. 932, 14 Ann. Cas. 764; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Southern Ry. Co. v. McNeill*, 155 Fed. 756, 777.

[a] The duty need not be declared in the act sought to be enforced, but may arise from the general law. *Ex parte Young*, 209 U. S. 123, 157, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

30. *Ex parte Young*, 209 U. S. 123, 157, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. N. S. 932, 14 Ann. Cas. 764; *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. ed. 535; *Sperry-Hutchinson Co. v. Kuhn*, 212 Fed. 555; *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 144, 67 S. E. 613.

[a] There is a wide difference between a bill to prevent the commission



enjoin prosecutions under a confessedly valid law by an officer charged with its enforcement, is in effect a suit against the state.<sup>31</sup>

c. *Mandamus and Injunction Against an Officer.*—A proceeding by mandamus,<sup>32</sup> or injunction,<sup>33</sup> to compel or restrain the performance of ministerial duties, is not a suit against the state. But it is otherwise where the duty is purely executive and political.<sup>34</sup> And it has

of a positive trespass, and a bill against officials merely to test the constitutionality of a statute under which they act, by formal judicial proceedings. *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. ed. 535; *Union Pac. R. Co. v. Alexander*, 113 Fed. 347.

[b] The principle is that the courts cannot enjoin state officers from taking action under a constitutional statute unless the officers are about to do some act which, if unauthorized by a valid law, constitutes an unlawful interference with the rights of a party. *Missouri K. & T. Ry. Co. v. Shannon*, 100 Tex. 379, 100 S. W. 138.

[c] "Special duty" refers to an administrative duty exercised by boards and ministerial officers, but not attorneys. Therefore a proceeding merely to test the validity of a statute brought against officers, who act only by judicial proceedings "as attorneys for the state," is a suit against the state. *Western Union Tel. Co. v. Andrews*, 154 Fed. 95, 106.

31. *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. ed. 399; *Arbuckle v. Blackburn*, 113 Fed. 616. See *State v. Southern Ry. Co.*, 145 N. C. 495, 59 S. E. 570, 13 L. R. A. (N. S.) 966.

32. *U. S.*—*In re Ayers*, 123 U. S. 443, 506, 8 Sup. Ct. 164, 31 L. ed. 216; *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 27 L. ed. 992; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 623. *Ark.*—*Pitcock v. State*, 91 Ark. 527, 538, 121 S. W. 742, 134 Am. St. Rep. 88. *Fla.*—*Railroad Comrs. v. Pensacola & A. R. Co.*, 24 Fla. 417, 467, 5 So. 129. *Ia.*—*McKeown v. Brown*, 167 Iowa 489, 149 N. W. 593. *Mont.*—*State ex rel. Robert Mitchell Furn. Co. v. Toole*, 26 Mont. 22, 66 Pac. 496, 91 Am. St. Rep. 386, 55 L. R. A. 644. *N. Y.*—*Easton v. Canal Board*, 216 N. Y. 486, 111 N. E. 49. *S. C.*—*Ehrlich v. Jennings*, 78 S. C. 269, 58 S. E. 922, 125 Am. St. Rep. 795.

See *infra*, III, and the title, "Mandamus."

[a] Where the state has given its consent by directing its officers to perform certain duties, a proceeding to compel performance of those duties may be maintained. *U'ren v. State Board of Control*, 31 Cal. App. 6, 159 Pac. 615.

[b] But a suit against a state banking board to compel payment from the depositors' guaranty fund is a suit against the state, the statute having given the state a definite title to the fund. *Lankford v. Platte Iron Wks. Co.*, 235 U. S. 461, 35 Sup. Ct. 173, 59 L. ed. 316; *State Banking Board v. Oklahoma Bankers Trust Co. (Okla.)*, 164 Pac. 660; *National Sur. Co. v. State Banking Board (Okla.)*, 152 Pac. 389; *Lovett v. Lankford (Okla.)*, 145 Pac. 767.

33. *U. S.*—*Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *In re Ayers*, 123 U. S. 443, 506, 8 Sup. Ct. 164, 31 L. ed. 216; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 623. *S. C.*—*Butler v. Ellerbe*, 44 S. C. 256, 22 S. E. 425. *Tenn.*—*North British & Merc. Ins. Co. v. Craig*, 106 Tenn. 621, 62 S. W. 155. *W. Va.*—*Chesapeake & O. Ry. Co. v. Miller*, 19 W. Va. 408.

[a] The execution of an unconstitutional statute by a state officer may be enjoined, when the execution would violate the rights of the complainant. *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. ed. 363; *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 6 L. ed. 204.

34. *Lankford v. Schroeder*, 47 Okla. 279, 147 Pac. 1049, L. R. A. 1915F, 623; *Lovett v. Lankford (Okla.)*, 145 Pac. 767.

[a] A suit against an officer to prevent the exercise by the state through such officer of some act of sovereignty cannot be maintained. *Imperial Sugar Co. v. Cabell (Tex. Civ. App.)*, 179 S. W. 83.

been held that a suit to test the validity of a statute by compelling acts forbidden thereby, is a suit against the state.<sup>35</sup>

d. *Actions on State Contracts*.—An action against a state officer as such for breach of a contract made and breached in his official capacity is an action against the state,<sup>36</sup> as is a suit against state officers to compel acts constituting a performance of contracts of the state.<sup>37</sup> And a suit to test the legality of a state contract is not maintainable because the state would be a necessary party.<sup>38</sup> But where the state has given its assent and has enjoined upon its officers ministerial duties with reference to its contracts, a suit to enforce those duties is maintainable.<sup>39</sup>

e. *Actions To Recover and Control Property of State*.—A suit against state officers in their official capacity, to recover money or

35. *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. ed. 448 (*distinguished* in *Rolston v. Missouri Fund Comrs.*, 120 U. S. 390, 411, 7 Sup. Ct. 599, 30 L. ed. 721); *League v. De Young*, 2 Tex. 497.

36. *McDowell v. Warden of Reformatory*, 169 Mich. 332, 135 N. W. 265; *Imperial Sugar Co. v. Cabell* (Tex. Civ. App.), 179 S. W. 83.

37. U. S.—*Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. ed. 363; *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. ed. 842. Neb. *State ex rel. Davis v. Mortensen*, 69 Neb. 376, 95 N. W. 831. Okla.—*Love v. Filtch*, 33 Okla. 131, 124 Pac. 30, 44 L. R. A. (N. S.) 212 note. W. Va. *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 144, 67 S. E. 613.

[a] *Suit for Specific Performance*. *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 29 Sup. Ct. 458, 53 L. ed. 742; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. ed. 805.

[b] *Suit for Injunction To Forbid Acts Constituting a Breach of Contract*.—*In re Ayers*, 123 U. S. 443, 502, 8 Sup. Ct. 164, 31 L. ed. 216; *Pitcock v. State*, 91 Ark. 527, 121 S. W. 742, 134 Am. St. Rep. 88.

[c] *Mandamus To Enforce*.—Ill. *People ex rel. National Cigar Co. v. Dulaney*, 96 Ill. 503. Neb.—*State ex rel. Davis v. Mortensen*, 69 Neb. 376, 95 N. W. 831. W. Va.—*Miller v. State Board of Agriculture*, 46 W. Va. 192, 32 S. E. 1007, 76 Am. St. Rep. 811.

[d] *A mandamus proceeding to compel allowance of a disputed claim growing out of a contract of the state is an action against the state*. *Love v. Filtch*, 33 Okla. 131, 124 Pac. 30, 44

L. R. A. (N. S.) 212. See also *Jobe v. Urquhart*, 102 Ark. 470, 143 S. W. 121, Ann. Cas. 1914A, 351.

[e] *Suit to compel state officer to pay out state's money on its obligations*, (1) cannot be brought (U. S. *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. ed. 890, 35 L. R. A. N. S. 243. Ia. *Wilson v. Louisiana Purchase Expo. Com.*, 133 Iowa 586, 110 N. W. 1045, 119 Am. St. Rep. 646. N. C.—*Garner v. Worth*, 122 N. C. 250, 29 S. E. 364), unless (2) the legislature has prescribed this as an official duty. *Garner v. Worth*, 122 N. C. 250, 29 S. E. 364.

[f] *The levy of taxes to pay state contracts will not be compelled*. *State ex rel. Guar. & Ind. Co. v. Jumel*, 38 La. Ann. 337.

[g] *Whether the contract is valid is immaterial within the rule*. *Pitcock v. State*, 91 Ark. 527, 538, 121 S. W. 742, 134 Am. St. Rep. 88, *overruling* *McConnell v. Arkansas Brick & Mfg. Co.*, 70 Ark. 568, 69 S. W. 559.

38. *Peebles v. Byrd*, 98 Ga. 688, 693, 25 S. E. 677.

39. See *infra*, III, and I, C, 2, c.

[a] *Mandamus to compel signing of contract is not obnoxious to rule*. *State ex rel. Robert Mitchell Furn. Co. v. Toole*, 26 Mont. 22, 66 Pac. 496, 91 Am. St. Rep. 386, 55 L. R. A. 644.

[b] *Where the state has set apart a specific fund for payment of its obligations, a suit to compel its officers to pay that fund is not one against the state, as it has assented to the claim*. *U'ren v. State Board of Control*, 31 Cal. App. 6, 159 Pac. 615; *Carr v. State*, 127 Ind. 204, 26 N. E. 778, 22 Am. St. Rep. 624, 11 L. R. A. 370.

property belonging to the state cannot be maintained,<sup>40</sup> except where the delivery of the money or property is prescribed as a ministerial duty.<sup>41</sup> And similarly no injunction can be issued against the officers of the state to restrain or control the use of property already in the possession of the state or of money in its treasury.<sup>42</sup>

f. *Actions Relating to Taxation.*—Suits to compel state officers to exercise the state's power of taxation,<sup>43</sup> and it has been held, suits to recover money paid as taxes under an illegal assessment,<sup>44</sup> and suits to cancel or set aside tax sales to the state because a cloud on title,<sup>45</sup> are suits against the state. But mandamus proceedings to compel the exercise of ministerial duties imposed by the taxation statutes,<sup>46</sup> and injunction suits to restrain the levy and collection of an illegal tax,<sup>47</sup>

40. **U. S.**—*Western Union Tel. Co. v. Andrews*, 154 Fed. 95, 106. See *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 27 L. ed. 992. **Kan.**—*Nation v. Tulley*, 86 Kan. 564, 121 Pac. 507, suit to recover fees paid by mistake into state treasury. **Mo.**—*Weston v. Dane*, 52 Mo. 461. **S. C.**—*Lewry v. Thompson*, 23 S. C. 418, 1 S. E. 141. **V. Va.**—*Coal & Coke Co. v. Conky*, 67 W. Va. 129, 67 S. E. 623. See *infra*, I, C, 2, f. Compare *supra*, I, C, 2, b.

[a] and bill to effect a foreclosure of a lien and sale of property owned by and in the possession of the state will not lie. *Christian v. Atlantic & N. C. R. Co.*, 133 U. S. 235, 243, 10 Sup. Ct. 260, 33 L. ed. 389; *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 27 L. ed. 992.

[b] But a suit to recover money deposited by a corporation in trust for holders of its contracts is not a suit against the state, it having no interest in the fund. *Kruger v. Life & Annuity Assn.*, 106 Cal. 98, 39 Pac. 213. See *Merrill v. American Reserve Bond Co.*, 153 Fed. 305; *Illinois L. Ins. Co. v. Prewitt*, 153 Ky. 36, 93 S. W. 633.

41. **Cal.**—*U'ren v. State Board of Control*, 31 Cal. App. 6, 159 Pac. 615. **Fla.**—*Railroad Comrs. v. Pensacola & A. R. Co.*, 24 Fla. 417, 468, 5 So. 129. **La.**—*State ex rel. New Orleans Canal & B. Co. v. Heard*, 47 La. Ann. 1679, 18 So. 740, 47 L. R. A. 512. **W. Va.**—*Blue Jacket Consol. Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514; *Chesapeake & O. Ry. Co. v. Miller*, 19 W. Va. 408, 417.

**Mandamus**, see *supra*, I, C, 2, c, d, and see *infra*, III.

42. *Backnap v. Schild*, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. ed. 599. See

*Salem Mills Co. v. Lord*, 42 Ore. 82, 69 Pac. 1033, 70 Pac. 832.

43. *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. ed. 890, 35 L. R. A. N. S. 243; *Louisiana v. Steele*, 134 U. S. 230, 10 Sup. Ct. 511, 33 L. ed. 891. See *supra*, I, C, 2, c, and generally the title "Taxation."

[a] But mandamus to compel county officers to levy a tax to pay city bonds is not a suit against the state. *Graham v. Folsom*, 200 U. S. 248, 26 Sup. Ct. 245, 50 L. ed. 464.

44. *Smith v. Reeves*, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. ed. 1140; *Bloxham v. Florida C. & P. R. Co.*, 35 Fla. 625, 17 So. 902. But compare *Scottish Union & Nat. Ins. Co. v. Herriott*, 109 Iowa 606, 80 N. W. 665, 77 Am. St. Rep. 548.

45. **U. S.**—*Chandler v. Dix*, 194 U. S. 590, 24 Sup. Ct. 766, 48 L. ed. 1129, where tax laws were assailed as unconstitutional. **Mich.**—*Burrill v. Auditor-General*, 46 Mich. 256, 9 N. W. 273. **N. Y.**—*Sanders v. Saxton*, 182 N. Y. 477, 75 N. E. 529, 108 Am. St. Rep. 826, 1 L. R. A. (N. S.) 727.

But see *Croom v. Pennington*, 59 Fla. 473, 52 So. 957, where the property was sold for taxes already paid.

46. *Huidekoper v. Hadley*, 177 Fed. 1, 100 C. C. A. 395, 40 L. R. A. (N. S.) 505.

**Levy of taxes to pay state contracts**, see *supra*, I, C, 2, d.

47. **U. S.**—*Greene v. Louisville Ry. Co.*, 244 U. S. 499, 37 Sup. Ct. 673, 61 L. ed. 1280, Ann. Cas. 1917E, 88; *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 283, 26 Sup. Ct. 252, 50 L. ed. 477; *Osborn v. Bank of U. S.*, 9 Wheat. 738, 6 L. ed. 204; *Third Nat. Bank v. Mylin*, 76 Fed. 385; *Gregg v.*



or to restrain excessive and illegal acts under a valid tax law,<sup>48</sup> are not suits against the state.

**3. Suits Against State Agencies, Political Subdivisions, and Corporations.**—An action against a corporation which is merely a governmental agency is in effect against the state.<sup>49</sup> But a suit against a private corporation in which the state is a stockholder,<sup>50</sup> against corporations created by the state for certain public purposes, not governmental,<sup>51</sup> or against a public corporation, such as a college, receiving state aid,<sup>52</sup> or against administrative boards and commissions,<sup>53</sup> or a suit against a political subdivision of the state, such as a county,<sup>54</sup> or a suit against a city,<sup>55</sup> is not a suit against the state. These cases must be distinguished from those holding that public cor-

Sanford, 65 Fed. 151, 12 C. C. A. 525. **S. C.**—Ware Shoals Mfg. Co. v. Jones, 78 S. C. 211, 58 S. E. 811. **Tex.**—Missouri K. & T. R. Co. v. Shannon, 100 Tex. 379, 100 S. W. 138, 10 L. R. A. (N. S.) 681 (*distinguishing* Stephens v. Texas & P. Ry. Co., 100 Tex. 177, on ground that tax was enforceable only by a suit at law and the defendant had a remedy by defense); Galveston H. & S. A. R. Co. v. Davidson (Tex. Civ. App.), 93 S. W. 436.

But see *Producer's Oil Co. v. Stephens*, 44 Tex. Civ. App. 327, 99 S. W. 157; *Blue Jacket Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514.

[a] An action to prevent enforcement of an unreasonable and confiscatory tariff is not against the state if the act itself is unconstitutional as against plaintiff. *Western Union Tel. Co. v. Andrews*, 154 Fed. 95, 107.

[b] Assessment board created by unconstitutional statute may be enjoined. *Union Pac. Ry. Co. v. Alexander*, 113 Fed. 347.

[c] But the auditor having no authority to enforce collection of a tax, a bill to restrain him from collecting the tax would bind only the state, if anyone, and cannot be maintained. *Coulter v. Weir*, 127 Fed. 897, 62 C. C. A. 429.

48. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 390, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Allen v. Baltimore & O. R. Co.*, 114 U. S. 311, 5 Sup. Ct. 925, 962, 29 L. ed. 200; *Gregg v. Sanford*, 65 Fed. 151, 12 C. C. A. 525; *Louisville & N. R. Co. v. Bate*, 12 Lea (Tenn.) 573.

49. *Ala.*—*Alabama Girls' Indus. School v. Reynolds*, 143 Ala. 579, 42

So. 114. **Minn.**—*Berman v. Minnesota State Agricultural Society*, 93 Minn. 125, 100 N. W. 732. **N. C.**—*Moody v. State's Prison*, 128 N. C. 12, 38 S. E. 131, 53 L. R. A. 855.

50. See 5 STANDARD PROC. 550.

51. *Gross v. World's Columbia Exposition*, 105 Ky. 840, 49 S. W. 458, 43 L. R. A. 703; *Stern v. State Dental Examiner*, 50 Wash. 100, 96 Pac. 693.

52. *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. ed. 890, 35 L. R. A. N. S. 243, note; *Moscow Hdw. Co. v. Regents of the University*, 19 Idaho 420, 113 Pac. 731.

53. **U. S.**—*Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 388, 14 Sup. Ct. 1047, 38 L. ed. 1014 (railroad commission); *Rolston v. Missouri Fund Commrs.*, 120 U. S. 390, 7 Sup. Ct. 599, 30 L. ed. 721. **Fla.**—*Railroad Commrs. v. Pensacola & A. R. Co.*, 24 Fla. 417, 466, 5 So. 129. **Ill.**—*City of Chicago v. Chicago*, 207 Ill. 37, 69 N. E. 919, board of education.

[a] A suit to enjoin enforcement of railroad rates prescribed by a railroad commission is not a suit against the state. *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 388, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Railroad Commrs. v. Pensacola & A. R. Co.*, 24 Fla. 417, 466, 5 So. 129.

54. *Lincoln v. Luning*, 133 U. S. 529, 10 Sup. Ct. 363, 33 L. ed. 766. See also the title, "Municipal Corporations."<sup>2</sup>

55. *Terre Haute v. Farmers' Loan & Trust Co.*, 99 Fed. 838, 40 C. C. A. 117; *Camden Interstate Ry. Co. v. Catlettsburg*, 129 Fed. 421.

porations, though not immune from suit, are not liable in a suit for the torts of its officers.<sup>56</sup>

**4. Suits Between Individuals and Affecting Property of the State.**—Suits between individuals which may incidentally affect the interests of the state are not within the prohibition of the rule.<sup>57</sup> And where property of the state or in which the state has an interest comes before the court in the regular exercise of judicial administration without being forcibly taken from the possession of the state, the court will proceed with its duty in regard to that property.<sup>58</sup>

**5. Objections.**—If an action is against the state by name, it may be dismissed on motion.<sup>59</sup> But if brought against a state officer, the objection should be raised by a demurrer,<sup>60</sup> or plea,<sup>61</sup> or by answer,<sup>62</sup> for in such case the question has been held to belong to the merits rather than to the jurisdiction.<sup>63</sup> But it has been held that the objection may be interposed at any time,<sup>64</sup> and may be interposed by the court on its own motion.<sup>65</sup>

**D. RULES GOVERNING ACTIONS GENERALLY.**—When the state invokes the aid of the courts, she is bound by all the rules established for the administration of justice between individuals, as to the matters submitted by her in her suit.<sup>66</sup> An action can be brought against a

56. *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. ed. 890, 35 L. R. A. N. S. 243.

57. *Poindexter v. Greenhow*, 114 U. S. 270, 297, 5 Sup. Ct. 903, 962, 29 L. ed. 185; *Hogston v. Bell*, 185 Ind. 536, 112 N. E. 883.

58. *Christian v. Atlantic & N. C. R. Co.*, 133 U. S. 233, 243, 10 Sup. Ct. 260, 33 L. ed. 589; *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 27 L. ed. 992, the state may come in as plaintiff as in prize cases, or intervene in other cases where she has a lien or other claim on the property. See *supra*, 1, C. 2, c.

[a] **Foreclosure of a mortgage on property, not owned by the state in fee nor in its possession, is not prevented by a lien of the state thereon subsequent to the mortgage.** But a bill will not lie to effect a foreclosure or obtain possession of property belonging to the state. *Christian v. Atlantic & N. C. R. Co.*, 133 U. S. 233, 243, 10 Sup. Ct. 260, 33 L. ed. 589.

59. *Illinois Central R. Co. v. Adams*, 180 U. S. 28, 35, 21 Sup. Ct. 251, 45 L. ed. 410.

60. *Illinois Central R. Co. v. Adams*, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. ed. 410.

61. *Illinois Central R. Co. v. Adams*, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. ed. 410.

62. See *Illinois Central R. Co. v. Adams*, 180 U. S. 28, 21 Sup. Ct. 251, 45 L. ed. 410.

63. *Scully v. Bird*, 209 U. S. 481, 28 Sup. Ct. 597, 52 L. ed. 899; *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 858, 6 L. ed. 204. But see *Pitcock v. State*, 91 Ark. 527, 121 S. W. 742, 134 Am. St. Rep. 88; *Butler v. Ellerbe*, 44 S. C. 256, 22 S. E. 425.

64. *Butler v. Ellerbe*, 44 S. C. 256, 22 S. E. 425.

65. *Butler v. Ellerbe*, 44 S. C. 256, 22 S. E. 425, *approving Lowry v. Thompson*, 25 S. C. 416, 1 S. E. 141.

66. **U. S.**—*Port Royal & A. Ry. Co. v. South Carolina*, 60 Fed. 552. **Colo.** *Colorado & S. R. Co. v. People*, 53 Colo. 571, 128 Pac. 886. **Ind.**—*State ex rel. Baldwin v. The Insurance Co.*, 115 Ind. 257, 17 N. E. 574. **Ky.**—*Com. v. Helm*, 163 Ky. 69, 173 S. W. 389. **Minn.** *State ex rel. Young v. Holgate*, 107 Minn. 71, 119 N. W. 792. **N. Y.**—*People v. Canal Board*, 55 N. Y. 390, quoted from in 13 STANDARD PROC. 57, note 89 [e]. **Ohio.**—*State v. Buttles' Exr.*, 3 Ohio St. 309. **S. C.**—*State v. Pacific Guano Co.*, 22 S. C. 54, 74. **Tex.**—*Frishtoe v. Blum*, 92 Tex. 76, 45 S. W. 998; *State v. Zanco's Heirs*, 18 Tex. Civ. App. 127, 44 S. W. 527.

**Default of state**, see 6 STANDARD PROC. 806.

state only upon the terms and conditions imposed by the statute by which it consents to be sued;<sup>67</sup> but except in so far as the statute provides otherwise, the rules of law applicable to ordinary actions apply.<sup>68</sup>

**E. CONDITIONS PRECEDENT.**—A presentation of a claim against the state and a refusal to allow or pay it, are conditions precedent to suit upon it.<sup>69</sup> In a suit by the state to rescind a purchase of land, a tender of the purchase money paid is not required.<sup>70</sup> The state is ordinarily not required to give the bonds or security required of private parties.<sup>71</sup> And some statutes provide that leave of court to sue is not required where the state is plaintiff.<sup>72</sup>

**F. JURISDICTION AND VENUE.**<sup>73</sup>—The general rules as to venue govern actions by the state.<sup>74</sup> Such actions must be in the court,<sup>75</sup>

**67. Ind.**—*State v. Mutual Life Ins. Co.*, 175 Ind. 59, 93 N. E. 213, 42 L. R. A. (N. S.) 256. **Mass.**—*Burroughs v. Com.*, 224 Mass. 28, 112 N. E. 491, Ann. Cas. 1917A, 38. **Miss.**—*State v. Dinkins*, 77 Miss. 874, 27 So. 832; *Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382. **N. J.**—*American Dock & Imp. Co. v. Trustees of Public Schools*, 32 N. J. Eq. 428, 432, *affirmed*, 35 N. J. Eq. 181. **S. D.**—*C. & J. Michel Brew. Co. v. State*, 19 S. D. 302, 103 N. W. 40, 70 L. R. A. 911. **Va.**—*McCandlish v. Com.*, 76 Va. 1002.

**68. Cal.**—*San Francisco Law & Coll. Co. v. State*, 141 Cal. 354, 74 Pac. 1047. **N. Y.**—*Fulton L. H. & P. Co. v. State*, 62 Misc. 189, 116 N. Y. Supp. 1000. **Wis.**—*Baxter v. State*, 10 Wis. 454.

[a] Issues made by the pleadings to be tried in the ordinary way. *San Francisco Law & Coll. Co. v. State*, 141 Cal. 354, 74 Pac. 1047.

[b] New trial may be awarded. *San Francisco Law & Coll. Co. v. State*, 141 Cal. 354, 74 Pac. 1047.

[c] When a state submits itself without reservation to the jurisdiction of the court in a particular case, the court has power to give full effect to what the state has by its act allowed to be done. *Louisiana v. Jurmel*, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. ed. 448.

**69. Lyman Co. v. State**, 11 S. D. 391, 78 N. W. 17; *Northwestern Mut. Life Ins. Co. v. State*, 163 Wis. 484, 155 N. W. 609, 158 N. W. 328.

**70. State v. Snyder**, 66 Tex. 687, 18 S. W. 106.

**71. Holmes v. State**, 100 Ala. 291, 14 So. 51.

[a] The state may sue out an attachment without a bond or undertaking. *San Luis Obispo v. Greenberg*, 120 Cal. 300, 52 Pac. 797; *Morgan v. Menzies*, 60 Cal. 341.

Injunction bond, see 13 STANDARD PROC. 164.

But a statute in general terms requiring a bond before a preliminary injunction can be ordered, applies to the state seeking such an injunction. See 13 STANDARD PROC. 164, note 9.

Appeal bond, see *infra*, I, M.

Security for costs, see *infra*, I, N.

**72. Nye v. Kelly**, 19 Wash. 73, 52 Pac. 528, rule applies to suits by the agents of the state for its sole benefit.

**73. Appellate jurisdiction where the state is a party**, see 17 STANDARD PROC. 730.

**74. See State v. Snyder**, 66 Tex. 687, 695, 18 S. W. 106.

[a] The common law rule that in personal actions the king can lay his action in any county he pleases is abrogated by the code. *People v. Hayes*, 7 How. Pr. (N. Y.) 248, an action against a public officer.

[b] Suit to recover land to be brought in county where land is situated under general laws. *State v. Wichita Land & Cattle Co.*, 73 Tex. 450, 11 S. W. 488; *State v. Stone Cattle & Pasture Co.*, 66 Tex. 363, 17 S. W. 735.

**75. Title Guar. & Sur. Co. v. Guernsey**, 205 Fed. 94.

[a] Action To Be Brought in the Superior Court.—**U. S.**—*Deseret Water O. & I. Co. v. California*, 202 Fed. 498, 120 C. C. A. 641, under California practice in eminent domain cases. **Ind.**—*State v. Mutual Life Ins. Co.*, 175 Ind.



and in the county<sup>76</sup> designated in the statute. Some statutes require actions on behalf of the state to be brought where the seat of government is located.<sup>77</sup>

**Federal Courts.**<sup>78</sup>—The United States supreme court has original jurisdiction of suits by a state against citizens of another state,<sup>79</sup> as well as of controversies between two states,<sup>80</sup> and of suits between a state and the United States,<sup>81</sup> but it has no original jurisdiction of suits by a state against its own citizens.<sup>82</sup>

**G. PARTIES.**<sup>83</sup>—Where the state has legal title to the claim sued on or is the real party in interest, the action should be brought in its name,<sup>84</sup> though by a statute some suits on behalf of the state may

59, 76, 93 N. E. 213, 42 L. R. A. (N. S.) 256, "superior court of Marion Co." Wash.—State *ex rel.* Pierce County v. Superior Court, 86 Wash. 685, 151 Pac. 108, in superior court of Thurston county.

[b] **Action To Be Brought (1) in Supreme Court.**—Idaho. —Bragaw v. Gooding, 14 Idaho 288, 94 Pac. 438. S. D.—State *ex rel.* Egan v. Norbeck & Nicholson Co., 38 S. D. 93, 160 N. W. 524. Wis.—Northwestern Mut. Life Ins. Co. v. State, 163 Wis. 484, 155 N. W. 609, 158 N. W. 328; Dickson v. State, 1 Wis. 122. (2) But issues of fact deemed necessary to be tried by a jury, must be certified to a court of general jurisdiction for trial under statute. The parties cannot stipulate that issues certified for trial by jury shall be tried by the court without a jury. C. & J. Michel Brew. Co. v. State, 19 S. D. 302, 103 N. W. 40, 70 L. R. A. 911.

76. State *ex rel.* Milwaukee Medical College v. Chittenden, 127 Wis. 468, 107 N. W. 500.

[a] A "state officer" within the statute relating to venue refers only to heads of the executive department, such as the governor, lieutenant governor, state treasurer, secretary of state, attorney general and the like. State *ex rel.* Milwaukee Med. College v. Chittenden, 127 Wis. 468, 494, 107 N. W. 500.

[b] A proceeding by mandamus or certiorari is an action within the venue statute. State *ex rel.* Milwaukee Medical College v. Chittenden, 127 Wis. 468, 490, 107 N. W. 500. See generally the title "Suits and Actions."

77. See the statutes. Com. v. Ford, 29 Gratt. (70 Va.) 683.

78. See the title "United States Courts."

79. Oregon v. Hitchcock, 202 U. S.

60, 26 Sup. Ct. 568, 50 L. ed. 935; Minnesota v. Northern Sec. Co., 184 U. S. 199, 22 Sup. Ct. 398, 46 L. ed. 499; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 287, 8 Sup. Ct. 1370, 32 L. ed. 230.

[a] Act of congress conferring the means of enforcing the jurisdiction is not essential. Kentucky v. Denard, 24 How. (U. S.) 63, 10 L. ed. 717.

[b] Jurisdiction is not exclusive and state courts may entertain suit. Plaquemines Tropical Fruit Co. v. Henderson, 170 U. S. 511, 18 Sup. Ct. 685, 42 L. ed. 1123.

[c] But a suit by a state against citizens of another state and citizens of the plaintiff state is not within the original jurisdiction of the United States supreme court. California v. Southern Pac. Co., 157 U. S. 229, 15 Sup. Ct. 591, 39 L. ed. 683.

80. South Dakota v. North Carolina, 192 U. S. 286, 24 Sup. Ct. 269, 48 L. ed. 448; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 287, 8 Sup. Ct. 1370, 32 L. ed. 239.

81. United States v. Texas, 143 U. S. 621, 644, 12 Sup. Ct. 488, 36 L. ed. 285.

82. Pennsylvania v. Quicksilver Min. Co., 10 Wall. (U. S.) 553, 19 L. ed. 998; Cohens v. Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257. See also the title "United States Courts."

83. See the title "Parties."

84. Willis v. Standard Oil Co., 50 Minn. 290, 52 N. W. 652.

[a] A collector of fees for the state cannot sue therefor in his own name. Willis v. Standard Oil Co., 50 Minn. 290, 52 N. W. 652.

[b] A taxpayer (1) cannot sue for money had and received by the defendant for the use of the state. Schneider v. Yellott, 124 Md. 92, 91 Atl. 779. (2)

be brought in the name of its agents.<sup>85</sup> Where officers are clothed with a corporate or quasi-corporate character they may sue in that character.<sup>86</sup> In equity where the state is interested, it should be made a party if it can be done.<sup>87</sup> And it has been held the inability to do so excuses the joinder.<sup>88</sup> Private persons may sometimes use the name of the state.<sup>89</sup> Some proceedings such as mandamus<sup>90</sup> and quo warranto,<sup>91</sup> informations in civil cases,<sup>92</sup> and suits involving matters exclusively *publici juris*,<sup>93</sup> are sometimes brought in the name of the state on relation of its officers or the interested party. Actions on bonds given to the state are sometimes required to be brought in the name of the state on the relation of the party interested.<sup>94</sup> But actions by the state upon obligations to it, in which no individual has a special interest, may be brought in its name without a private relator.<sup>95</sup>

Nor can he sue to recover funds wasted or paid out. The action must be by the state. *Sears v. James*, 47 Ore. 50, 82 Pac. 14; *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

As to actions by taxpayer to enjoin illegal acts of state officers, see 13 STANDARD PROC. 14.

[c] Contract made by and with a state officer cannot be sued on in the name of the state. *State of Maine v. Gould*, 11 Metc. (Mass.) 220.

85. *Nye v. Kelly*, 19 Wash. 73, 52 Pac. 528.

86. *Willis v. Standard Oil Co.*, 50 Minn. 290, 52 N. W. 652.

87. *Davis v. Gray*, 16 Wall. (U. S.) 203, 220, 21 L. ed. 447.

88. *Davis v. Gray*, 16 Wall. (U. S.) 203, 21 L. ed. 447.

[a] But this rule does not authorize (1) the maintenance of a suit which is really against the state (*Sanders v. Saxton*, 182 N. Y. 477, 75 N. E. 529, 108 Am. St. Rep. 826, 1 L. R. A. [N. S.] 727), or (2) in which the state is an indispensable party. *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 451, 3 Sup. Ct. 292, 296, 27 L. ed. 992; *Salem Mills Co. v. Lord*, 42 Ore. 82, 69 Pac. 1033, 70 Pac. 832.

89. *Morris C. & Bkg. Co. v. State*, 14 N. J. L. 411, wherever the authority or the interest of the state in the prosecution of any of the great purposes of government comes into conflict with individual rights and the state or its agents is the actor in carrying these purposes into execution, an individual may use the name of the state to be relieved against its proceedings.

[a] But to enforce individual rights

of private persons, the name of the state cannot be used as a party plaintiff. *Cal.*—*People v. Pacheco*, 29 Cal. 210. *Ore.*—*State ex rel. Wilson v. Shively*, 10 Ore. 267. *S. D.*—*State ex rel. Gilbert v. Union Inv. Co.*, 7 S. D. 51, 63 N. W. 232.

90. See 19 STANDARD PROC. 246.

91. See the title "Quo Warranto."

92. See 12 STANDARD PROC. 711, et seq.

93. *Fla.*—*State ex rel. Fleming v. Crawford*, 28 Fla. 441, 509, 10 So. 118, 14 L. R. A. 253, governor. *Ind.*—*State ex rel. Baldwin v. The Insurance Co.*, 115 Ind. 257, 17 N. E. 574. *Ore.*—*State v. Duniway*, 63 Ore. 555, 128 Pac. 853, secretary of state. *Wis.*—*State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 471, 51 N. W. 724, 15 L. R. A. 561.

Winding up building and loan association, see 18 STANDARD PROC. 1108.

94. *Neal v. State*, 49 Ind. 51; *State ex rel. Bell v. United States Fid. & Guar. Co.*, 236 Mo. 352, 139 S. W. 163. See the title "Undertakings."

[a] The relator is the real party, and the state is but a nominal party. *Neal v. State*, 49 Ind. 51.

[b] Bonds running to the state should be sued on in the name of the state. *Schneider v. Yellott*, 124 Md. 92, 91 Atl. 779; *State v. Welbes*, 11 S. D. 86, 75 N. W. 820. See 8 STANDARD PROC. 786 (executor's bond); 10 STANDARD PROC. 883 (guardian's bonds), and the title "Undertakings."

Injunction bond, see 13 STANDARD PROC. 327, note 61 [a].

95. *Ind.*—*State ex rel. Baldwin v. The Insurance Co.*, 115 Ind. 257, 17 N. E. 574; *State v. Johnson*, 52 Ind. 197;

The state may intervene in an action when it has the requisite interest.<sup>96</sup>

H. PLEADING.—The pleadings in actions by and against states follow the general rules regulating pleadings generally.<sup>97</sup>

Set-off, Counterclaim and Recoupment.<sup>98</sup> — The state may plead set-offs in an action against it.<sup>99</sup> In an action by the state, the defendant may file a cross-bill which is part of the defense, ancillary to and dependent upon the suit of the state,<sup>1</sup> but a cross-bill seeking affirmative relief cannot be filed upon a claim upon which the state cannot be sued.<sup>2</sup> A defendant may plead a recoupment in an action by the

Shane v. Francis, 30 Ind. 92. Ore.—State v. Duniway, 63 Ore. 555, 128 Pac. 853. Wis.—State ex rel. Attorney General v. Cunningham, 81 Wis. 440, 471, 51 N. W. 724, 15 L. R. A. 561. Can.—Attorney General v. Winnipeg Elec. Ry. Co., 22 Man. 761, he may sue without a relator as well as with one.

But see Com. v. Helm, 163 Ky. 69, 173 S. W. 389, holding every suit instituted in the name of the state and for its benefit must be on the relation of some authorized person.

[a] The object in having a relator is for the protection of the crown against costs, not for the protection of the defendant. Attorney General v. Winnipeg Elec. Ry. Co., 22 Man. (Can.) 761, 767; Attorney General v. Logan (1891) 2 Q. B. Div. (Eng.) 100, 55 J. P. 615, 65 L. T. (N. S.) 162.

96. U. S.—Tindal v. Wesley, 167 U. S. 204, 17 Sup. Ct. 770, 42 L. ed. 137; Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. ed. 780; Railroad Tax Cases, 136 Fed. 233. Ga.—Central R. Co. v. Collins, 40 Ga. 582. Ind. Parker v. State ex rel. Powell, 132 Ind. 419, 31 N. E. 1114. Ia.—See Payette v. Marshall Co., 180 Iowa 660, 163 N. W. 592. Tex.—State v. Farmers' Loan & T. Co., 81 Tex. 530, 546, 17 S. W. 60.

And see 14 STANDARD PROC. 299.

Intervention by private persons in actions by and against the state, see 14 STANDARD PROC. 310.

97. See *infra*, this note, and Alabama v. Burr, 115 U. S. 413, 6 Sup. Ct. 81, 29 L. ed. 435 (declaration in action to enforce stockholders' liability); Neal v. State, 49 Ind. 51.

[a] Corporate character of state need not be alleged in its complaint. State v. Torinus, 22 Minn. 272.

[b] A presentation of plaintiff's

claim and its disallowance must be alleged. Chicago, M. & St. P. R. Co. v. State, 53 Wis. 509, 10 N. W. 560. Contra, Bickerdike v. State, 144 Cal. 681, 78 Pac. 270.

[c] Where leave of court is required as a condition to suit by the attorney-general, it must be alleged. People v. Bleecker St. & F. F. R. Co., 140 App. Div. 611, 125 N. Y. Supp. 1045.

[d] Character of state's title need not be alleged in action to recover state's property forcibly taken. State v. Delesdenier, 7 Tex. 76.

[e] An allegation that the state acquiesced in the illegal acts of its agents is a conclusion of the pleader. State v. Mutual Life Ins. Co., 175 Ind. 59, 81, 93 N. E. 213, 42 L. R. A. (N. S.) 256.

[f] A plea in abatement that the attorney general did not bring the suit cannot be filed. McCauley v. State, 21 Md. 556, 569.

[g] General denial may be pleaded by state. Baxter v. State, 10 Wis. 454.

98. See the title "Set-Off, Counterclaim and Recoupment."

Set-offs against the United States, see the title "United States."

Set-off in suits to collect taxes, see the title "Taxation."

99. Com. v. Phoenix Bank, 11 Mete. (Mass.) 129.

1. Port Royal & A. Ry. Co. v. South Carolina, 60 Fed. 552; Brundage v. Knox, 279 Ill. 450, 117 N. E. 123, 133.

[a] In a suit by the state to recover property, the defendant may file a cross-complaint to litigate and quiet the title to the property. State v. Portsmouth Sav. Bank, 106 Ind. 435, 7 N. E. 379.

2. Alabama Girls' Indus. School v. Reynolds, 143 Ala. 579, 42 So. 114; Holmes v. State, 100 Ala. 291, 14 So.



state.<sup>3</sup> But he cannot set up a set-off or counterclaim arising out of a distinct transaction,<sup>4</sup> although the contrary has been held.<sup>5</sup> A counterclaim against the state for any balance above the amount of the state's claim cannot be maintained.<sup>6</sup>

I. PROCESS.<sup>7</sup>—In actions against a state, process must be served on the governor,<sup>8</sup> or the attorney general,<sup>9</sup> or on both,<sup>10</sup> depending on the local statutes and rules of court.

J. APPEARANCE AND COUNSEL.<sup>11</sup>—Suits of the state must be brought by its proper legal officer.<sup>12</sup> The attorney general is commonly required to prosecute and defend all actions in which the state is a party or is interested.<sup>13</sup> But he cannot waive the immunity of

51; *American Dock & Imp. Co. v. Sup-*  
port of Public Schools, 32 N. J. Eq.  
428, 432, *affirmed*, 35 N. J. Eq. 181.

3. Ark.—*State v. Arkansas Brick & Mfg. Co.*, 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376, note. Md. *State v. Baltimore & O. R. Co.*, 34 Md. 344, 374. Miss.—*Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382.

[a] The defendant may plead credits and offsets properly defensive so far as they are dependent on or grow out of the transaction constituting the subject matter of the suit. Minn. *State ex rel. Young v. Holgate*, 107 Minn. 71, 119 N. W. 792. N. C.—*Battle v. Thompson*, 65 N. C. 406. Tenn. *Moore v. Tate*, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712. Va.—*McCandlish v. Com.*, 76 Va. 1002.

Compare *State v. Gaines*, 46 La. Ann. 431, 15 So. 174.

4. Mich.—*Auditor General v. Bay*, 106 Mich. 662, 64 N. W. 570. Md. *State v. Baltimore & O. R. Co.*, 34 Md. 344; *State v. Northern Central Ry. Co.*, 18 Md. 193. Minn.—*State ex rel. Young v. Holgate*, 107 Minn. 71, 119 N. W. 792. Miss.—*Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382. N. C. *Battle v. Thompson*, 65 N. C. 406. Tenn. *Moore v. Tate*, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712. Tex.—*Bates v. Texas*, 2 Tex. 616.

[a] Statutes providing for set-offs and counterclaims do not embrace the government unless it is named in the statute. Md.—*State v. Baltimore & O. R. Co.*, 34 Md. 344. Miss.—*Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382. Tenn.—*Moore v. Tate*, 87 Tenn. 725, 11 S. W. 935, 10 Am. St. Rep. 712.

5. Com. v. Barker, 126 Ky. 200, 103 S. W. 303; *State v. Franklin Bank*, 10 Ohio 91.

6. Ark.—*State v. Arkansas Brick & Mfg. Co.*, 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376. Cal.—*People v. Miles*, 56 Cal. 401. Ohio.—*State v. Franklin Bank*, 10 Ohio 91. Okla. See *United States v. Warren*, 12 Okla. 350, 71 Pac. 685.

7. See the titles "Process;" "Service of Process and Papers."

8. U. S.—*Kentucky v. Dennison*, 24 How. 66, 98, 16 L. ed. 717. S. C.—*Ex parte Dunn*, 8 S. C. 207. Tex.—*State v. Cook*, 57 Tex. 205; *State v. Steele*, 57 Tex. 200, service may be on either the governor or attorney general, the statute being silent.

9. *Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382; *State v. Cook*, 57 Tex. 205; *State v. Steele*, 57 Tex. 200.

[a] Substituted service of cross-bill on attorney-general is proper. *Port Royal & A. Ry. Co. v. South Carolina*, 60 Fed. 552.

10. *New Jersey v. New York*, 5 Pet. (U. S.) 284, 8 L. ed. 127; *Grayson v. Virginia*, 3 Dall. (U. S.) 320, 1 L. ed. 619.

11. Manner of making appearance, see 2 STANDARD PROC. 519.

12. Mich.—*People v. Navarre*, 22 Mich. 1. N. Y.—*People v. Hyman*, 136 N. Y. Supp. 145, in actions for trespass to public land the land commissioner may represent the state. Okla. *State ex rel. Haskell v. Huston*, 21 Okla. 782, 97 Pac. 982, governor. Ore. *State v. Duniway*, 63 Ore. 555, 128 Pac. 853. Tenn.—*State for use of Marion Co. v. Kelley*, 111 Tenn. 583, 82 S. W. 311, state revenue agent.

13. Ky.—*Com. v. Louisville Property Co.*, 141 Ky. 731, 133 S. W. 759. Md.—*McCauley v. State*, 21 Md. 556. Mo.—*State ex rel. Delmar Jockey Club v. Zachritz*, 166 Mo. 307, 65 S. W. 999, 89 Am. St. Rep. 711. Neb.—*State ex*

the state from suit and enter an appearance to make it a party defendant,<sup>14</sup> unless statute authorizes him to do so.<sup>15</sup>

K. CONTROL AND DISMISSAL OF SUIT.—The attorney general has complete control over and the power to dismiss or discontinue actions instituted by him on behalf of the state,<sup>16</sup> unless, it has been held, the state is merely a nominal party.<sup>17</sup>

L. JUDGMENT, AND ITS ENFORCEMENT.<sup>18</sup>—The state is bound by,<sup>19</sup> or on the other hand may enforce,<sup>20</sup> judgments in actions to which it is a party, to the same extent as any other suitor. A judgment in favor of an individual against a state consenting to be sued, cannot be enforced by a levy and sale of its property.<sup>21</sup> But provision is generally made for its satisfaction by appropriation of the legislature.<sup>22</sup>

*rel. Board of Transportation v. Fremont, Elkhorn & M. V. R. Co.*, 22 Neb. 313, 35 N. W. 118. N. Y.—*People v. Hyman*, 136 N. Y. Supp. 145. Okla. *Ex parte Kelly*, 45 Okla. 577, 146 Pac. 444; *State ex rel. Haskell v. Huston*, 21 Okla. 782, 97 Pac. 982, governor must request him to sue to authorize him to do so. Ore.—*State v. Duniway*, 63 Ore. 555, 128 Pac. 853. Tex.—*State v. Farmers' Loan & T. Co.*, 81 Tex. 530, 549, 17 S. W. 60. Wis.—*State v. Pederson*, 135 Wis. 31, 114 N. W. 828.

[a] On refusal of attorney general to sue, the treasurer (1) may sue (*State v. Pederson*, 135 Wis. 31, 114 N. W. 828), or (2) a citizen may do so. *State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N. W. 724, 15 L. R. A. 561.

[b] Attorney general cannot insist on being substituted as counsel in place of special counsel authorized by statute. *People v. Santa Clara Lumb. Co.*, 126 App. Div. 616, 110 N. Y. Supp. 280; *People v. Santa Clara Lumb. Co.*, 60 Misc. 150, 113 N. Y. Supp. 70.

[c] Authority of attorney general to institute suit should be questioned by motion to dismiss the information instead of by demurrer. *People v. Oakland Water Front Co.*, 118 Cal. 234, 50 Pac. 305.

[d] Filing of demurrer by attorney general is an appearance. *New Jersey v. New York*, 6 Pet. (U. S.) 323, 8 L. ed. 414.

14. U. S.—*Railroad Tax Cases*, 136 Fed. 233. Okla.—*National Sur. Co. v. State Banking Board*, 152 Pac. 389; *Lankford v. Schroeder*, 47 Okla. 279, 147 Pac. 1049, L. R. A. 1915F, 623. S. C.—*Ex parte Dunn*, 8 S. C. 207, 233.

15. *State Banking Board v. Farish*, 235 U. S. 498, 35 Sup. Ct. 185, 59 L. ed. 330; *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 26 Sup. Ct. 252, 50 L. ed. 477; *McKeown v. Brown*, 167 Iowa 489, 149 N. W. 593.

16. *People v. Spring Lake Dist.*, 253 Ill. 479, 97 N. E. 1042; *State v. Southern R. Co.*, 82 S. C. 12, 62 S. E. 1116. See the title "Quo Warranto."

17. *People v. North San Francisco H., etc. Assn.*, 38 Cal. 564. See also *People ex rel. Garrison v. Clark*, 72 Cal. 289, 13 Pac. 858.

18. Default, see 6 STANDARD PROC. 806.

19. *Tolleston Club v. State*, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; *State ex rel. Baldwin v. The Insurance Co.*, 115 Ind. 257, 17 N. E. 574; *State v. Cloudt* (Tex. Civ. App.), 84 S. W. 415.

20. See 15 STANDARD PROC. 747, note 57 [c].

Exemption as against state or nation, see 16 STANDARD PROC. 121.

21. N. C.—*Garner v. Worth*, 122 N. C. 250, 29 S. E. 364. Tex.—*Nichols v. State*, 11 Tex. Civ. App. 327, 32 S. W. 452. Wash.—*State ex rel. Peel v. Clausen*, 94 Wash. 166, 162 Pac. 1. See 15 STANDARD PROC. 851.

22. Idaho.—*Bragaw v. Gooding*, 14 Idaho 288, 94 Pac. 438; *George H. Fuller Desk Co. v. State*, 6 Idaho 315, 55 Pac. 857. Miss.—*Raymond v. State*, 54 Miss. 562, 28 Am. Rep. 382. N. C. *Clements v. State*, 77 N. C. 142, the clerk should transmit the proceedings and judgment to the general assembly. Tex.—*Nichols v. State*, 11 Tex. Civ. App. 327, 32 S. W. 452.

**Judgments in actions between states**, may be enforced against the state as such by the United States supreme court, by resort to appropriate remedies.<sup>23</sup>

**M. APPEAL AND ERROR.**—The state when aggrieved by a judgment in a civil action to which it is a party may appeal or prosecute writ of error therefrom.<sup>24</sup> And in criminal actions statutes generally confer the right to appeal from certain orders.<sup>25</sup> Appeals on behalf of the state must be taken by the officer designated by law,<sup>26</sup> and must be prosecuted in the same way as appeals by private persons,<sup>27</sup> though generally the state is not required to give an undertaking on appeal.<sup>28</sup> It is sometimes provided that where the state is a party, the appeal may be taken directly to the supreme court.<sup>29</sup>

The state may dismiss its appeal.<sup>30</sup> And causes in which the state is a party may be advanced out of their regular order on motion.<sup>31</sup>

23. *Virginia v. West Virginia*, 246 U. S. 565, 38 Sup. Ct. 400, 405, 62 L. ed. 883.

[a] The judgment debtor should be given an opportunity to abide by the judgment before compulsory process is resorted to. *Virginia v. West Virginia*, 241 U. S. 531, 36 Sup. Ct. 719, 60 L. ed. 1147.

24. **U. S.**—*South Carolina v. Wesley*, 155 U. S. 542, 15 Sup. Ct. 230, 39 L. ed. 254, dismissing writ of error of state as it was not a party. **Cal.** *Pacific Power Co. v. State*, 31 Cal. App. 719, 162 Pac. 641. See *United Railroads v. Colgan*, 153 Cal. 53, 94 Pac. 245. **Fla.**—*State v. Gadsden County*, 63 Fla. 620, 58 So. 232. **Idaho.**—*State v. Eves*, 6 Idaho 144, 53 Pac. 543. **Ill.** *People v. Blue Mountain Joe*, 129 Ill. 370, 21 N. E. 923. **Minn.**—*State v. Duluth Board of Trade*, 107 Minn. 506, 121 N. W. 395, 23 L. R. A. (N. S.) 1260. **Wash.**—*State ex rel. Murphy v. Snook*, 78 Wash. 671, 139 Pac. 764, in a disbarment proceeding.

[a] Under statute providing "any party aggrieved" may appeal. *State v. Eves*, 6 Idaho 144, 53 Pac. 543; *State ex rel. Murphy v. Snook*, 78 Wash. 671, 139 Pac. 764.

[b] A statute declaring writ of error may be granted on any judgment, embraces judgments in favor of the state. *Wheeler v. State*, 8 Tex. 228.

[c] Citation on writ of error must specify the state officer on whom service is to be made. Service should be on the district attorney, though service on the attorney general is valid in the absence of statute to the contrary. *Wheeler v. State*, 8 Tex. 228.

25. See the title "Review."

26. *Smith v. New Orleans*, 43 La. Ann. 726, 9 So. 773 (tax collector who is sued may appeal for the state); *State v. Duff*, 83 Wis. 291, 53 N. W. 446, district attorney or attorney general may appeal. See *Succession of Fletcher*, 12 La. Ann. 498.

[a] Governor may appeal. *State ex rel. Livingston v. Graham*, 25 La. Ann. 629; *State ex rel. Strauss v. Dubuclet*, 25 La. Ann. 161.

[b] An appeal by an unauthorized person does not give the appellate court jurisdiction. *State v. Duff*, 83 Wis. 291, 53 N. W. 446.

[c] The attorney general only can appear for the state in the supreme court. *People v. Pacheco*, 29 Cal. 210; *People v. Navarre*, 22 Mich. 1. See *Sacramento v. Central Pac. R. Co.*, 61 Cal. 250.

27. *State v. Kroner*, 2 Tex. 492.

[a] Appeal should be in name of state where it is the only party. *Boston & A. R. Co. v. Com.*, 157 Mass. 68, 31 N. E. 696.

[b] If the transcript on an appeal by the state is not filed in time, the appeal will be dismissed as in the case of appeals by private persons. *State v. Kroner*, 2 Tex. 492.

28. *San Francisco Law & Coll. Co. v. State*, 141 Cal. 354, 74 Pac. 1047 (whether the state is plaintiff or defendant); *Smith v. New Orleans*, 43 La. Ann. 726, 9 So. 773.

29. *Canal Comrs. v. Sanitary District*, 191 Ill. 326, 61 N. E. 71. See 17 STANDARD PROC. 730, note 53.

30. *State v. Moriarty*, 20 Iowa 595.

31. **U. S.**—*Hoge v. Richmond & Dan-*



N. COSTS.—Costs cannot be taxed against the state, unless statute so provides.<sup>32</sup> Security for costs need not be given by the state.<sup>33</sup>

II. STATE BOUNDARIES.—Questions of boundary of the state are not questions to be determined by the judicial department of a state.<sup>34</sup> But suits involving questions of boundary between the general government and a state or between two states of the union are judicial questions falling within the original jurisdiction of the United States supreme court.<sup>35</sup> Such suits are instituted by a bill in equity,<sup>36</sup> and determined in the same manner as suits involving private boundaries.<sup>37</sup> The costs of the suit are usually divided between the states.<sup>38</sup>

III. MANDAMUS AGAINST STATE OFFICERS.—A proceeding by mandamus is an appropriate remedy to compel state officers to perform their official duties, not involving the exercise of a dis-

ville R. R. Co., 93 U. S. 1, 23 L. ed. 781; Ward v. State, 12 Wall. 163, 20 L. ed. 260. Fla.—Spratt v. Jacksonville, 29 Fla. 171, 10 So. 734. Ind. Parker v. State *ex rel.* Powell, 132 Ind. 419, 31 N. E. 1114. N. Y.—People *ex rel.* Augerstein v. Kinney, 92 N. Y. 647, notice of motion.

[a] The state must be a party in name and materially interested to entitle it to have the cause advanced. Spratt v. Jacksonville, 29 Fla. 171, 10 So. 734.

32. Costs in civil cases, see 5 STANDARD PROC. 828.

Costs in criminal cases, see 5 STANDARD PROC. 772.

Costs on appeal, see 5 STANDARD PROC. 983.

33. People v. Pierce, 6 Ill. 553. See the title "Security for Costs."

34. Harrold v. Arrington, 64 Tex. 223.

35. Louisiana v. Mississippi, 202 U. S. 1, 26 Sup. Ct. 408, 50 L. ed. 913; United States v. Texas, 143 U. S. 621, 12 Sup. Ct. 488, 36 L. ed. 285.

36. United States v. Texas, 143 U. S. 621, 12 Sup. Ct. 488, 36 L. ed. 285; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 287, 8 Sup. Ct. 1370, 32 L. ed. 239; New Jersey v. New York, 5 Pet. (U. S.) 284, 290, 8 L. ed. 127. See Fowler v. Lindsay, 3 Dall. (U. S.) 411, 1 L. ed. 658. "I will not say that a state could not sue at law."

37. Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 734, 9 L. ed. 1233. See the title "Lands and Land Transfers."

[a] The rules and practice of the English court of chancery govern.

Rhode Island v. Massachusetts, 14 Pet. (U. S.) 210, 10 L. ed. 423.

[b] Parties.—The inhabitants of the disputed territory need not be made parties. Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 9 L. ed. 1233.

[c] The United States May Intervene.—Florida v. Georgia, 17 How. (U. S.) 478, 15 L. ed. 181. See 14 STANDARD PROC. 300, note 67.

[d] An issue of law may be directed; a commission awarded; (1) or if the court is satisfied without either, it may decree the location of the boundary. Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 734, 9 L. ed. 1233. See also North Carolina v. Tennessee, 240 U. S. 652, 36 Sup. Ct. 604, 60 L. ed. 847; Maryland v. Virginia, 225 U. S. 1, 32 Sup. Ct. 672, 56 L. ed. 955; Missouri v. Iowa, 160 U. S. 688, 16 Sup. Ct. 433, 40 L. ed. 583, 165 U. S. 118, 17 Sup. Ct. 290, 41 L. ed. 655. (2) A confirmation of the commissioner's report is not a final decree and it may be changed or set aside, on motion, at a subsequent term. Iowa v. Illinois, 151 U. S. 238, 14 Sup. Ct. 333, 38 L. ed. 145.

[e] Question of Boundary a Mixed Question of Law and Fact.—United States v. Jackalow, 1 Black (U. S.) 484, 17 L. ed. 225.

38. Missouri v. Iowa, 165 U. S. 118, 144, 17 Sup. Ct. 290, 41 L. ed. 655; Nebraska v. Iowa, 143 U. S. 359, 370, 12 Sup. Ct. 396, 36 L. ed. 186, 145 U. S. 519, 12 Sup. Ct. 976, 36 L. ed. 798.

[a] Where a state defendant does not desire or need the determination of the court as to boundary, the un-

cretion,<sup>39</sup> unless the act to be performed is such that the proceeding is in effect a suit against the state.<sup>40</sup>

**State Contracts.**—The writ of mandamus is an appropriate remedy to compel the performance of official duties with reference to state contracts,<sup>41</sup> where the right is clear,<sup>42</sup> and the act to be performed is not discretionary,<sup>43</sup> unless the act to be performed is such that the suit would be one against the state.<sup>44</sup>

**IV. INJUNCTION AGAINST STATE OFFICERS.**—The performance by state officers of illegal acts not involving the exercise of discretion may be enjoined in accordance with the general rules regulating the granting of injunctive relief.<sup>45</sup> But their action when

successful plaintiff will be taxed with costs. *Missouri v. Illinois*, 202 U. S. 598, 26 Sup. Ct. 713, 50 L. ed. 1160.

39. Mandamus against governor, see the title "Mandamus."

As to claims, see *infra*, V.

Appointment and removal from office, see the title "Officers."

As to elections, see the title "Mandamus."

Against highway officers, see the title "Highways, Streets and Bridges."

Against state health officers, see the title "Health."

40. See *supra*, I, C, 2.

41. State *ex rel.* Woodruff-Dunlap Print. Co. v. Cornell, 52 Neb. 25, 71 N. W. 961.

For fuller statement of rules and their application, see the title "Municipal Corporations."

[a] The award of a contract may be compelled. State *ex rel.* Woodruff-Dunlap Print. Co. v. Cornell, 52 Neb. 25, 71 N. W. 961. But compare *Mills Pub. Co. v. Larrabee*, 78 Iowa 97, 42 N. W. 593, holding suit to be against the state.

[b] Where contract is to be awarded to "lowest responsible bidder," the awarding of the contract will not be compelled. Mo.—State *ex rel.* State Journal Co. v. McGrath, 91 Mo. 386, 3 S. W. 846. Mont.—State *ex rel.* Eaves v. Rickards, 16 Mont. 145, 40 Pac. 210, 50 Am. St. Rep. 476, 28 L. R. A. 298. Neb.—State *ex rel.* Woodruff-Dunlap Print. Co. v. Bartley, 50 Neb. 874, 70 N. W. 367. Ohio.—State *ex rel.* Nevins v. Comrs. of Printing, 18 Ohio St. 386. W. Va.—Butler v. Printing Comrs., 68 W. Va. 493, 70 S. E. 119, 38 L. R. A. (N. S.) 653.

[c] Where an option to reject any and all bids is reserved, the acceptance of a particular bid will not be com-

pelled. *Hilton Bridge Const. Co. v. Matter*, 13 App. Div. 24, 43 N. Y. Supp. 99. See State *ex rel.* Woodruff-Dunlap Print. Co. v. Cornell, 52 Neb. 25, 71 N. W. 961.

[d] Where action of board in awarding a contract to another is so defective, it is void, the writ may be granted, but ordinarily the writ does not lie to annul contracts. *Detroit Free Press v. Board of State Auditors*, 47 Mich. 135, 10 N. W. 171. See also *Hilton Bridge Const. Co. v. Matter*, 13 App. Div. 24, 43 N. Y. Supp. 99; *Capital Printing Co. v. Hoey*, 124 N. C. 767, 33 S. E. 160. Compare *Marsh v. State*, 2 Neb. (Unof.) 372, 96 N. W. 520.

[e] The signing of a contract awarded by a state agent may be compelled. State *ex rel.* Robert Mitchell Furn. Co. v. Toole, 26 Mont. 22, 66 Pac. 496, 91 Am. St. Rep. 386, 55 L. R. A. 644.

42. State *ex rel.* Woodruff-Dunlap Print. Co. v. Bartley, 50 Neb. 874, 70 N. W. 367.

[a] If petitioner's bid is defective, mandamus to compel award of contract will be denied. *In re Weed, Parsons & Co. v. Beach*, 56 How. Pr. (N. Y.) 470.

[b] Enforcement of contract in excess of authority will not be compelled. *People ex rel. New York Cent. & H. R. R. Co. v. Walsh*, 159 App. Div. 252, 144 N. Y. Supp. 367.

43. See *supra*, this section.

44. See *supra*, I, C, 2.

45. U. S.—*Ex parte* Younge, 209 U. S. 123, 155, 28 Sup. Ct. 441, 52 L. ed. 714. 14 Ann. Cas. 764, 3 L. R. A. (N. S.) 932, enjoining enforcement of unconstitutional law. Del.—*Delaware Sur. Co. v. Layton*, 50 Atl. 373, against secretary of state. Pa.—*Mott*

involving a discretion will not be enjoined unless the discretion is exercised fraudulently, arbitrarily or illegally.<sup>46</sup>

**V. CLAIMS AGAINST STATES.**—Though some statutes authorize actions upon claims against the state,<sup>47</sup> in some jurisdictions a claimant is given a remedy by appeal to the courts from an adverse decision on his claim.<sup>48</sup> The writ of certiorari is sometimes used to review the audit.<sup>49</sup> And in some states courts of claims have been created with jurisdiction to hear and determine private claims against the state.<sup>50</sup>

**Mandamus To Enforce Claims Against.**—Mandamus will lie to compel action on claims against states and territories in accordance with the general rules elsewhere discussed,<sup>51</sup> unless the circumstances are such that the proceeding is one against the state and the state has not consented to be sued.<sup>52</sup> Accordingly the proper officers will be compelled to act on a claim when they wholly refuse to do so.<sup>53</sup> But their

*v. Pennsylvania R. Co.*, 30 Pa. 9, 72 Am. Dec. 664, enjoining governor. *S. D. Franklin v. Appel*, 10 S. D. 391, 73 N. W. 259, relief denied where legal remedy is adequate.

As an action against the state, see *supra*, I, B, 2, c.

For general rules, see the titles "Injunctions;" "Municipal Corporations."

Injunction against board of health, see 10 STANDARD PROC. 988.

46. *Southern Min. Co. v. Lowe*, 105 Ga. 352, 31 S. E. 191; *Henkel v. Millard*, 97 Md. 24, 54 Atl. 637.

[a] Prohibiting an act which the officer has no legal right to do is not an interference with his discretion. *Ex parte Young*, 209 U. S. 123, 159, 28 Sup. Ct. 441, 52 L. ed. 714, 14 Ann. Cas. 764, 13 L. R. A. (N. S.) 932.

47. See *supra*, I, B.

48. *Ind.*—State *ex rel. Hord v. Board of Comrs.*, 101 Ind. 69. *Neb.*—State *ex rel. Society v. Cornell*, 56 Neb. 143, 76 N. W. 459. *N. Y.*—*Slavin v. State*, 152 N. Y. 45, 46 N. E. 321; *Spencer v. State*, 135 N. Y. 619, 32 N. E. 128; *McMaster v. State*, 108 N. Y. 542, 15 N. E. 417. *S. C.*—*Carolina Glass Co. v. State*, 87 S. C. 270, 69 S. E. 391.

But see *Robinson v. La Follette*, 46 W. Va. 565, 33 S. E. 288, holding writ of error does not lie from decision of auditor.

[a] The right to appeal is waived by an acceptance of warrant for part of claim allowed. *Weston v. Falk*, 66 Neb. 198, 92 N. W. 204, 93 N. W. 131.

[b] On appeal, the claim must be

presented and acted upon on the same proofs (1) submitted to the auditor. *Garneau v. Moore*, 39 Neb. 701, 58 N. W. 438. (2) The court is clothed with the same powers possessed by the board of audit. *Danolds v. State*, 89 N. Y. 36, 51, 42 Am. Rep. 277.

49. *People ex rel. Lovett v. Miller*, 101 App. Div. 291, 91 N. Y. Supp. 639. See the title "Certiorari."

50. *O'Neil v. State*, 223 N. Y. 40, 119 N. E. 95; *Quayle v. State*, 192 N. Y. 47, 84 N. E. 583 (jurisdiction of court considered); *People ex rel. Palmer v. Travis*, 180 App. Div. 25, 167 N. Y. Supp. 467; *Taylor v. State*, 124 N. Y. Supp. 818.

[a] Notice of intention to file a claim is a condition precedent. *Buckles v. State*, 221 N. Y. 418, 117 N. E. 811.

**United States court of claims**, see the title "United States Courts."

51. See the titles "Mandamus;" "Officers."

[a] The board of state auditors is not subject to mandamus issued by the supreme court. *People ex rel. Dewey v. Board of State Auditors*, 32 Mich. 191.

52. See *supra*, I, C, 2.

53. *Colo.*—*Howell v. Cooper*, 2 Colo. App. 530, 31 Pac. 523. *Idaho.*—*Bragaw v. Gooding*, 14 Idaho 288, 94 Pac. 438; *Pyke v. Steunenberg*, 5 Idaho 614, 51 Pac. 614. *La.*—State *ex rel. New Orleans C. & B. Co. v. Heard*, 47 La. Ann. 1679, 18 So. 746, 47 L. R. A. 512; State *ex rel. Collens v. Jumel*, 30 La. Ann. 861. *Mo.*—State *ex rel. Wilcox v. Weigel*, 48 Mo. 29, denying



judgment as to allowance or disallowance of a claim will not be interfered with or controlled,<sup>54</sup> unless it is exercised arbitrarily.<sup>55</sup> But even in the latter case, the allowance of a claim against a special fund will not be compelled, if the fund is exhausted.<sup>56</sup> A duty to issue a warrant on a claim against the state, will be enforced,<sup>57</sup> if an appropriation to pay the claim has been made,<sup>58</sup> and has not been withdrawn.<sup>59</sup> And similarly payment of a warrant may be compelled,<sup>60</sup> if there are funds on hand applicable to and sufficient for its pay-

writ as respondents were not required to act on claim in question. **Neb.** *State ex rel. Society v. Cornell*, 56 Neb. 143, 76 N. W. 459. **N. Y.**—*People ex rel. Noyes v. Schmer*, 81 Misc. 522, 143 N. Y. Supp. 475. **Ore.**—*Irwin-Hodson Co. v. Kincaid*, 31 Ore. 478, 49 Pac. 765. **S. D.**—*Sawyer v. Mayhew*, 10 S. D. 18, 71 N. W. 141.

54. **Ark.**—*Jobe v. Urquhart*, 102 Ark. 470, 143 S. W. 121, Ann. Cas. 1914A, 351. **Cal.**—*Sullivan v. Gage*, 145 Cal. 759, 79 Pac. 537; *Springer v. Green*, 46 Cal. 73. **Colo.**—*Howell v. Cooper*, 2 Colo. App. 530, 31 Pac. 523. **Idaho.**—*Kroutinger v. Board of Examiners*, 8 Idaho 463, 69 Pac. 279; *Pyke v. Steunenberg*, 5 Idaho 614, 51 Pac. 614. **Mo.**—*State ex rel. Keck v. Seibert*, 130 Mo. 202, 222, 32 S. W. 670, statute makes auditor quasi judicial officer. **N. Y.**—*People ex rel. New York Cent. & H. R. R. Co. v. Walsh*, 159 App. Div. 252, 144 N. Y. Supp. 367. **Ore.**—*Irwin-Hodson Co. v. Kincaid*, 31 Ore. 478, 49 Pac. 765. **S. D.**—*Sawyer v. Mayhew*, 10 S. D. 18, 71 N. W. 141. **W. Va.**—*Robinson v. La Follette*, 46 W. Va. 565, 33 S. E. 288. **Wis.**—*State ex rel. Martin v. Doyle*, 38 Wis. 92.

55. *State ex rel. Davis v. Cutler*, 34 Utah 99, 95 Pac. 1071.

[a] The allowance of claims legally chargeable against the state may be compelled. **Cal.**—*San Luis Obispo v. Gage*, 139 Cal. 398, 73 Pac. 174. **Ore.** *State v. Brown*, 10 Ore. 215; *Burch v. Earhart*, 7 Ore. 58. **Utah.**—*State ex rel. Davis v. Cutler*, 34 Utah 99, 95 Pac. 1071; *Thoreson v. State Board of Examiners*, 19 Utah 18, 28, 57 Pac. 175, where board rejected claim because statute was unconstitutional.

[b] Where the legislature allows a claim, the duty of the commissioners to adjust it will be enforced by mandamus. *People ex rel. Cayuga Nation v. Comrs. of Land Office*, 207 N. Y. 42, 100 N. E. 735.

56. *Payne v. State Board of Wagon Road Comrs.*, 4 Idaho 384, 39 Pac. 548.

57. **Ark.**—*Jobe v. Caldwell*, 93 Ark. 503, 125 S. W. 423. **Colo.**—*Schwanbeck v. People ex rel. Smith*, 15 Colo. 64, 24 Pac. 575. **Ill.**—*People ex rel. Clemens v. Smith*, 43 Ill. 219, 92 Am. Dec. 109. **La.**—*State ex rel. New Orleans C. & B. Co. v. Heard*, 47 La. Ann. 1679, 18 So. 746, 47 L. R. A. 512. **Nev.**—*State ex rel. Lyon County v. Hallock*, 20 Nev. 326, 22 Pac. 123. **Wyo.**—*State ex rel. Jamison v. Forsyth*, 21 Wyo. 359, 133 Pac. 521.

Form of petition for writ to draw warrant, see 9 STANDARD PROC. 807.

58. *Files v. State*, 42 Ark. 233.

[a] A duty to issue a certificate of indebtedness will be enforced where no appropriation has been made. *Files v. State*, 42 Ark. 233.

59. *Com. v. Boutwell*, 13 Wall. (U. S.) 526, 20 L. ed. 631.

60. **Colo.**—*Nance v. Stuart*, 7 Colo. App. 510, 44 Pac. 779. **Ill.**—*People ex rel. Clemens v. Smith*, 43 Ill. 219, 92 Am. Dec. 109. **La.**—*State ex rel. New Orleans C. & B. Co. v. Heard*, 47 La. Ann. 1679, 18 So. 746, 47 L. R. A. 512.

[a] Auditing of claim and issuance of warrant therefor are necessary prerequisites to mandamus to compel payment of claim. *L. P. Bayne & Co. v. Jenkins*, 66 N. C. 356.

[b] Although the treasurer has made payment to another person under mistake, he will be compelled to pay relator's warrant. *People ex rel. Clemens v. Smith*, 43 Ill. 219, 92 Am. Dec. 109, where payment was made on a forged power of attorney.

[c] Where fraud in the creation of the claim is set up, the writ will not be issued. *Garner v. Worth*, 122 N. C. 250, 29 S. E. 364.

ment.<sup>61</sup> But payment of state bonds in the medium named therein will not be compelled where the legislature has determined to pay them in a different medium.<sup>62</sup>

**VI. TERRITORIAL COURTS.**—Territorial courts are created by act of congress,<sup>63</sup> and they usually possess jurisdiction of causes of a civil nature without regard to the inquiry whether the controversy, if it had arisen in a state, would have been cognizable in the state or in the federal courts.<sup>64</sup> Though for some purposes they may be vested with the powers of the courts of the United States,<sup>65</sup> they are not, strictly speaking courts of the United States within the meaning of the constitution,<sup>66</sup> but are legislative courts of the territory, created by virtue of the power of congress to make needful laws respecting territories.<sup>67</sup> The acts of congress respecting proceedings in the United States courts do not apply to the procedure in territorial courts,<sup>68</sup> though it has been held that the federal equity rules bind the territorial court in the absence of a local equity system.<sup>69</sup> The territorial courts may adopt rules not in conflict with the constitution or laws of the United States or of the territory.<sup>70</sup>

**Particular Territories and United States Possessions.**—The judicial power of Alaska is vested in a district court and in commissioners exercising powers of probate courts and in commissioners as ex officio justices of the peace,<sup>71</sup> and that of Hawaii is vested in a supreme court,

61. *Colo.*—Nance v. People, 25 Colo. 252, 54 Pac. 631; Nance v. Stuart, 7 Colo. App. 510, 44 Pac. 779. *Me.* Weston v. Dane, 51 Me. 461. *Tenn.* State ex rel. O'Connor v. Craig, 64 S. W. 326.

[a] Payment out of funds not appropriated to the payment of the warrant in question will not be directed. Nance v. People, 25 Colo. 252, 54 Pac. 631.

[b] A duty to indorse the warrant "not paid for want of funds" may be enforced by mandamus, if there are no funds on hand. State ex rel. Hellar v. Young, 18 Wash. 21, 50 Pac. 786.

62. State ex rel. Seeligman v. Hays, 50 Mo. 34, 11 Am. Rep. 402.

63. Baker v. Morton, 12 Wall. (U. S.) 150, 20 L. ed. 262.

64. Baker v. Morton, 12 Wall. (U. S.) 150, 20 L. ed. 262; Benner v. Porter, 9 How. (U. S.) 235, 13 L. ed. 119. See United States v. Mays, 1 Idaho 763.

**Jurisdiction over Indians,** see 12 STANDARD PROC. 41.

65. Summers v. United States, 251 U. S. 92, 34 Sup. Ct. 38, 58 L. ed. 137; Reynolds v. United States, 98 U. S. 145, 154, 25 L. ed. 244; United States v. Falshaw, 4 Ariz. 330, 40 Pac. 209.

66. *U. S.*—McAllister v. United States, 141 U. S. 174, 11 Sup. Ct. 949, 35 L. ed. 693; Good v. Martin, 95 U. S. 90, 98, 24 L. ed. 341; Clinton v. Englebrecht, 13 Wall. 434, 447, 20 L. ed. 659. *Alaska.*—Allen v. Myers, 1 Alaska 114. *Haw.*—In re Wong Tuck, 11 Hawaii 600, 626; Hawaii v. Edwards, 11 Hawaii 571. *Mont.*—United States v. Upham, 2 Mont. 170.

67. Clinton v. Englebrecht, 13 Wall. (U. S.) 434, 447, 20 L. ed. 659; Benner v. Porter, 9 How. (U. S.) 235, 13 L. ed. 119; United States v. Upham, 2 Mont. 170. See also Stevens v. Baker, 1 Wash. Ter. 315.

68. Hornbuckle v. Toombs, 18 Wall. (U. S.) 648, 21 L. ed. 966.

69. Stevens v. Baker, 1 Wash. Ter. 315.

70. United States v. Mays, 1 Idaho 763.

71. In re Bruno Munro, 1 Alaska 279, towns cannot create municipal courts.

[a] The district court of Alaska (1) acts in a dual capacity, first as a territorial court for the administration of the local laws, and second as a United States court to administer federal laws applicable to the district. United States v. North. Pac. W. & T.

circuit courts and in such inferior courts as the legislature may from time to time establish.<sup>72</sup> The judicial power of the Philippine Islands is vested in a supreme court, courts of first instance, justices' courts, municipal courts and such special tribunals as may be authorized by law.<sup>73</sup> And with respect to Porto Rico its organic act provides that its judicial power shall be vested in the courts already established, including certain municipal and police courts.<sup>74</sup> The judicial power of the Canal Zone is vested in a supreme court and in circuit, district and municipal courts.<sup>75</sup>

Co., 4 Alaska 552; *United States v. Doo-Noch-Keen*, 2 Alaska 624. See also *T. L. Coquitlam v. United States*, 163 U. S. 346, 16 Sup. Ct. 1117, 41 L. ed. 184, it is in effect the supreme court of the territory. (2) It has general jurisdiction in civil and criminal cases. *Bird v. United States*, 187 U. S. 118, 23 Sup. Ct. 42, 47 L. ed. 100; *In re Bruno Munro*, 1 Alaska 279. (3) It has admiralty jurisdiction co-extensive with the district courts of the United States. *In re Cooper*, 143 U. S. 472, 12 Sup. Ct. 453, 36 L. ed. 232; *The Nugget*, 1 Alaska 202. (4) It has not appellate jurisdiction of appeals from a judgment of a commissioner sitting as a justice's court, for less than two hundred dollars. *Decker v. Williams*, 73 Fed. 308.

72. *Carter v. Gear*, 197 U. S. 348, 25 Sup. Ct. 491, 49 L. ed. 787 (as to powers of judges at chambers); *In the Matter of Carter*, 16 Hawaii 242; *In re Ah Ho*, 11 Hawaii 654. See also *Wynne v. United States*, 217 U. S. 234, 30 Sup. Ct. 447, 54 L. ed. 748.

[a] The supreme court is primarily a court of appellate jurisdiction with such original jurisdiction only as is conferred by law. *In re Pringle*, 22 Hawaii 589; *Wahiawa Sugar Co. v. Waiialua Agricultural Co.*, 13 Hawaii 109; *In re Estate of Bishop*, 11 Hawaii 33.

[b] The circuit court of the first district is a superior court of record with jurisdiction of appeals from magistrates. *Gomez v. Whitney*, 21 Hawaii 539, 547.

73. *Pendleton v. United States*, 216 U. S. 305, 30 Sup. Ct. 315, 54 L. ed. 491; *Conchada v. Director of Prisons*, 31 Phil. Isl. 94.

[a] Jurisdiction of Supreme Court. *Ocampo v. United States*, 234 U. S. 91, 34 Sup. Ct. 712, 58 L. ed. 1231; *General De Tabacos v. Trinchera*, 7 Phil. Isl. 708, to issue attachment.

[b] Jurisdiction of courts of first instance, see *Manila R. R. Co. v. Attorney General*, 20 Phil. Isl. 523 (over actions affecting realty); *United States v. Arceo*, 6 Phil. Isl. 29; *United States v. Pagdayuman*, 5 Phil. Isl. 265.

[c] Jurisdiction of justices of the peace, see *Schultz v. Concepcion*, 32 Phil. Isl. 1; *Tuason v. Crossfield*, 30 Phil. Isl. 543.

[d] Judgments of courts of first instance on appeal from justice's courts may be appealed to the supreme court when the constitutionality of a statute or ordinance is involved. *United States v. Pacis*, 31 Phil. Isl. 524; *United States v. Tamparong*, 31 Phil. Isl. 321; *McGirr v. Hamilton*, 30 Phil. Isl. 563.

74. See U. S. Comp. St., 1916, §3784.

[a] Jurisdiction of Supreme Court. *Ponce v. Roman Catholic Church*, 210 U. S. 296, 28 Sup. Ct. 737, 52 L. ed. 1068 (as to original jurisdiction of supreme court); *Roman Catholic Apostolic Church v. Bayamon*, 18 P. R. 809; *Mora v. Rosaly*, 18 P. R. 170, over appeals from judgments on appeal.

[b] Jurisdiction of District Court. *Turner v. Municipal Council*, 24 P. R. 556; *Rio v. Vazquez*, 17 P. R. 644; *Hernandez v. Perez*, 17 P. R. 579, jurisdictional amount. The district court has jurisdiction of appeals from the municipal court. *Fradera v. Morales*, 19 P. R. 1064; *Scognaminglio Opera Co. v. Aldrey*, 14 P. R. 428.

[c] Jurisdiction of Justices of the Peace.—*People v. Paratze*, 22 P. R. 35, criminal jurisdiction.

[d] The municipal courts have exclusive jurisdiction of civil cases in which the amount involved does not exceed five hundred dollars. *Gonzalez v. Rosado*, 23 P. R. 1; *Gonzalez v. Pizarri*, 16 P. R. 7; *Lowande v. Garcia*, 12 P. R. 290.

75. *Canal Zone v. Murray*, 2 Canal Zone 161 (district courts are courts of



**Review by Federal Courts.**—A review of the judgments and decrees of territorial courts by the United States courts is discussed in another title.<sup>76</sup>

<p>limited jurisdiction); <i>Gonzalez v. Canal Zone</i>, 2 Canal Zone 157 (appeals to the circuit court are tried de novo); <i>Montilla v. Herbruger</i>, 2 Canal Zone 154; <i>Canal Zone ex rel. Seixas v. Gudger</i>, 2 Canal Zone 69, supreme court in exercise of original jurisdiction may</p>	<p>issue mandamus. See <i>Smith v. Government Canal Zone ex rel. MacIntyre</i>, 239 Fed. 133, 152 C. C. A. 175; <i>Panama R. Co. v. Beckford</i>, 231 Fed. 436, 145 C. C. A. 430. 76. See the title "<b>United States Courts.</b>"</p>
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**STATUTE OF FRAUDS.**—See **Frauds, Statute of.**

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By the Editorial Staff.

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For further references and cross-references, see the index to this work and the cross-references throughout this article.



**I. JUDICIAL CONTROL OVER PROCESS OF LEGISLATION.**

A. **GENERALLY.**<sup>1</sup>—As a general rule, the courts will not intervene to hinder or influence the process of legislation in any of its steps.<sup>2</sup>

B. **INITIATIVE AND REFERENDUM.**—Ministerial duties resting upon officers in connection with initiative and referendum petitions may be enforced by the writ of mandamus when the right is clear.<sup>3</sup> It has been held since the duty of printing proposed acts on ballots or of calling an election is a political act, equity has no jurisdiction to grant an injunction,<sup>4</sup> but statutes sometimes authorize injunctive relief.<sup>5</sup>

**II. JUDICIAL DETERMINATION OF CONSTITUTIONALITY.**

A. **GENERALLY.**—The courts have the power,<sup>6</sup> and it is their duty to declare a statute unconstitutional which is clearly in violation of the constitution, when the question is properly presented,<sup>7</sup> and when it is

1. Control over ordinances, see the title "Municipal Corporations."

2. *State ex rel. Berry v. Superior Court*, 92 Wash. 16, 159 Pac. 92.

[a] **Enactment of statutes not compellable.** *Coleman v. Dobbins*, 8 Ind. 156.

[b] **Speaker of house cannot be compelled to send a bill to senate** which he decides has not passed. *Ex parte Echols*, 39 Ala. 698, 88 Am. Dec. 749. See also *State ex rel. Davisson v. Bolte*, 151 Mo. 362, 52 S. W. 262, 74 Am. St. Rep. 537.

**Determining constitutionality**, see *infra*, II.

3. *Hodges v. Dawdy*, 104 Ark. 583, 149 S. W. 656; *State ex rel. Gongwer v. Graves*, 90 Ohio St. 311, 107 N. E. 1018.

[a] **Filing of Petition.**—*State ex rel. Halliburton v. Roach*, 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639; *Threadgill v. Cross*, 26 Okla. 403, 109 Pac. 558, 138 Am. St. Rep. 964; *Norris v. Cross*, 25 Okla. 287, 105 Pac. 1000. See *State ex rel. Dotta v. Brodigan*, 37 Nev. 37, 138 Pac. 914.

[b] **Proceeding to a hearing of protests and to an examination of the sufficiency of the petition.** *Norris v. Cross*, 25 Okla. 287, 105 Pac. 1000.

[c] **Transmission of Petition to Proper Officer for a Ballot Title.**—See *Brazell v. Zeigler*, 26 Okla. 826, 110 Pac. 1052.

[d] **Submission of a proposed ordinance or law to a vote of the electors** will be compelled unless the law when voted on would be void. *State ex rel. Davies v. White*, 36 Nev. 334, 136 Pac. 110, 50 L. R. A. (N. S.) 195; *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609.

[e] **A Voter and Petitioner May Be Relator.**—*State ex rel. Mohr v. Seattle*, 59 Wash. 68, 75, 109 Pac. 309.

4. *Duggan v. Emporia*, 84 Kan. 429, 114 Pac. 235, Ann. Cas. 1912A, 719; *State v. Dunbar*, 48 Ore. 109, 85 Pac. 337, for present law in Oregon, see next note.

5. *Libby v. Olcott*, 66 Ore. 124, 134 Pac. 13; *State v. Olcott*, 62 Ore. 277, 125 Pac. 303, on a showing that the petition is insufficient, the certification or printing on the official ballot of the ballot title and numbers may be enjoined.

[a] **District attorney is proper relator.** *State v. Olcott*, 62 Ore. 277, 125 Pac. 303; *Friendly v. Olcott*, 61 Ore. 580, 123 Pac. 53.

[b] **Court may go behind apparent regularity of petition and inquire into its genuineness.** *State v. Olcott*, 62 Ore. 277, 125 Pac. 303.

6. **U. S.**—*Marbury v. Madison*, 1 Cranch 137, 2 L. ed. 60. **Fla.**—*Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916. **N. C.**—*Attorney General v. Knight*, 169 N. C. 333, 85 S. E. 418, Ann. Cas. 1917D, 517, L. R. A. 1915F, 898. **Tenn.**—*Brinkley v. State*, 125 Tenn. 371, 143 S. W. 1120. **Va.**—*Willis v. Kalmbach*, 109 Va. 475, 478, 64 S. E. 342, 21 L. R. A. (N. S.) 1009; *Com. v. Caton*, 4 Call (8 Va.) 5, 7, 20.

And see *infra*, this section.

7. **Colo.**—*Leddy v. People*, 59 Colo. 120, 147 Pac. 365. **Fla.**—*State ex rel. West v. Butler*, 70 Fla. 102, 69 So. 771; *Hayes v. Walker*, 54 Fla. 163, 44 So. 747. **Ill.**—*Lane v. Doe ex dem. Dorman*, 4 Ill. 238, 36 Am. Dec. 543. **Md.**—*Somerset Co. Comrs. v. Pocomoke*

necessarily involved in the case before the court.<sup>8</sup> But the validity of proposed legislation,<sup>9</sup> or of legislation that has not become operative,<sup>10</sup> will not be determined.

The right to raise the question may be waived, or precluded by the doctrine of estoppel.<sup>11</sup>

**B. WHO MAY RAISE QUESTION.**—Only persons who may be injured by the operation of a statute, may question its validity.<sup>12</sup> And

Bridge Co., 109 Md. 1, 71 Atl. 462, 16 Ann. Cas. 874. **Mass.**—Salisbury Land & Imp. Co. v. Com., 215 Mass. 371, 102 N. E. 619, 46 L. R. A. (N. S.) 1196. **N. Y.**—People v. Gillson, 109 N. Y. 389, 398, 17 N. E. 343, 4 Am. St. Rep. 465; Brooks v. Tayntor, 17 Misc. 534, 40 N. Y. Supp. 445, 74 N. Y. St. 879. **N. C.**—Attorney General v. Knight, 169 N. C. 333, 85 S. E. 418, Ann. Cas. 1917D, 517, L. R. A. 1915F, 898. **S. D.**—*In re* Opinion of the Judges, 38 S. D. 635, 162 N. W. 536. **Wis.**—State *ex rel.* Hustig v. Board of State Canvassers, 159 Wis. 216, 150 N. W. 542, Ann. Cas. 1916D, 159.

**Advisory opinion as to statutes regulating governor's duties**, see 17 **STANDARD PROC.** 746, note 42.

**8. U. S.**—Weyman-Bruton Land Co. v. Ladd, 231 Fed. 898, 901, 146 C. C. A. 94; Republic Iron & Steel Co. v. Carlton, 189 Fed. 126; *Ex parte* Randolph, 2 Brock. 447, 20 Fed. Cas. No. 11,558. **Ala.**—State *ex rel.* Glass v. Stone, 197 Ala. 662, 73 So. 330. **Ark.**—Martin v. State, 79 Ark. 236, 96 S. W. 342. **Cal.**—Marin Municipal Water Dist. v. Dolge, 172 Cal. 724, 158 Pac. 187. **Fla.**—Lippman v. State, 72 Fla. 428, 73 So. 357. **Ga.**—Seoville v. Calhoun, 76 Ga. 263. **Ill.**—Illinois Cent. R. Co. v. Chicago & G. W. R. Co., 246 Ill. 620, 93 N. E. 44. **Ind.**—State v. McCormack, 185 Ind. 302, 113 N. E. 1001; Hoover v. Wood, 9 Ind. 286. **Ia.**—Thompson v. Mitchell, 133 Iowa 527, 110 N. W. 901; Dubuque & Dak. Ry. Co. v. Diehl, 64 Iowa 635, 21 N. W. 117. **Mo.**—Shohoney v. Quincy, Q. & K. C. R. Co., 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912A, 1143; Davidson v. Hartford L. Ins. Co., 151 Mo. App. 561, 132 S. W. 291. **Mont.**—Potter v. Furnish, 46 Mont. 391, 128 Pac. 542. **N. D.**—Reeves & Co. v. Russell, 28 N. D. 265, 148 N. W. 654, L. R. A. 1915D, 1149. **Ohio.**—State v. Baughman, 38 Ohio St. 455. **Wash.**—Sayles v. Walla Walla Co., 30 Wash. 194, 70 Pac. 256.

[a] Unless absolutely necessary, the court will not determine the constitutionality of a statute. Weyman-Bruton Land Co. v. Ladd, 231 Fed. 898, 901, 146 C. C. A. 94.

[b] The reluctance of the court to act is a mere rule of comity between coordinate departments of government. Hunter v. Colfax Consol. Coal Co., 175 Iowa 245, 154 N. W. 1037, 1048, 157 N. W. 145, Ann. Cas. 1917E, 803, L. R. A. 1917D, 15.

9. Pfeiffer v. Graves, 88 Ohio St. 473, 104 N. E. 529; State *ex rel.* Griffiths v. Superior Court, 92 Wash. 44, 159 Pac. 101, 162 Pac. 360. See Cress v. Estes, 43 Okla. 213, 142 Pac. 411.

**Advisory opinion of appellate court as to proposed legislation**, see 17 **STANDARD PROC.** 747, note 45.

10. **Ala.**—Kansas City, M. & B. R. Co. v. Whitehead, 109 Ala. 495, 19 So. 705. **Ga.**—Clayton v. Calhoun, 76 Ga. 270. **La.**—Rosenberg & Sons v. Boston Shoe Store, 133 La. 195, 198, 62 So. 629. **Wash.**—State *ex rel.* Campbell v. Superior Court, 25 Wash. 271, 65 Pac. 183.

11. **Ill.**—Moses v. Royal Indemnity Co., 276 Ill. 177, 114 N. E. 554. **Minn.**—William Deering & Co. v. Peterson, 75 Minn. 118, 77 N. W. 568, by accepting benefits of statute. **Mo.**—Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 690, 113 S. W. 1108. **N. H.**—Dow v. Electric Co., 68 N. H. 59, 31 Atl. 22. **N. Y.**—New York v. Gorman, 26 App. Div. 191, 49 N. Y. Supp. 1026. **Wis.**—Outagamie Co. v. Zuehlke, 165 Wis. 32, 161 N. W. 6.

[a] By Failure To Make Timely Objection During the Trial.—Lohmeyer v. St. Louis Cordage Co., 214 Mo. 685, 113 S. W. 1108.

12. **U. S.**—Hawkins v. Bleakly, 243 U. S. 210, 37 Sup. Ct. 255, 61 L. ed. 678, Ann. Cas. 1917D, 637; Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 21 Sup. Ct. 703, 45 L. ed. 994. **Ill.**—State Public Utilities Com. v. Chicago & W. T. E. Co., 275 Ill. 555, 114

therefore some courts hold that ministerial officers with no direct interest in the matter cannot set up the unconstitutionality of a statute in a mandamus proceeding to enforce duties thereunder,<sup>13</sup> though there are cases to the contrary.<sup>14</sup>

C. WHAT COURTS MAY DETERMINE. — The constitutionality of a law may be determined by courts of original jurisdiction,<sup>15</sup> including the justice's court,<sup>16</sup> as well as courts of last resort upon appeal.<sup>17</sup> But

N. E. 325, Ann. Cas. 1917C, 50. **Ky.** Louisville & N. R. Co. v. Com., 175 Ky. 372, 194 S. W. 315. **Mass.**—McGlue v. Essex Co. Comrs., 225 Mass. 59, 113 N. E. 742. **Mo.**—State ex rel. St. Louis Co. v. Gordon, 268 Mo. 713, 188 S. W. 160. **Mont.**—Pohl v. Chicago, M. & St. P. Ry. Co., 52 Mont. 512, 160 Pac. 515. **Neb.**—Urbach v. Omaha, 101 Neb. 314, 163 N. W. 307, L. R. A. 1917E, 1163. **N. Y.**—Duffy v. Rodriguez, 139 App. Div. 755, 124 N. Y. Supp. 529. **N. D.**—Turnquist v. Cass Co. Drain Comrs., 11 N. D. 514, 92 N. W. 852. **Okl.**—Insurance Co. of North America v. Welch, 49 Okla. 620, 154 Pac. 48, Ann. Cas. 1918E, 471. **Ore.**—McKinney v. Watson, 74 Ore. 220, 145 Pac. 266. **Tenn.**—McCamey v. Cummings, 130 Tenn. 494, 172 S. W. 311. **Wis.**—State v. Currans, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252.

[a] **Torrens Law.**—An abutting owner made party to a registration of land proceeding cannot question constitutionality of registration act. Marvin Realty Co. v. Barre, 142 App. Div. 4, 126 N. Y. Supp. 483; Duffy v. Rodriguez, 139 App. Div. 755, 124 N. Y. Supp. 529.

**Violation of Due Process Clause.—Who May Question.**—See 7 STANDARD PROC. 899.

13. **U. S.**—Braxton County Court v. West Virginia, 208 U. S. 192, 28 Sup. Ct. 275, 52 L. ed. 450. **Fla.**—County Comrs. of Franklin Co. v. State ex rel. Patton, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183. **Idaho.**—Wright v. Kelly, 4 Idaho 624, 43 Pac. 565. **Okl.** Threadgill v. Cross, 26 Okla. 403, 109 Pac. 553, 138 Am. St. Rep. 964. **Utah.** Thoreson v. State Board of Examiners, 19 Utah 18, 57 Pac. 175. **W. Va.** Capito v. Topping, 65 W. Va. 587, 64 S. E. 845, 22 L. R. A. (N. S.) 1089.

See 7 STANDARD PROC. 899.

14. **Ark.**—Hodges v. Dawdy, 104 Ark. 583, 149 S. W. 656. **Cal.**—Denman v. Broderick, 111 Cal. 96, 43 Pac. 516. **Neb.**—Van Horn v. State, 46

Neb. 62, 82, 64 N. W. 365. **Ohio.** State ex rel. Eastman v. Comrs. of Warren Co., 17 Ohio St. 558; Citizens' Bank v. Wright, 6 Ohio St. 318. **Tex.** See Williams v. Taylor, 83 Tex. 667, 19 S. W. 156. **Wash.**—Hindman v. Boyd, 42 Wash. 17, 84 Pac. 609.

15. State ex rel. Wynne v. Lee, 106 La. 400, 31 So. 14; People ex rel. Wogan v. Rafferty, 77 Misc. 258, 136 N. Y. Supp. 4 (affirmed, 154 App. Div. 767, 139 N. Y. Supp. 572); Ithaca v. Babcock, 36 Misc. 49, 72 N. Y. Supp. 519. See In re Wintjen's Est., 99 Misc. 471, 165 N. Y. Supp. 927; Welch v. Bard, 81 Misc. 262, 142 N. Y. Supp. 26.

[a] Whether a state law violates the federal constitution may be determined by the state court. Robb v. Connolly, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. ed. 542.

[b] Except in the clearest cases, courts of first instance should not declare statutes unconstitutional. In re Meng, 96 Misc. 126, 159 N. Y. Supp. 535.

[c] Court at (1) special term. Brooks v. Tayntor, 17 Misc. 534, 40 N. Y. Supp. 445, 74 N. Y. St. 879. (2) But a single judge sitting in special term should not pronounce an act unconstitutional except in a palpable case. Welch v. Bard, 81 Misc. 262, 142 N. Y. Supp. 26.

[d] A surrogate's court will assume a statute to be constitutional. In re Porter's Estate, 67 Misc. 19, 124 N. Y. Supp. 676.

[e] The state court of claims will assume a statute to be valid until passed upon by the appellate courts. Brainerd v. State, 131 N. Y. Supp. 221.

16. Mayberry v. Kelly, 1 Kan. 116. But see Ortman v. Greenman, 4 Mich. 291, disapproving act of justice of the peace in passing on statute.

17. State ex rel. Campbell v. St. Louis Ct. of Appeals, 97 Mo. 276, 282, 10 S. W. 874; People ex rel. Wogan



this jurisdiction is sometimes withheld from intermediate appellate courts.<sup>18</sup> Federal courts have power to declare statutes unconstitutional, as in violation of a state as well as the federal constitution,<sup>19</sup> although they are reluctant to declare a state statute to be in conflict with a state constitution before that question has been decided by the state tribunals, and will not do so as a general rule.<sup>20</sup> If conflict with the state constitution is the sole ground of attack, the supreme court of the state is the final authority,<sup>21</sup> and in other cases, the ultimate decision rests with the United States supreme court.<sup>22</sup>

**D. IN WHAT PROCEEDINGS QUESTION MAY BE DETERMINED. — 1. Generally.** — Courts will not determine the constitutionality of statutes in fictitious suits.<sup>23</sup>

**2. Mandamus.** — Constitutional questions may be determined in mandamus proceedings in a proper case,<sup>24</sup> but some cases hold that the constitutionality of a statute cannot be raised in a mandamus proceeding where the right to relief depends upon holding the statute to be unconstitutional.<sup>25</sup>

**3. Habeas Corpus.** — According to the weight of authority a judgment of conviction based on an unconstitutional statute is void, and

*v. Rafferty*, 77 Misc. 258, 263, 136 N. Y. Supp. 48, *affirmed*, 154 App. Div. 767, 139 N. Y. Supp. 572.

**18.** *Knudsen v. Houghton*, 160 Ill. App. 440; *State ex rel. Campbell v. St. Louis Ct. of Appeals*, 97 Mo. 276, 10 S. W. 874.

**19.** *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 26 Sup. Ct. 459, 50 L. ed. 744; *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. ed. 542; *Southern Ry. Co. v. McNeill*, 155 Fed. 756.

[a] **State and federal statutes** may be declared unconstitutional by a federal court. *Southern Ry. Co. v. McNeill*, 155 Fed. 756.

**20.** *Pullman Co. v. Knott*, 235 U. S. 23, 35 Sup. Ct. 2, 59 L. ed. 105; *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 291, 26 Sup. Ct. 459, 50 L. ed. 744; *Fish v. Fond Du Lac*, 9 Fed. Cas. No. 4,813a.

[a] **Unless the highest state court** has adjudged a state statute unconstitutional, the federal court will not hold it to be in conflict with the state constitution. *Fish v. Fond Du Lac*, 9 Fed. Cas. No. 4,813a.

**Jurisdiction of federal courts** where a federal question is involved, see the title "United States Courts."

**21.** *Michigan Cent. R. Co. v. Powers*, 201 U. S. 245, 291, 26 Sup. Ct. 459, 50 L. ed. 744.

**22.** *Michigan Cent. R. Co. v. Powers*,

201 U. S. 245, 291, 26 Sup. Ct. 459, 50 L. ed. 744.

**23.** *Fesler v. Brayton*, 145 Ind. 71, 44 N. E. 37, 32 L. R. A. 578; *Brewington v. Lowe*, 1 Ind. 21, *Smith* 79, 48 Am. Dec. 349; *McGlue v. Essex Co. Comrs.*, 225 Mass. 59, 113 N. E. 742.

**24. Ill.**—*People ex rel. Woodvatt v. Thompson*, 155 Ill. 451, 40 N. E. 307. **Ind.**—*Parker v. State*, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567. **Mich.**—*Giddings v. Secretary of State*, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402. **Nev.**—*State v. Stoddard*, 25 Nev. 452, 62 Pac. 237, 51 L. R. A. 229. **N. Y.**—*People ex rel. Carter v. Rice*, 135 N. Y. 473, 31 N. E. 921, 16 L. R. A. 836; *Long Sault Dev. Co. v. Kennedy*, 158 App. Div. 398, 143 N. Y. Supp. 454.

[a] **The appellate court will decide grave constitutional questions**, raised by original applications for writs which must be acted upon summarily except in instances where the circumstances are such that a decision is imperative and the application could not readily have been made earlier. *State ex rel. Hagendorf v. Blaisdell*, 20 N. D. 622, 127 N. W. 720.

**25. Cal.**—*Davis v. Superior Court*, 63 Cal. 581; *People ex rel. Hall v. San Francisco*, 20 Cal. 591. **Idaho.**—*Wright v. Kelly*, 4 Idaho 624, 43 Pac. 565. **Utah.**—*Maxwell v. Burton*, 2 Utah 595.

therefore on habeas corpus proceedings the constitutionality of the statute may be inquired into.<sup>26</sup> Some courts, however, hold that the judgment is erroneous merely, not void, and that the constitutional question cannot be raised in this proceeding.<sup>27</sup>

**4. Injunction Against Enforcement.**<sup>28</sup>—Equity has jurisdiction to enjoin an officer from enforcing an unconstitutional statute where the execution would cause irreparable injury to the complainant and where the remedy at law is inadequate.<sup>29</sup> But the courts should be

As a defense in mandamus proceeding, see *infra*, this section.

**26. U. S.**—*Ex parte Siebold*, 100 U. S. 371, 376, 25 L. ed. 717. **Kan.**—See *In re Jarvis*, 66 Kan. 329, 71 Pac. 576, query. **Mass.**—*Herrick v. Smith*, 1 Gray 1, 61 Am. Dec. 381. **Minn.**—*In re White*, 43 Minn. 250, 45 N. W. 232. **Mo.**—*Ex parte Neet*, 157 Mo. 527, 57 S. W. 1025, 80 Am. St. Rep. 638. **N. Y.**—*In re Paul*, 94 N. Y. 497. **Tex.** *Ex parte Mato*, 19 Tex. App. 112.

[a] When the time for appeal has expired and there is no other remedy the constitutional question may be determined on habeas corpus. *In re Jarvis*, 66 Kan. 329, 71 Pac. 576.

**27. Ill.**—*People v. Jonas*, 173 Ill. 316, 50 N. E. 1051. **Ind.**—*Koepke v. Hill*, 157 Ind. 172, 60 N. E. 1039, 87 Am. St. Rep. 161. **Mich.**—*In re Maguire*, 114 Mich. 80, 72 N. W. 15. **Neb.** *Ex parte Fisher*, 6 Neb. 309.

[a] The reason is that it is the duty of the court trying the case to decide whether the facts stated make a case within the statute or ordinance, and whether the statute or ordinance is valid and constitutional. The court has jurisdiction to decide these questions and an error in decision is a mere mistake of law rendering the judgment erroneous merely. *Koepke v. Hill*, 157 Ind. 172, 60 N. E. 1039, 87 Am. St. Rep. 161.

**28. As to ordinances**, see the title "Municipal Corporations."

**29. U. S.**—*McCabe v. Atchison*, T. & S. F. R. Co., 235 U. S. 151, 35 Sup. Ct. 69, 59 L. ed. 169; *August Busch & Co. v. Webb*, 122 Fed. 655. **Kan.** *Emporia Tel. Co. v. Public Utilities Com.*, 97 Kan. 136, 154 Pac. 262. **Mass.** *Moneyweight Scale Co. v. McBride*, 199 Mass. 503, 85 N. E. 870. **N. D.** *Bartels Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N. W. 576. **Ore.** See *Evanhoff v. State Indus. Acc. Com.*, 78 Ore. 503, 154 Pac. 106. **S. C.**—See *Hutchinson v. York Co.*, 86 S. C. 396,

68 S. E. 577. **S. D.**—*Jewett Bros. & Jewett v. Smail*, 20 S. D. 232, 105 N. W. 738.

See *Frost v. Thomas*, 26 Colo. 222, 56 Pac. 899, 77 Am. St. Rep. 259, the governor will not be enjoined from executing a law merely because it is alleged to be unconstitutional.

**Enjoining illegal license**, see 18 STANDARD PROC. 985.

Whether this is an action against the state, see the title "States and Territories."

**Enjoining collection of taxes imposed by unconstitutional law**, see the title "Taxation."

[a] **Federal equity court** (1) has jurisdiction. *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Nolen v. Riechman*, 225 Fed. 812; *Minneapolis Brew. Co. v. McGillivray*, 104 Fed. 258. See 12 STANDARD PROC. 1018. (2) But the judicial code requires that two of three judges, one of whom must be a justice of the supreme court or a circuit judge, must concur before a temporary injunction shall issue. *Lykins v. Chesapeake & O. Ry. Co.*, 209 Fed. 573, 126 C. C. A. 395; *Louisville & N. R. Co. v. Railroad Com.*, 208 Fed. 35; *Chicago, B. & Q. R. Co. v. Oglesby*, 198 Fed. 153.

[b] **A taxpayer** who will suffer injury may in his own name resist the enforcement of an unconstitutional statute. *McKinney v. Watson*, 74 Ore. 220, 145 Pac. 266.

[c] **A holder of bonds** may enjoin issuance of bonds to take up outstanding bonds, under invalid statute. *Smith v. Appleton*, 19 Wis. 468.

[d] **The complaint must show** that the enforcement is against the plaintiff's personal or property rights. *Plumb v. Christie*, 103 Ga. 686, 30 S. E. 759, 42 L. R. A. 181; *Sherod v. Atchison*, 71 Ore. 446, 142 Pac. 351, Ann. Cas. 1916C, 1151.

slow to enjoin the performance of official duties prescribed by presumptively valid statutes.<sup>30</sup>

**E. MANNER OF RAISING OBJECTION.**—The question as to the constitutionality of a statute may be raised by plea in abatement,<sup>31</sup> by plea in bar,<sup>32</sup> or answer.<sup>33</sup> The courts are in conflict as to whether the objection can be raised by demurrer.<sup>34</sup> The question may be presented otherwise than by pleadings.<sup>35</sup> When there is no opportunity to present the question earlier, the question may be raised in the reply,<sup>36</sup> in the instructions,<sup>37</sup> or in a motion for new trial.<sup>38</sup> A general challenge by a request for an instruction in the nature of a demurrer to the evidence at the close of the plaintiff's case, or a peremptory instruction at the close of the whole case does not raise question of the unconstitutionality of the statute on which the action is based.<sup>39</sup> But it has been held that the objection cannot be raised by a motion in the proceedings,<sup>40</sup> or on an agreed statement or admission<sup>41</sup> of the

30. *Jewett Bros. & Jewett v. Smail*, 20 S. D. 232, 105 N. W. 738.

31. *Dudley v. Wabash R. Co.*, 238 Mo. 184, 142 S. W. 338.

32. *Dudley v. Wabash R. Co.*, 238 Mo. 184, 142 S. W. 338.

33. *George v. Quincy, O. & K. C. R. Co.*, 249 Mo. 197, 155 S. W. 453.

[a] **Answer.**—Where a statute is relied on as the basis of an action, its constitutionality must be raised in the answer. *George v. Quincy, O. & K. C. R. Co.*, 249 Mo. 197, 155 S. W. 453; *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 690, 113 S. W. 1108.

34. See *infra*, this note.

[a] **Cannot Be Raised by Demurrer.** *Western Ry. v. Foshee*, 183 Ala. 182, 62 So. 500; *Nakwosas v. Western Paper Stock Co.*, 260 Ill. 172, 102 N. E. 1041, Ann. Cas. 1914D, 467; *Gifford v. Culver*, 261 Ill. 530, 104 N. E. 147. But compare *Beauvoir Club v. State*, 148 Ala. 643, 42 So. 1040, 121 Am. St. Rep. 82.

[b] **Can be Raised by Demurrer.** *Duffy v. Rodriguez*, 139 App. Div. 755, 124 N. Y. Supp. 529.

35. *McCabe's Admx. v. Maysville & Big Sandy Ry. Co.*, 136 Ky. 674, 679, 124 S. W. 892.

[a] **When a cause of action or defense is based on a statute**, the court will take judicial notice of the legal question presented if its attention is directed to the fact that the legality of the statute is drawn in question and the determination of its validity is necessary to a correct decision of the case. *McCabe's Admx. v. Maysville &*

*Big Sandy Ry. Co.*, 136 Ky. 674, 124 S. W. 892.

36. *Hanks v. Hanks*, 218 Mo. 670, 117 S. W. 1101.

[a] **When the defendant grounds an affirmative defense on a statute** claimed to be constitutional, it seems the plaintiff should plead the objection in his reply, though this has been questioned. *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 690, 113 S. W. 1108.

37. *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 690, 113 S. W. 1108; *State ex rel. Campbell v. St. Louis Ct. of Appeals*, 97 Mo. 276, 281, 10 S. W. 874.

38. *Dudley v. Wabash R. Co.*, 238 Mo. 184, 142 S. W. 338, *citing* *Logan v. Field*, 192 Mo. 54, 66, 90 S. W. 127.

[a] **As when the court gives some instruction for the first time** involving the constitution, by permitting nine out of twelve jurors to render a verdict for example. *Logan v. Field*, 192 Mo. 54, 66, 90 S. W. 127.

39. *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S. W. 1108.

40. See *infra*, this note.

[a] **A Motion in Arrest of Judgment.**—*Armond v. State*, 18 Ga. App. 140, 88 S. E. 990.

[b] **Motion To Remand.**—*Lamar v. Dana*, 10 Blatchf. 34, 14 Fed. Cas. No. 8,005.

41. *Chicago & G. T. Ry. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. ed. 176; *Freitag v. Union Stock Yard & T. Co.*, 262 Ill. 551, 104 N. E. 901; *Nakwosas v. Western Paper Stock Co.*, 260 Ill. 172, 102 N. E. 1041, Ann. Cas. 1914D, 467.



parties as to the facts, or on an assignment of errors and joinder in error.<sup>42</sup>

A person, questioning the constitutionality of a statute, should clearly point out wherein it is invalid,<sup>43</sup> as only those objections that have been raised and insisted upon will be considered.<sup>44</sup> All objections to a statute whether springing out of a state or of the federal constitution may be presented in a single suit.<sup>45</sup>

**Argument.**—In the absence of a full argument on the constitutional question, the court may decline to pass upon it.<sup>46</sup>

**F. WHEN QUESTION MUST BE RAISED.—1. Generally.**—The hesitation of the courts to declare a statute unconstitutional will be greater when it has been on the statute books for a long period of time,<sup>47</sup> although even in such a case, the court must declare the statute

[a] Parties by waiving other questions cannot form an agreed case upon which constitutional questions will be decided. *Dubuque & Dak. Ry. Co. v. Diehl*, 64 Iowa 635, 21 N. W. 117.

42. *Freitag v. Union Stock Yard etc. Co.*, 262 Ill. 551, 104 N. E. 901, as the joinder in error is a mere admission of the facts in the assignment.

43. *Cal.*—*Ex parte Anderson*, 18 Cal. App. 593, 123 Pac. 972. *Ga.*—*Hazleton v. Atlanta*, 144 Ga. 775, 87 S. E. 1043; *Rooks v. Tindall*, 138 Ga. 863, 76 S. E. 378. *Ind.*—*Edenharter v. Connor*, 185 Ind. 643, 114 N. E. 212. *Mo.* *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S. W. 1108. *N. Y.*—*People ex rel. Darling v. Warden of Prison*, 154 App. Div. 413, 139 N. Y. Supp. 277. *Ore.*—*Crowley v. State*, 11 Ore. 512, 6 Pac. 70.

But see *Beauvoir Club v. State*, 148 Ala. 643, 42 So. 1040, 121 Ala. St. Rep. 82. Compare *New York v. Chicago, B. & Q. R. Co.*, 56 Neb. 572, 76 N. W. 1065.

See 7 STANDARD PROC. 903.

[a] A plea of general issue does not raise the question of the constitutionality of the statute. *Southern Ry. Co. v. Stonewall Ins. Co.*, 177 Ala. 327, 58 So. 313, Ann. Cas. 1915A, 987.

[b] The particular statute or part thereof assailed must be pointed out. *Edenharter v. Connor*, 185 Ind. 643, 114 N. E. 212.

[c] The particular provision of the constitution violated (1) must be specified. *Ind.*—*Simmons v. Simmons*, 116 N. E. 49; *Edenharter v. Connor*, 185 Ind. 643, 114 N. E. 212. *La.*—*State ex rel. Labauve v. Michel*, 121 La. 374,

46 So. 430. *Mo.*—*George v. Quincy, O. & K. C. R. Co.*, 249 Mo. 197, 155 S. W. 453; *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 113 S. W. 1108. (2) But the section numbers of the provision violated need not be set out, nor need it be referred to by numbers. *State ex rel. Campbell v. St. Louis Ct. of Appeals*, 97 Mo. 276, 10 S. W. 874.

[d] **Irregularities in Passage.**—(1) Where the court takes judicial notice of journal entries showing the steps taken in passing a statute, they need not be pleaded. *State v. Swiggart*, 118 Tenn. 556, 102 S. W. 75. See 7 ENCY. OF EV. 991. (2) Otherwise facts showing the failure of the legislature to conform with the prescribed formalities must be alleged. *Bresee v. Preston*, 91 Neb. 174, 135 N. W. 544; *New York v. Chicago, B. & Q. R. Co.*, 56 Neb. 572, 76 N. W. 1065; *People ex rel. Scott v. Suprs. of Chenango*, 8 N. Y. 317.

[e] But where a statute conferring jurisdiction on a court is unconstitutional, a party who raises the point of want of jurisdiction need not again specifically attack the act as unconstitutional. *Murray v. Tifton*, 143 Ga. 301, 84 S. E. 967.

44. *State ex rel. Brandon v. Prince (Ala.)*, 74 So. 939; *Dees v. State (Ala. App.)*, 75 So. 645 (brief must be filed); *Potter v. Furnish*, 46 Mont. 391, 128 Pac. 542.

45. *Michigan Central R. Co. v. Powers*, 201 U. S. 245, 291, 26 Sup. Ct. 459, 50 L. ed. 744.

46. *J. P. Schaller & Co. v. Canisota Grain Co.*, 32 S. D. 15, 141 N. W. 993.

47. *Com. v. Kneeland*, 20 Pick.

void if it is plainly unconstitutional and the question is properly raised.<sup>48</sup> But when a statute has long been treated by the courts as constitutional and important rights have been based thereon, the court may thereafter refuse to consider its constitutionality.<sup>49</sup> So also when the determination would result in great confusion, the validity of statutes involving purely political and administrative questions will not be determined after a lapse of years.<sup>50</sup>

2. **At What Stage of Proceedings.**—a. *In civil actions* a person desiring to object to the constitutionality of a statute should do so at the earliest practicable stage of the action,<sup>51</sup> or the objection will be deemed waived,<sup>52</sup> and will not be inquired into by the appellate court.<sup>53</sup> But an exception exists where on the whole case some provision of the constitution is, either directly or by necessary implication, involved in the rendition of the judgment and decided against the appellant,<sup>54</sup> or where the statute is necessary to the jurisdiction of the trial or appellate court.<sup>55</sup>

b. *In Criminal Prosecutions.*—It has been held that the constitutionality of the statute on which a criminal prosecution is based may be questioned for the first time on appeal.<sup>56</sup>

G. **INQUIRY.**—Whether a statute is constitutional is a question of law.<sup>57</sup> The presumptions are in favor of the constitutionality of a statute, enacted by the legislature.<sup>58</sup> And in determining the validity

(Mass.) 206, 217; *Kucker v. Sunlight Oil etc. Co.*, 230 Pa. 528, 533, 79 Atl. 747, Ann. Cas. 1912A, 593.

48. *People ex rel. Simpson Co. v. Kempner*, 154 App. Div. 671, 139 N. Y. Supp. 440; *Kucker v. Sunlight Oil etc. Co.*, 230 Pa. 528, 79 Atl. 747, Ann. Cas. 1912A, 593.

49. *Van Nada v. Goedde*, 263 Ill. 105, 114, 191 N. E. 1072; *Richter v. Burdock*, 257 Ill. 410, 100 N. E. 1063.

50. *State ex rel. Warson v. Howell*, 92 Wash. 540, 159 Pac. 777. Compare *McCamey v. Cummings*, 130 Tenn. 494, 172 S. W. 311.

51. *George v. Quincy, O. & K. C. R. Co.*, 249 Mo. 197, 155 S. W. 453; *Hartzler v. Metropolitan St. R. Co.*, 218 Mo. 562, 117 S. W. 1124; *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 690, 113 S. W. 1108.

52. See *supra*, this section.

53. *State ex rel. Vandiver v. Burke*, 175 Ala. 561, 578, 57 So. 870; See *Beardsley v. New York L. E. & W. R. Co.*, 162 N. Y. 230, 56 N. E. 488.

54. *Lohmeyer v. St. Louis Cordage Co.*, 214 Mo. 685, 690, 113 S. W. 1108.

55. *State ex rel. Vandiver v. Burke*, 175 Ala. 561, 578, 57 So. 870.

56. *Schwartz v. People*, 46 Colo. 239, 104 Pac. 92. But see *State ex rel.*

*Vandiver v. Burke*, 175 Ala. 561, 57 So. 870.

57. **U. S.**—*Post v. Supervisors*, 105 U. S. 667, 26 L. ed. 1204. **Colo.**—*Rio Grande S. Co. v. Catlin*, 40 Colo. 450, 94 Pac. 323. **S. C.**—*Hutchison v. York Co.*, 86 S. C. 396, 405, 68 S. E. 577. **Tex.** *Williams v. Taylor*, 83 Tex. 667, 19 S. W. 156.

58. **U. S.**—*Smeltzer v. St. Louis & S. F. R. Co.*, 158 Fed. 649. **Ala.**—*Fairhope Single Tax Corp. v. Melville*, 193 Ala. 289, 69 So. 466. **Cal.**—*People ex rel. Mattison v. Nye*, 9 Cal. App. 148, 98 Pac. 241. **Mo.**—*State v. Merchants' Exch.*, 269 Mo. 346, 190 S. W. 903, Ann. Cas. 1917E, 871. **Mont.**—*State ex rel. Peyton v. Cunningham*, 39 Mont. 197, 103 Pac. 497. **N. Y.**—*New York Cent. & H. R. R. Co. v. Williams*, 64 Misc. 15, 118 N. Y. Supp. 785. **S. C.** *Fripp v. Coburn*, 101 S. C. 312, 318, 85 S. E. 774; *Hutchison v. York Co.*, 86 S. C. 396, 405, 68 S. E. 577. **Va.**—*Willis v. Kalmbach*, 109 Va. 475, 64 S. E. 342, 21 L. R. A. (N. S.) 1009; *Whitlock v. Hawkins*, 105 Va. 242, 53 S. E. 401. **Wash.**—*State v. Walter Bowen & Co.*, 86 Wash. 23, 149 Pac. 330, Ann. Cas. 1917B, 625.

See generally the title, "**Presumptions**," in *ENCY. OF EV.*

of a particular statute, the court will give it a liberal construction,<sup>59</sup> and will resolve all doubts in its favor.<sup>60</sup> The court will not declare the statute unconstitutional unless it appears clearly to conflict with the constitution,<sup>61</sup> or unless its invalidity appears beyond a reasonable doubt.<sup>62</sup> And if the statute is reasonably susceptible of two constructions, one of which would render it constitutional, the other unconstitutional, the former will be adopted.<sup>63</sup> The mere fact that a statute may seem unwise or unreasonable does not justify the court in annulling it.<sup>64</sup>

59. *Hayes v. Walker*, 54 Fla. 163, 44 So. 747.

60. **U. S.**—*United States v. Delaware & H. Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. ed. 836. **Ala.**—*Smith v. Stiles*, 195 Ala. 107, 70 So. 905. **Ark.**—*Waterman v. Hawkins*, 75 Ark. 120, 86 S. W. 844. **Mass.**—*Attorney General v. Williams*, 178 Mass. 330, 59 N. E. 812. **Nev.**—*State v. Wells Fargo & Co.*, 38 Nev. 505, 150 Pac. 836. **N. D.**—*State ex rel. Linde v. Taylor*, 33 N. D. 76, 156 N. W. 561, L. R. A. 1918B, 156. **Wash.**—*State ex rel. Warson v. Howell*, 92 Wash. 540, 159 Pac. 777.

[a] **Strained definitions and garbled expressions** will not be seized on to defeat a statute. *Smith v. Stiles*, 195 Ala. 107, 70 So. 905.

61. **U. S.**—*Dartmouth College Case*, 4 Wheat. 518, 4 L. ed. 629; *Fletcher v. Peck*, 6 Cranch 87, 128, 3 L. ed. 162 (per Marshall J.); *Weber v. Freed*, 224 Fed. 355, 140 C. C. A. 41. **Cal.**—*Moore v. Williams*, 19 Cal. App. 600, 127 Pac. 509. **Fla.**—*Dutton Phos. Co. v. Priest*, 67 Fla. 370, 381, 65 So. 282. **Ky.**—*Dwiggins Wire Fence Co. v. Patterson*, 166 Ky. 278, 282, 179 S. W. 224. **Mich.**—*Burton v. Koch*, 184 Mich. 250, 151 N. W. 48. **Miss.**—*State ex rel. Collins v. Jones*, 106 Miss. 522, 64 So. 241. **N. J.**—*Attorney General v. McGuinness*, 78 N. J. L. 346, 371, 75 Atl. 455. **N. Y.**—*People v. Byrne*, 99 Misc. 1, 163 N. Y. Supp. 682. **Ohio.**—*Miami Co. v. Dayton*, 92 Ohio St. 215, 110 N. E. 726. **Tex.**—*Judkins v. Robison*, 160 S. W. 955, 957; *Ex parte Mode*, 77 Tex. Crim. 432, 180 S. W. 708, 726, Ann. Cas. 1918E, 845. **Va.**—*Chesapeake & O. Ry. Co. v. May*, 120 Va. 790, 92 S. E. 801. **W. Va.**—*Herold v. McQueen*, 71 W. Va. 43, 75 S. E. 313. **Wis.**—*Outagamie Co. v. Zuehlke*, 165 Wis. 32, 161 N. W. 6.

[a] **Plain and palpable repugnancy** between the statute and constitution is essential. *Willis v. Kalmbach*, 109

Va. 475, 64 S. E. 342, 21 L. R. A. (N. S.) 1009.

62. **U. S.**—*Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496, 14 Ct. Cl. 594; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606. **Ala.**—*Hails v. State* (Ala. App.), 75 So. 724. **Colo.**—*Chicago, B. & Q. R. Co. v. School Dist.*, 165 Pac. 260. **Fla.**—*Pinellas Park Drain Dist. v. Kessler*, 69 Fla. 558, 563, 68 So. 668; *Hayes v. Walker*, 54 Fla. 163, 44 So. 747. **Idaho.**—*Gillesby v. Board of Comrs.*, 17 Idaho 586, 107 Pac. 71. **Ill.**—*Victor Chemical Wks. v. Illinois Indus. Bd.*, 274 Ill. 11, 16, 113 N. E. 173, Ann. Cas. 1918B, 627; *Dragovich v. Iroquois Iron Co.*, 269 Ill. 478, 481, 109 N. E. 999. **Mass.**—*In re Wellington*, 16 Pick. 87, 26 Am. Dec. 631. **N. Y.**—*Ithaca v. Babcock*, 36 Misc. 49, 72 N. Y. Supp. 519. **Ore.**—*Evanhoff v. State Indus. Acc. Com.*, 78 Ore. 503, 154 Pac. 106. **Pa.**—*Com. v. Smith*, 4 Binn. 117. **S. C.**—*State v. Hammond*, 66 S. C. 219, 227, 44 S. E. 797. **Wash.**—*State ex rel. Case v. Howell*, 85 Wash. 294, 147 Pac. 1159, Ann. Cas. 1916A, 1231. **Wis.**—*State ex rel. Scanlan v. Archibold*, 146 Wis. 363, 131 N. W. 895.

[a] **Only in cases free from doubt or from real doubt**, will the statute be declared unconstitutional. *United States v. Shauver*, 214 Fed. 154; *Thorlton v. Guirl Drain Co.*, 184 Ind. 637, 112 N. E. 5.

63. **U. S.**—*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 34 Sup. Ct. 359, 58 L. ed. 713; *United States v. Delaware & H. Co.*, 213 U. S. 366, 29 Sup. Ct. 527, 53 L. ed. 836. **Cal.**—*In re Ahart*, 172 Cal. 762, 159 Pac. 160; *Chesebrough v. San Francisco*, 153 Cal. 559, 567, 96 Pac. 288. **Ind.**—*Thorlton v. Guirl Drain Co.*, 184 Ind. 637, 112 N. E. 5. **N. J.**—*Attorney General v. McGuinness*, 78 N. J. L. 346, 75 Atl. 455.

64. **Ark.**—*Little Rock v. North Little Rock*, 72 Ark. 195, 79 S. W. 785.



The validity of a statute must be determined by its terms,<sup>65</sup> and by what it authorizes,<sup>66</sup> and not by what has been done or probably will be done under it.<sup>67</sup> As a general rule the court can consider only those matters which appear upon the face of the statute,<sup>68</sup> or which it takes judicial notice of.<sup>69</sup> The court will look beyond the mere form of expression to the object and purpose of the legislation,<sup>70</sup> and will sometimes consider the habits and customs of the community.<sup>71</sup> The courts cannot inquire into the legality of the legislature itself,<sup>72</sup> or their compliance with their own rules,<sup>73</sup> or the motives of the legislature in passing it, or the means by which they were induced to enact it.<sup>74</sup> The courts are not in accord as to whether the legislative journals may be resorted to in case of a regularly enrolled and authen-

Cal.—*Spier v. Baker*, 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196. Fla.—*State ex rel. Clarkson v. Phillips*, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918A, 138; *Dutton Phos. Co. v. Priest*, 67 Fla. 370, 381, 65 So. 282. Md.—*Clark v. Hartford Agr. & Breed. Assn.*, 118 Md. 608, 85 Atl. 503. N. Y.—*People v. Charles Schweinler Press*, 214 N. Y. 395, 108 N. E. 639, Ann. Cas. 1916D, 1059. N. D.—*State ex rel. Linde v. Taylor*, 33 N. D. 76, 156 N. W. 561, L. R. A. 1918B, 156.

65. *Grainger v. Douglas Park Jockey Club*, 148 Fed. 513, 78 C. C. A. 199; *Ex parte Christensen*, 43 Fed. 243.

66. U. S.—*Minneapolis Brew Co. v. McGillivray*, 104 Fed. 258; *Ex parte Christensen*, 43 Fed. 243. N. Y.—*People ex rel. Nechamcus v. Warden of Prison*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; *New York v. Kelsey*, 158 App. Div. 183, 143 N. Y. Supp. 41; *Cleveland v. Watertown*, 99 Misc. 66, 165 N. Y. Supp. 305. Ore.—*Sterett & Oberle Pack. Co. v. Portland*, 79 Ore. 260, 154 Pac. 410. Vt.—*State v. Clement Nat. Bank*, 84 Vt. 167, 186, 78 Atl. 944, Ann. Cas. 1912D, 22.

67. *Ex parte Christensen*, 43 Fed. 243.

68. Tex.—*Johnson v. Elliott* (Tex. Civ. App.), 168 S. W. 968. Wash.—*Barker v. State Fish Com.*, 88 Wash. 73, 152 Pac. 537, Ann. Cas. 1917D, 810. Wis.—*State ex rel. Scanlan v. Archibold*, 146 Wis. 363, 131 N. W. 895.

[a] Words not found in the statute either expressly or by necessary implication cannot be read into it even to save its constitutionality. *Mellen Lumber Co. v. Industrial Commission*, 154 Wis. 114, 120, 142 N. W. 187, Ann.

Cas. 1915B, 997, L. R. A. 1916A, 374.

69. Tex.—*Johnson v. Elliott* (Tex. Civ. App.), 168 S. W. 968. Wash.—*Barker v. State Fish Com.*, 88 Wash. 73, 80, 152 Pac. 537, Ann. Cas. 1917D, 810. Wis.—*State ex rel. Scanlan v. Archibold*, 146 Wis. 363, 131 N. W. 895.

See ENCY. OF EV. title "Judicial Notice."

[a] Seeming exceptions to the rule may exist in exceptional cases. *Barker v. State Fish Com.*, 88 Wash. 73, 80, 152 Pac. 537, Ann. Cas. 1917D, 810.

70. *Attorney General v. Williams*, 178 Mass. 330, 59 N. E. 812; *Pohl v. Chicago, M. & St. P. Ry. Co.*, 52 Mont. 572, 160 Pac. 515. See 7 ENCY. OF EV. 962.

[a] The question is not to be determined by the effect of the statute in a particular case, but upon its general purpose and efficiency to effect that end. *Rochester v. West*, 164 N. Y. 510, 58 N. E. 673, 79 Am. St. Rep. 659, 53 L. R. A. 548.

71. *State v. Sutton*, 83 N. J. L. 46, 49, 84 Atl. 1057.

72. *Hughes v. Felton*, 11 Colo. 489, 19 Pac. 444.

73. *Railway Co. v. Gill*, 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452.

74. Ark.—*Little Rock v. North Little Rock*, 72 Ark. 195, 79 S. W. 785. Cal.—*Dobbins v. Los Angeles*, 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95. Ill.—*People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N. E. 307. Mich.—*People v. Gardner*, 143 Mich. 104, 106 N. W. 541. Neb.—*State ex rel. Thayer v. School Dist.*, 99 Neb. 338, 156 N. W. 641.

ticated act, to show non-compliance with constitutional requirements as to the method of its enactment.<sup>75</sup>

H. CONCLUSIVENESS. — Adjudications of the constitutionality of an act in previous actions between other parties do not preclude a review of the question based on other grounds.<sup>76</sup> But when the appellate court has passed upon a statute a number of times, it may decline to re-examine it when no special reason is assigned why or how it is unconstitutional.<sup>77</sup>

### III. WHETHER STATUTORY REMEDY IS EXCLUSIVE.<sup>78</sup>

Where a statute confers a new right, the remedy provided by the statute is exclusive, so far as the common-law courts are concerned.<sup>79</sup> If the right existed at common law, the remedy provided by the statute is cumulative,<sup>80</sup> unless the common-law remedy is abrogated.<sup>81</sup>

### IV. EFFECT OF REPEALING ACTS ON PENDING ACTIONS.

In the absence of a saving clause,<sup>82</sup> the repeal of a statute creating a cause of action or a remedy, or conferring jurisdiction, determines all pending proceedings under it, at the point where the repeal finds them.<sup>83</sup> And on repeal pending appeal, the appellate court cannot

75. See 12 ENCY. OF EV. 43.

76. *Von Boeckmann v. Corn Products Ref. Co.*, 274 Ill. 605, 113 N. E. 902. See *State ex rel. Collins v. Jones*, 106 Miss. 522, 577, 64 So. 241, and generally the titles "Res Judicata" and "Stare Decisis."

77. *Yechout v. Tesnohlidok*, 97 Neb. 387, 150 N. W. 199.

78. Effect on equitable remedies, see 18 STANDARD PROC. 846.

79. *Ala.*—*Singer Sew. Mach. Co. v. Teasley*, 73 So. 969. *Cal.*—*Ward v. Severance*, 7 Cal. 126 (the party may probably resort to chancery for relief); *People v. Craycroft*, 2 Cal. 243, 56 Am. Dec. 331. *Ky.*—*Grimes v. Central L. Ins. Co.*, 172 Ky. 18, 188 S. W. 901. *Wis.*—*Chicago & N. W. Ry. Co. v. Railroad Com.*, 162 Wis. 91, 155 N. W. 941.

80. *U. S.*—Second Nat. Bank *v. Georger*, 246 Fed. 517. *Cal.*—*Ward v. Severance*, 7 Cal. 126; *People v. Craycroft*, 2 Cal. 243, 56 Am. Dec. 331. *Ky.*—*Grimes v. Central Life Ins. Co.*, 172 Ky. 18, 188 S. W. 901. *Wis.*—*Field v. Milwaukee*, 161 Wis. 393, 154 N. W. 698.

81. *Grimes v. Central Life Ins. Co.*, 172 Ky. 18, 188 S. W. 901.

82. *Ariz.*—*Steinfeld v. Nielsen*, 15 Ariz. 424, 467, 139 Pac. 879. *Conn.*—*Chittenden v. Judson*, 57 Conn. 333, 17 Atl. 929. *Mo.*—*State ex rel. Wayne Co. v. Hackman*, 272 Mo. 600, 199 S. W. 990. *Mont.*—*Bookwalter v. Conrad*, 15 Mont.

464, 39 Pac. 573, 851, effect of saving clause on venue.

[a] "Suit" and "civil cause" within meaning of saving clause defined. *Burlington v. Burlington Traction Co.*, 70 Vt. 491, 41 Atl. 514.

[b] Not only the right on which the action is founded but also the pending action must be saved from the repeal, where the right is created by statute. *Dillon v. Linder*, 36 Wis. 344, 350.

83. *U. S.*—*South Carolina v. Gailard*, 101 U. S. 433, 25 L. ed. 937. *Ariz.*—*Steinfeld v. Nielsen*, 15 Ariz. 424, 467, 139 Pac. 879. *Colo.*—*Smith v. District Court*, 4 Colo. 235. *Ill.*—*Merlo v. Johnston City & B. M. C. & M. Co.*, 258 Ill. 328, 101 N. E. 525; *Vance v. Rankin*, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173. *Miss.*—*French v. State*, 53 Miss. 651. *Mo.*—*State ex rel. Wayne Co. v. Hackman*, 272 Mo. 600, 199 S. W. 990. *N. C.*—*Wikel v. Board of Comrs.*, 120 N. C. 451, 27 S. E. 117. *Wis.*—*Beebee v. O'Brien*, 10 Wis. 481.

As to jurisdiction, see 17 STANDARD PROC. 710.

[a] Repeal (1) of criminal statute. *U. S.*—*Yeaton v. United States*, 5 Cranch 281, 3 L. ed. 101. *Cal.*—*Spears v. Modoc*, 101 Cal. 303, 35 Pac. 869. *Ky.*—*Speckert v. Louisville*, 78 Ky. 287. *N. Y.*—*Hartung v. People*, 22 N. Y. 95. (2) Though repeal takes place after conviction, the judgment is arrested. *Aaron v. State*, 40 Ala. 307;

affirm the judgment, but must dispose of the case under the law as it stands when its decision is rendered.<sup>84</sup> But the repeal of a statute cannot affect vested rights,<sup>85</sup> and actions which are concluded.<sup>86</sup> The repeal of a statute regulating procedure merely, does not abate pending suits,<sup>87</sup> and further proceedings must conform to the new act.<sup>88</sup> A repealing act which substantially reenacts the old statute does not affect pending suits.<sup>89</sup> The repeal of a repealing act does not revive proceedings in the absence of specific provision.<sup>90</sup>

**V. AMENDMENT TO AVAIL OF CHANGE IN LAW PENDING SUIT.**—Where pending an equity case, a statute materially enlarging the powers of the court is passed, it has been held that an amendment to make a case within the statute may be filed.<sup>91</sup> And statutes

*Hartung v. People*, 22 N. Y. 95; *Butler v. Palmer*, 1 Hill (N. Y.) 324. (3) But where the repeal takes place after judgment, the execution of the sentence is not affected (*Aaron v. State*, 40 Ala. 307; *State v. Addington*, 2 Bail. [S. C.] 516, 23 Am. Dec. 150), unless (4) the sentence is not executed on the day specified and the prisoner is brought back for resentencing, the court then being required to inquire if legal reasons exist against resentencing him. *Aaron v. State*, 40 Ala. 307.

[b] **Repeal of Statute Prescribing Penalty.**—*Miller v. Chicago & N. W. Ry. Co.*, 133 Wis. 183, 113 N. W. 384.

[c] The repeal of a statute giving double damages defeats the right to such recovery. *Bay City & E. S. R. Co. v. Austin*, 21 Mich. 390, 409. *Contra*, *Dow v. Electric Co.*, 68 N. H. 59, 31 Atl. 22.

Effect on attachment suits, see 3 STANDARD PROC. 817.

[d] But the omission from a revision of a statute expressly applicable to pending actions does not prevent such applicability to cases where the right has once attached. *Birdsall v. Wheeler*, 53 Conn. 429, 20 Atl. 607.

84. U. S.—*United States v. Boisdore's Heirs*, 8 How. 113, 121, 12 L. ed. 1009. *Ariz.*—*Steinfeld v. Nielsen*, 15 Ariz. 424, 467, 139 Pac. 879. *Cal.* *Spears v. Modoc*, 101 Cal. 303, 35 Pac. 869, will direct dismissal. *Fla.*—*Pensacola & A. R. Co. v. State*, 45 Fla. 86, 33 So. 985, 110 Am. St. Rep. 67, penal action by state. *Ill.*—*Merlo v. Johnston City & B. M. C. & M. Co.*, 258 Ill. 328, 101 N. E. 525; *Bradley v. Martin*, 100 Ill. App. 668. *Ky.*—*Speckert v. Louisville*, 78 Ky. 287. *Md.*—*Keller v. State*, 12 Md. 322, 71 Am. Dec. 596,

striking out affirmance and granting reversal. *N. Y.*—*Hartung v. People*, 22 N. Y. 95, a criminal prosecution—appellate court will reverse. *Tex.*—*Mutual Film Corp. v. Morris* (Tex. Civ. App.), 184 S. W. 1060. *Wis.*—*Beebee v. O'Brien*, 10 Wis. 481. See 17 STANDARD PROC. 711, note 47.

85. *Eastman v. Clackamas Co.*, 12 Sawy. 613, 32 Fed. 24; *State v. Williams*, 10 Tex. Civ. App. 346, 30 S. W. 477, a right of action on a liquor dealer's bond becoming vested on the breach, an action thereon is not affected by a repeal of the law requiring a bond.

86. *Fla.*—*Pensacola & A. R. Co. v. State*, 45 Fla. 86, 33 So. 985, 110 Am. St. Rep. 67. *Ill.*—*Vance v. Rankin*, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173; *Van Inwagen v. Chicago*, 61 Ill. 31. *Wis.*—*Dillon v. Linder*, 36 Wis. 344. *Eng.*—*Kay v. Goodwin*, 6 Bing. 576, 4 Moore & P. 341, 19 E. C. L. 261, 130 Eng. Reprint 1403.

87. *Lessee of Mitchell v. Eyster*, 7 Ohio 257 pt. 1; *Danforth v. Smith*, 23 Vt. 247.

88. *Ill.*—*People v. Clark*, 283 Ill. 221, 119 N. E. 329. *Ind.*—*Pittsburgh, C. C. & St. L. Ry. Co. v. Oglesby*, 165 Ind. 542, 76 N. E. 165. *Kan.*—*See Wheelock v. Myers*, 64 Kan. 47, 67 Pac. 632.

89. *Moore v. Kenockee*, 75 Mich. 332, 42 N. W. 944, 4 L. R. A. 555; *McMullen v. Guest*, 6 Tex. 275.

90. *Com. v. Leech*, 24 Pa. 55.

[a] But where a subsequent statute saving actions is passed before the formal abatement of a suit pending at the time of repeal, the suit may be maintained. *Davis v. Meade*, 13 Serg. & R. (Pa.) 281.

91. *Harvey v. Lord*, 11 Biss. (U. S.)



authorizing courts to allow amendments to change actions at law to suits in equity and vice versa applies to pending proceedings.<sup>92</sup>

**VI. PLEADING STATUTES.**—A. NECESSITY OF.—Statutes which are judicially noticed, of course need not be specially pleaded.<sup>93</sup> Thus in actions in state courts it is not necessary to plead public statutes of the forum,<sup>94</sup> or the statutes of the United States.<sup>95</sup> And in the federal courts, the laws of a state,<sup>96</sup> and of the United States,<sup>97</sup> need not be pleaded. But private statutes<sup>98</sup> and statutes of other<sup>99</sup>

144, 10 Fed. 236, when after the filing of a bill giving a court enlarged pauses, the plaintiff may amend to make a case enabling the court to administer the enlarged powers acquired pendente lite. See *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. ed. 864. But see *Sanborn v. Sanborn*, 7 Gray (Mass.) 142, holding that after a suit for specific performance was brought and after a report of a master that no such agreement was made, the plaintiff cannot amend to seek relief on the ground of fraud under a statute made pendente lite conferring such jurisdiction on the court.

92. *George v. Reed*, 101 Mass. 378.

93. As to judicial notice of statutes, see the "ENCYCLOPEDIA OF EVIDENCE," title "Judicial Notice."

Pleading municipal ordinances, see the title "Municipal Corporations."

94. Ill.—*People v. Taylor*, 281 Ill. 355, 117 N. E. 1047. Mo.—*Gibson v. Chicago G. W. R. Co.*, 225 Mo. 473, 483, 125 S. W. 453. N. J.—*Newman v. Sanders*, 89 N. J. L. 120, 97 Atl. 782.

Pleading facts judicially noticed, generally, see 6 STANDARD PROC. 639, and 16 STANDARD PROC. 518.

[a] Charter powers of a city granted by public act need not be pleaded. *O'Connor v. Laredo* (Tex. Civ. App.), 167 S. W. 1091.

[b] But a practical construction of a statute relied on must be pleaded. *New York v. Fifth Ave. Coach Co.*, 158 N. Y. Supp. 750.

Necessity of referring to statute, see 6 STANDARD PROC. 696, 4 STANDARD PROC. 852; 18 STANDARD PROC. 1058; 21 STANDARD PROC. 283, in indictment or information, see 12 STANDARD PROC. 440.

All facts necessary to bring the party within the statute must be pleaded. See 6 STANDARD PROC. 679, and 4 STANDARD PROC. 352.

Negating exceptions, see 6 STANDARD PROC. 680.

95. *McDonald v. Railway Transfer Co.*, 121 Minn. 273, 141 N. W. 177; *Pipes v. Missouri Pac. Ry. Co.*, 267 Mo. 385, 184 S. W. 79; *Stubblefield v. St. Louis & S. F. R. Co.*, 194 Mo. App. 396, 184 S. W. 149.

96. *Williams v. William B. Scaife & Sons Co.*, 227 Fed. 922; *Noonan v. Delaware, L. & W. R. Co.*, 68 Fed. 1.

97. *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355, Ann. Cas. 1914B, 134.

98. *Crawfordsville & S. W. Tp. B. v. Fletcher*, 104 Ind. 97, 2 N. E. 243; *Hooper v. New York*, 96 Misc. 47, 160 N. Y. Supp. 14.

In indictment or information, see 12 STANDARD PROC. 441.

Acts of incorporation as private statutes, see 5 STANDARD PROC. 642. Act incorporating a bank as a public act. See 4 STANDARD PROC. 4, note 9.

99. Ill.—*Christiansen v. Graver Tank Wks.*, 223 Ill. 142, 151, 79 N. E. 97. Kan.—*Showalter v. Rickert*, 61 Kan. 82, 67 Pac. 454. Ky.—*Blair v. Norfolk & W. Ry. Co.*, 162 Ky. 833, 173 S. W. 162. Minn.—*Hoyt v. McNeil*, 13 Minn. 390. Mo.—*Gibson v. Chicago G. W. R. Co.*, 225 Mo. 473, 125 S. W. 453; *State Nat. Bank v. Anderson* (Mo. App.), 198 S. W. 511; *Davis v. McColl* (Mo. App.), 184 S. W. 920. N. Y. *Naualis v. Philadelphia & R. Coal & Iron Co.*, 170 App. Div. 500, 156 N. Y. Supp. 357. Tex.—*Kinney v. Tri-State Tel. Co.* (Tex. Civ. App.), 201 S. W. 1180. Wash.—*Lagomarsino v. Pacific Alaska Nav. Co.*, 100 Wash. 105, 170 Pac. 368. Wis.—*Welch v. Dunning*, 163 Wis. 535, 158 N. W. 323; *Dean v. Dean*, 162 Wis. 303, 156 N. W. 135.

See *Hollister v. Hollister*, 85 Ore. 316, 166 Pac. 940, considering law of sister state set up in brief though not pleaded.

[a] In actions based on foreign statutes, statute must be set forth, whatever the form of action or the

states and of foreign countries,<sup>1</sup> relied upon as the foundation of a liability or defense must be pleaded and proved as other facts, but when they are relied on merely as evidence of ultimate facts, they need not be pleaded.<sup>2</sup>

**B. MANNER OF. — PRIVATE STATUTES.** — Statutes generally provide that in pleading a private statute, it is sufficient to refer to it by stating its title and the day on which it became a law.<sup>3</sup>

**Statutes of Sister States, and Foreign Countries.** — In pleading statutes of other states or foreign countries their language must be quoted,<sup>4</sup> or the substance of their provisions stated.<sup>5</sup> It is not sufficient to state what in the judgment of the pleader are their general provisions and requirements,<sup>6</sup> or merely to refer to them by their titles and dates of

nature of the liability. *Fogle v. Pindell*, 248 Mo. 65, 154 S. W. 81.

[b] **Foreign Statute of Limitations.** Ark.—*Carter v. Adamson*, 21 Ark. 287. Ia.—*Gillett v. Hill*, 32 Iowa 220. Ky. *Valz v. First Nat. Bank*, 96 Ky. 543, 29 S. W. 329, 49 Am. St. Rep. 306. Neb. *Minneapolis Harvester Wks. v. Smith*, 36 Neb. 616, 54 N. W. 973. Okla. *Richardson v. Mackay*, 4 Okla. 328, 46 Pac. 546.

1. *Sultan of Turkey v. Tiryakian*, 213 N. Y. 429, 108 N. E. 72.

[a] **Lex fori** governs necessity of pleading foreign law. *Panama Elec. Ry. Co. v. Moyers*, 249 Fed. 19, 161 C. C. A. 79.

2. Ill.—*Drtna v. Charles Tea Co.*, 281 Ill. 259, 118 N. E. 69; *Christiansen v. Graver Tank Wks.*, 223 Ill. 142, 152, 79 N. E. 97. Ia.—*Green v. Equitable Mut. L. & End. Assn.*, 105 Iowa 628, 635, 75 N. W. 635. Mo.—*Fogle v. Pindell*, 248 Mo. 65, 154 S. W. 81.

**Pleading evidence**, see the title, "Pleading."

[a] **Under plea of "not guilty,"** a foreign law may be proved as part of defense to the action although not alleged. *Christiansen v. Graver Tank Wks.*, 223 Ill. 142, 152, 79 N. E. 97.

3. *Zable v. Louisville Baptist O. Home*, 92 Ky. 89, 17 S. W. 212, 13 L. R. A. 668; *Hooper v. New York*, 96 Misc. 47, 160 N. Y. Supp. 14.

**In indictment or information**, see 12 STANDARD PROC. 44.

4. *Showalter v. Rickert*, 64 Kan. 82, 67 Pac. 454; *Minneapolis Harvester Wks. v. Smith*, 36 Neb. 616, 54 N. W. 973.

5. Ark.—*St. Louis, I. M. & S. R. Co. v. Haist*, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65. Kan.—*Sho-*

*walter v. Rickert*, 64 Kan. 82, 67 Pac. 454. Minn.—*Hoyt v. McNeil*, 13 Minn. 390. N. J.—*Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52. N. Y. *Sultan of Turkey v. Tiryakian*, 213 N. Y. 429, 108 N. E. 72. Wis.—*Central Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. 141.

[a] **Foreign Statute of Limitations.** *Valz v. First Nat. Bank*, 96 Ky. 543, 29 S. W. 329, 49 Am. St. Rep. 306; *Minneapolis Harvester Wks. v. Smith*, 36 Neb. 616, 54 N. W. 973.

[b] **Substance must be pleaded with such distinctness** that the court may judge of its effect. *Wentz v. Chicago, B. & Q. R. Co.*, 259 Mo. 450, 465, 168 S. W. 1166, Ann. Cas. 1916B, 317.

6. *Carey v. Cincinnati & C. R. Co.*, 5 Iowa 357; *Wentz v. Chicago B. & Q. R. Co.*, 259 Mo. 450, 465, 168 S. W. 1166, Ann. Cas. 1916B, 317; *Gibson v. Chicago G. W. R. Co.*, 225 Mo. 473, 125 S. W. 453.

[a] **A general averment** (1) of the existence of a statute and that it confers a right is objectionable as being a mere conclusion. Ala.—*Cubbedge, Hazlehurst & Co. v. Napier*, 62 Ala. 518. Mo.—*Gibson v. Chicago G. W. R. Co.*, 225 Mo. 473, 486, 125 S. W. 453. N. J.—*Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52. See *Lomb v. Pioneer Sav. & L. Co.*, 96 Ala. 430, 11 So. 154; *Holmes v. Broughton*, 10 Wend. (N. Y.) 75, 25 Am. Dec. 536. (2) But see *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 22 N. E. 572, 15 Am. St. Rep. 494, 5 L. R. A. 541, holding an allegation that a "surrogate had jurisdiction and was duly authorized and empowered by the laws of the state of New Jersey to issue said letters" of administration is sufficient to authorize proof of the laws. To

approval,<sup>7</sup> or by the volumes and sections of a compilation,<sup>8</sup> unless such a method of pleading is authorized by statute.<sup>9</sup> And where it is claimed the cause of action is barred by a foreign law, facts bringing the action within its application must be alleged,<sup>10</sup> unless a statute provides otherwise.<sup>11</sup>

**VII. JUDICIAL QUESTIONS AND QUESTIONS OF LAW AND FACT.**<sup>12</sup> — It is a judicial question whether a general law can be made applicable,<sup>13</sup> or whether a given act repeals another.<sup>14</sup> The public or private character of a statute,<sup>15</sup> its constitutionality,<sup>16</sup> and the construction, effect and application of statutes,<sup>17</sup> are questions of law for the court. So also it is within the province of the courts to ascertain the meaning of and constitution, when such question properly arises.<sup>18</sup>

similar effect. See *Consolidated Tank Line Co. v. Collier*, 148 Ill. 259, 35 N. E. 756, 39 Am. St. Rep. 181; *Berney v. Drexel*, 33 Hun (N. Y.) 34; *Bank of Utica v. Smedes*, 3 Cow. (N. Y.) 662, 684.

7. *Carey v. Cincinnati & C. R. Co.*, 5 Iowa 357; *McDonald v. Bankers' Life Assn.*, 154 Mo. 618, 55 S. W. 999.

8. *Atlantic Coast Line R. Co. v. Barton*, 14 Ga. App. 160, 80 S. E. 530.

9. *Central Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. 141, a foreign statute may be pleaded by referring to its title and the date of its passage.

10. *Ala.*—*Minniece v. Jeter*, 65 Ala. 222, that contract was made in foreign state to be alleged. *Ill.*—*Grammer v. Grammer*, 52 Ill. App. 273, residence of payee must be alleged. *Okla.*—*Richardson v. Mackay*, 4 Okla. 328, 46 Pac. 546.

11. *Allen v. Allen*, 95 Cal. 184, 27 Pac. 30.

12. See the title "Province of Court and Jury."

13. *State v. Hammond*, 66 S. C. 219, 44 S. E. 797; *Carolina Grocery Co. v. Burnet*, 61 S. C. 205, 210, 39 S. E. 381, 58 L. R. A. 687.

14. *Merlo v. Johnston City & B. M. C. & M. Co.*, 258 Ill. 328, 101 N. E. 525.

15. *Durham v. Richmond & D. R. Co.*, 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1.

16. See *supra*, II.

17. *Ill.*—*People v. Peden*, 109 Ill. App. 560. *N. Y.*—*People v. Ganly*, 170 App. Div. 702, 156 N. Y. Supp. 671; *Winchell v. Camillus*, 109 App. Div. 341, 95 N. Y. Supp. 688. *N. C.*—*Goins v. Board of Trustees*, 169 N. C. 736, 86 S. E. 629.

[a] "Among the well settled rules of construction of statutes, are these: 1st, the natural import of the words of any legislative act, according to the common use of them when applied to the subject matter of the act, is to be taken as expressing the intention of the legislature, unless the intention so resulting from the ordinary import of the words be repugnant to sound acknowledged principles of public policy, . . . and 2d, if the subject of the statute relates to courts or legal proofs, the words of the legislature are to be construed technically, unless from the statute it appears that the terms were used in a more popular sense." *People ex rel. Hughes v. May*, 3 Mich. 598, 605.

18. *Kamper v. Hawkins*, 1 Va. Cas. (3 Va.) 20, 82. See also the following cases: *Cal.*—*Older v. Superior Court*, 157 Cal. 770, 109 Pac. 478. *Ky.*—*Rhea v. Newman*, 153 Ky. 604, 156 S. W. 154, 44 L. R. A. (N. S.) 989. *Ore.*—*Schubel v. Olcott*, 60 Ore. 503, 120 Pac. 375. *Tenn.*—*Prescott v. Duncan*, 126 Tenn. 106, 148 S. W. 229.

And see *supra*, II.

[a] Some rules of construction of statutes are equally applicable (1) to the construction of the constitution. *People v. May*, 3 Mich. 598, 605. (2) But "a written constitution must be interpreted and effect given to it as the paramount law of the land, equally obligatory upon the legislature as upon other departments of government and individual citizens, according to its spirit and the intent of its framers, as indicated by its terms." *People ex rel. Bolton v. Albertson*, 55 N. Y. 50, 55. (3) And since constitutions import the utmost discrimination in the



**Foreign Laws.** — The functions of the judge and jury with respect to foreign laws are not well distinguished.<sup>19</sup> As a general rule, foreign laws are facts which must be proved to and found by the jury as such,<sup>20</sup> unless by statute the court is required to take judicial notice of the statutes and decisions of other countries or states;<sup>21</sup> but it has been held that the better opinion is that the evidence should be addressed to the court rather than the jury.<sup>22</sup> What is proper evidence of the law is a question of law for the court.<sup>23</sup> Where the evidence of the foreign law is a single statute or decision of a court, the language of which is not in dispute, the construction of it, like any other writing, is a question of law for the court;<sup>24</sup> but where the law is to be de-

use of language, while statutes are often hastily and unskillfully drawn, the discretion of courts is more restricted in applying the rules of construction to a constitution than in the construction of statutes. *Greencastle v. Black*, 5 Ind. 557, 566, 570. See also *Dorman v. State*, 34 Ala. 216, 238; *Carton v. Secretary of State*, 151 Mich. 337, 351, 115 N. W. 429, 439.

19. *Hynes v. McDermott*, 82 N. Y. 41, 58, 37 Am. Rep. 538, citing 1 Taylor on Ev., 7 ed., §48.

[a] When foreign laws are in evidence, it is no less the duty of the court to determine the law of the case from them, than it is its duty in determining its own laws. *Slaughter v. Metropolitan St. Ry. Co.*, 116 Mo. 269, 277, 23 S. W. 760.

20. Conn.—*Dyer v. Smith*, 12 Conn. 384. Ill.—*Mexican Cent. Ry. Co. v. Gehr*, 66 Ill. App. 173, 195. Md.—*Thrasher v. Everhart*, 3 Gill & J. 234. Mass.—*Paddleford v. Lane & Co.*, 223 Mass. 113, 111 N. E. 769; *Coe v. Hill*, 201 Mass. 15, 86 N. E. 949; *Electric Welding Co. v. Prince*, 200 Mass. 386, 86 N. E. 947, 128 Am. St. Rep. 434; *Ufford v. Spaulding*, 156 Mass. 65, 30 N. E. 360; *Holman v. King*, 7 Mete. 384. N. H.—*Pickard v. Bailey*, 26 N. H. 152, 169. N. Y.—*Bank of China v. Morse*, 168 N. Y. 458, 470, 61 N. E. 774, 85 Am. St. Rep. 676, 56 L. R. A. 139. Ohio.—*Ingraham v. Hart*, 11 Ohio 255. S. C.—*Frasier v. Charleston & W. C. Ry. Co.*, 73 S. C. 140, 144, 52 S. E. 964. Tex.—*St. Louis & S. F. R. Co. v. Conrad* (Tex. Civ. App.), 99 S. W. 209. Vt.—*Morrisette v. Canadian Pac. R. V. Co.*, 74 Vt. 232, 243, 52 Atl. 520; *Peck v. Hibbard*, 26 Vt. 698, 706, 62 Am. Dec. 605.

Judicial notice not taken of foreign

laws, see 5 ENCY. OF EV. 808, and 7 STANDARD PROC. 955, and 958.

As to manner of proving foreign law, see 5 ENCY. OF EV. 821.

[a] Exception.—A case in which the foreign law is introduced to enable the court to determine whether a written instrument is evidence is not within the application of this general rule. *Thrasher v. Everhart*, 3 Gill & Johns. (Md.) 234.

21. *Lockwood v. Crawford*, 18 Conn. 361; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398. See 7 STANDARD PROC. 956.

22. *Pickard v. Bailey*, 26 N. H. 152, 169. See also *Hooper v. Moore*, 50 N. C. 130.

23. Mass.—*Kline v. Baker*, 99 Mass. 253. N. Y.—*Hynes v. McDermott*, 82 N. Y. 41, 58, 37 Am. Rep. 538. Ore.—*State v. Moy Looke*, 7 Ore. 54.

[a] Of the competence of the witness as to the foreign law, the court is to judge. *Kenny v. Clarkson*, 1 Johns. (N. Y.) 385, 394, 3 Am. Dec. 336.

24. Ala.—*Inge v. Murphy*, 10 Ala. 885. Ill.—*Mexican Cent. Ry. Co. v. Gehr*, 66 Ill. App. 173, 195. Mass.—*Electric Welding Co. v. Prince*, 200 Mass. 386, 86 N. E. 947, 128 Am. St. Rep. 434; *Wylie v. Cotter*, 170 Mass. 356, 49 N. E. 746, 64 Am. St. Rep. 305; *Shoe & Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753. N. Y.—*Bank of China v. Morse*, 168 N. Y. 458, 470, 61 N. E. 774, 85 Am. St. Rep. 676, 56 L. R. A. 139. N. C.—*Moore v. Gwynn*, 27 N. C. 187; *State v. Jackson*, 13 N. C. 563. Ore.—*State v. Moy Looke*, 7 Ore. 54. S. C.—*Frasier v. Charleston & W. C. Ry. Co.*, 73 S. C. 140, 145, 52 S. E. 964; *State v. Whittle*, 59 S. C. 297, 304, 37 S. E. 923. Va.—*Union Cent. Life Ins. Co. v. Pollard*,

terminated by considering numerous decisions which may be more or less conflicting,<sup>26</sup> or which bear upon the subject only collaterally or by way of analogy, and where inferences may be drawn from them,<sup>26</sup> or where the evidence consists of the parol testimony of expert witness as to the construction given a statute by the tribunals of the foreign state,<sup>27</sup> the question to be determined is one of fact for the jury, and not of law.

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| <p>94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271.<br/>         [a] <b>Whether the writing contains the law</b> is all that the jury can decide. Mexican Cent. Ry. Co. v. Gehr, 66 Ill. App. 173, 195.<br/>         25. <i>Electric Welding Co. v. Prince</i>, 200 Mass. 386, 390, 86 N. E. 947, 128 Am. St. Rep. 434; <i>Wylie v. Cotter</i>, 170 Mass. 356, 49 N. E. 746, 64 Am. St. Rep. 305; <i>St. Louis &amp; S. F. R. Co. v. Conrad</i> (Tex. Civ. App.), 99 S. W. 209.<br/>         26. <i>Electric Welding Co. v. Prince</i>,</p> | <p>200 Mass. 386, 390, 86 N. E. 947, 128 Am. St. Rep. 434; <i>Wylie v. Cotter</i>, 170 Mass. 356, 49 N. E. 746, 64 Am. St. Rep. 305; <i>St. Louis &amp; S. F. R. Co. v. Conrad</i> (Tex. Civ. App.), 99 S. W. 209.<br/>         27. <b>Mass.</b>—<i>Kline v. Baker</i>, 99 Mass. 253. <b>N. C.</b>—<i>Hancock v. Western Union Tel. Co.</i>, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403. <b>Tex.</b>—<i>St. Louis &amp; S. F. R. Co. v. Conrad</i> (Tex. Civ. App.), 99 S. W. 209. <b>Vt.</b>—<i>Morrisette v. Canadian Pac. R. Co.</i>, 74 Vt. 232, 243, 52 Atl. 520.</p> |
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**STATUTORY ACTIONS.**— See **Statutes; Summary Proceedings; Pleading.**

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**STAY OF PROCEEDINGS.**— See **Supersedeas and Stay of Proceedings.**

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**STEAM.**— See **Injuries to Persons and Property; Public Service Corporations.**

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# STENOGRAPHERS

By the Editorial Staff.

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For cross-references see the index to this work and the notes throughout this article.

**I. NATURE OF OFFICE.**—A stenographer is an officer of the court<sup>1</sup> charged under oath<sup>2</sup> with certain prescribed duties<sup>3</sup> in con-

1. **Ala.**—*Ex parte Hill*, 196 Ala. 462, 71 So. 994. **Ga.**—*Seaboard Air-Line Ry. v. Memory*, 126 Ga. 183, 55 S. E. 15. **Ore.**—*Tallmadge v. Hooper*, 37 Ore. 503, 510, 61 Pac. 349, 1127. **P. R.**—*People v. Santiago*, 16 Porto Rico 446. **S. C.**—*Rynerson v. Allison*, 30 S. C. 534, 538, 9 S. E. 656.

[a] Not an attache of the judge (1) but an officer of the court. *Ex parte Hill*, 196 Ala. 462, 71 So. 994. (2) That the word "attaches" as used in a statute authorizing courts to appoint "their clerks and attaches," includes stenographers, see *Elder v. McDougald*, 145 Cal. 740, 79 Pac. 429.

[b] The stenographer is a new officer unknown until lately in our judicial history. *Rynerson v. Allison*, 30 S. C. 534, 9 S. E. 656.

[c] That the position of stenographer is not an "office" within the meaning of the word as used in the constitution, see *Robertson v. Ellis*, 38 Tex. Civ. App. 146, 84 S. W. 1097.

[d] History of stenographers in Missouri, see *State v. Hitchcock*, 171 Mo. App. 109, 153 S. W. 546.

2. **Colo.**—*Keady v. Owers*, 30 Colo. 1, 69 Pac. 509. **Ga.**—*Seaboard Air-Line Ry. v. Memory*, 126 Ga. 183, 55 S. E. 15. **Mass.**—*Churchill v. Palmer*, 115 Mass. 310. **Mo.**—*State v. McKay*, 249 Mo. 249, 155 S. W. 396, Ann. Cas. 1914D, 97; *State v. Hitchcock*, 171 Mo. App. 109, 153 S. W. 546. **Tex.**—*Burden v. State*, 70 Tex. Crim. 349, 156 S. W. 1196; *Robertson v. Ellis*, 38 Tex. Civ. App. 146, 84 S. W. 1097.

3. Duties of, see *infra*, 111

nection with the making, preserving and transcribing of reports of judicial proceedings.<sup>4</sup>

The purpose of employing stenographers is to expedite the business of courts<sup>5</sup> through the assistance they afford the judge or counsel in preparing for<sup>6</sup> or conducting<sup>7</sup> trials or in preserving accurate records of the testimony and proceedings for subsequent use.<sup>8</sup>

## II. APPOINTMENT, QUALIFICATION AND REMOVAL. — A.

**POWER TO APPOINT. — 1. Source of.** — The matter of appointing and removing court stenographers and reporters is, in general, regulated by constitutional and statutory provisions,<sup>9</sup> or provisions of city charters.<sup>10</sup>

**2. In What Proceedings.** — The statutes authorize the employment of stenographic reporters in both civil<sup>11</sup> and criminal<sup>12</sup> proceed-

4. *Tallmadge v. Hooper*, 37 Ore. 503, 61 Pac. 349, 1127; *Rynerson v. Allison*, 30 S. C. 534, 9 S. E. 656.

5. *State v. McKay*, 249 Mo. 249, 155 S. W. 396, Ann. Cas. 1914D, 97; *State ex rel. Tilley v. Ford*, 41 Mo. App. 127.

6. *Etter v. McLennan County* (Tex. Civ. App.), 156 S. W. 251.

[a] **Employed in lunacy proceedings** instituted by the prosecuting attorney prior to criminal prosecution. *Etter v. McLennan County* (Tex. Civ. App.), 156 S. W. 251.

7. *Ala.*—*Loudermilk v. State*, 4 Ala. App. 167, 58 So. 180. *Mass.*—*Churchill v. Palmer*, 115 Mass. 310. *N. Y.*—*Moynahan v. City of New York*, 205 N. Y. 181, 98 N. E. 482. *Tex.*—*Robertson v. Ellis*, 38 Tex. Civ. App. 146, 84 S. W. 1097.

8. *Ala.*—*Loudermilk v. State*, 4 Ala. App. 167, 58 So. 180. *Mass.*—*Churchill v. Palmer*, 115 Mass. 310. *Neb.*—*Home Fire Ins. Co. v. Galley*, 43 Neb. 71, 61 N. W. 84. *P. R.*—*People v. Santiago*, 16 Porto Rico 446. *Tex.*—*Robertson v. Ellis*, 38 Tex. Civ. App. 146, 84 S. W. 1097.

See *infra*, III, D.

9. *Ala.*—*Ex parte Hill*, 196 Ala. 462, 71 So. 994; *Jennings v. State*, 15 Ala. App. 116, 72 So. 690. *Ark.*—*Mullett v. Morris*, 117 Ark. 377, 174 S. W. 1161. *Cal.*—*Elder v. McDougald*, 145 Cal. 740, 79 Pac. 429. *Ill.*—*People v. Kelley*, 134 Ill. App. 642. *Ky.*—*Woodruff v. Goldbach*, 153 Ky. 411, 155 S. W. 729, 156 S. W. 115. *Mass.*—*Churchill v. Palmer*, 115 Mass. 310. *Mo.*—*State v. McKay*, 249 Mo. 249, 155 S. W. 396, Ann. Cas. 1914D, 97. *Okla.*—*Board of Comrs. v. De Armond*, 55 Okla. 618, 155 Pac. 592. *Pa.*—*Russell v. City of Philadelphia*, 236

*Pa.* 560, 84 Atl. 1101. *Tex.*—*Shoek v. Colorado County*, 52 Tex. Civ. App. 473, 115 S. W. 61; *Robertson v. Ellis*, 38 Tex. Civ. App. 146, 84 S. W. 1097. *Utah.* *State ex rel. Davis v. Cutler*, 34 Utah 99, 95 Pac. 1071. *W. Va.*—*Weigand v. Alliance Supply Co.*, 44 W. Va. 133, 28 S. E. 803.

[a] **In place of the official reporter**, the court may appoint a competent stenographer. *Jennings v. State*, 15 Ala. App. 116, 72 So. 690.

10. *Trefts v. McDougald*, 15 Cal. App. 584, 115 Pac. 655; *Elder v. McDougald*, 145 Cal. 740, 79 Pac. 429.

[a] **As to reporters in preliminary examinations** before police judges, the provisions of the municipal charter, rather than those of the general laws are controlling. *Elder v. McDougald*, 145 Cal. 740, 79 Pac. 429; *Trefts v. McDougald*, 15 Cal. App. 584, 115 Pac. 655.

11. *U. S.*—*In re Rozinsky*, 101 Fed. 229. *Ala.*—*Ex parte Hill*, 196 Ala. 462, 71 So. 994. *Ark.*—*Mullett v. Morris*, 117 Ark. 377, 174 S. W. 1161. *Colo.* *Keady v. Owers*, 30 Colo. 1, 69 Pac. 509. *Ga.*—*Seaboard Air Line Ry. v. Memory*, 126 Ga. 183, 55 S. E. 15. *Ind.* *Chicago & S. E. Ry. Co. v. McEwen*, 35 Ind. App. 251, 71 N. E. 926. *N. Y.* *Bottom v. Neely*, 104 N. Y. Supp. 429. *Okla.*—*Methvine v. Fisher*, 166 Pac. 702. *Wis.*—*Gilechrist v. Brande*, 58 Wis. 184, 15 N. W. 817.

12. *Ala.*—*Jennings v. State*, 15 Ala. App. 116, 72 So. 690. *Ill.*—*People v. King*, 276 Ill. 138, 114 N. E. 601. *Ia.* *State v. Frost*, 95 Iowa 448, 64 N. W. 401. *Kan.*—*State v. Dreany*, 65 Kan. 292, 69 Pac. 182. *La.*—*State v. Vicknair*, 118 La. 963, 43 So. 635. *Mo.*

ings. Their services are not, except in certain jurisdictions,<sup>13</sup> limited to trials of causes in court, but extend to other proceedings of a judicial or quasi judicial nature.<sup>14</sup>

**3. By Judge or Court.**—a. *In General.*—Authority to appoint stenographers and reporters is generally lodged in certain designated judges<sup>15</sup> who are empowered to select them in the first instance or to require them to act in a particular case when their services<sup>16</sup> are prop-

State *v.* Pagels, 92 Mo. 300, 4 S. W. 931. **Okla.**—Corliss *v.* State, 12 Okla. 526, 159 Pac. 1015. **P. R.**—People *v.* Santiago, 16 Porto Rico 446. **Tex.** Burden *v.* State, 70 Tex. Crim. 349, 156 S. W. 1196; Nelson *v.* State, 48 Tex. Crim. 471, 88 S. W. 807.

Before grand jury, see 10 STANDARD PROC. 653.

[a] **On Preliminary Examination.** Elder *v.* McDougald, 145 Cal. 740, 79 Pac. 429; People *v.* McIntyre, 127 Cal. 423, 59 Pac. 779. See further 21 STANDARD PROC. 514.

[b] **A stenographer from district attorney's office appointed.** Jennings *v.* State, 15 Ala. App. 116, 72 So. 690.

[c] **Refusal to permit defendant's private stenographer to attend the trial and report the proceedings, held error.** State *v.* Dreany, 65 Kan. 292, 69 Pac. 182.

13. Weigand *v.* Alliance Supply Co., 44 W. Va. 133, 28 S. E. 803.

14. Co-Operative Mfg. Produce & Home Co. *v.* Rusche, 30 Ky. L. Rep. 790, 99 S. W. 677; Russell *v.* City of Philadelphia, 236 Pa. 560, 84 Atl. 1101.

[a] **Proceedings Before Commissioners.**—Co-Operative Mfg. Produce & Home Co. *v.* Rusche, 30 Ky. L. Rep. 790, 99 S. W. 677. *Contra*, Weigand *v.* Alliance Supply Co., 44 W. Va. 133, 28 S. E. 803.

[b] **Before masters and special masters in chancery.** Russell *v.* City of Philadelphia, 236 Pa. 560, 84 Atl. 1101.

[c] **Proceedings Before Referees.** **U. S.**—*In re* Rozinsky, 101 Fed. 229. **N. Y.**—Eckstein *v.* Schleimer, 62 Misc. 635, 116 N. Y. Supp. 7; Bottome *v.* Neely, 104 N. Y. Supp. 429. **Pa.**—Russell *v.* Philadelphia, 236 Pa. 560, 84 Atl. 1101, in bankruptcy.

Before grand jury, see *supra*, this note and 10 STANDARD PROC. 653.

[d] **At Lunacy Inquiry.**—Etter *v.* McLennan County (Tex. Civ. App.), 156 S. W. 251.

15. **Ala.**—*Ex parte* Hill, 196 Ala. 462, 71 So. 994. **Cal.**—People *v.* McIn-

tyre, 127 Cal. 423, 59 Pac. 779. **Ga.** Peoples *v.* Garrison & Son, 143 Ga. 384, 85 S. E. 119. **Ill.**—People *v.* Kelley, 134 Ill. App. 642. **Ky.**—Woodruff *v.* Goldbach, 153 Ky. 411, 155 S. W. 729, 156 S. W. 115. **Mass.**—Churchill *v.* Palmer, 115 Mass. 310. **Mo.**—State *v.* McKay, 249 Mo. 249, 155 S. W. 396, Ann. Cas. 1914D, 97; State *ex rel.* Tilley *v.* Ford, 41 Mo. App. 127. **Neb.** Home Fire Ins. Co. *v.* Galley, 43 Neb. 71, 61 N. W. 84. **Okla.**—Board of Comrs. *v.* De Armond, 55 Okla. 618, 155 Pac. 592. **Ore.**—Tallmadge *v.* Hooper, 37 Ore. 503, 61 Pac. 349, 1127. **Pa.**—Russell *v.* Philadelphia, 236 Pa. 560, 84 Atl. 1101. **Tex.**—Otto *v.* Wren (Tex. Civ. App.), 184 S. W. 350; Robertson *v.* Ellis, 38 Tex. Civ. App. 146, 84 S. W. 1097. **Utah.**—State *ex rel.* Davis *v.* Cutler, 34 Utah 99, 95 Pac. 1071. **W. Va.**—Weigand *v.* Alliance Supply Co., 44 W. Va. 133, 28 S. E. 803.

[a] **Appointment made from eligible lists under civil service rules.** O'Sullivan *v.* Knox, 54 App. Div. 374, 66 N. Y. Supp. 611.

[b] **The constitutionality of a statute imposing upon judges of the civil district court for the parish of Orleans the duty of appointing shorthand reporters, discussed.** Rapier *v.* Guedry, 136 La. 443, 67 So. 322.

[c] **Circuit Judge.**—Mullett *v.* Morris, 117 Ark. 377, 174 S. W. 1161; Tallmadge *v.* Hooper, 37 Ore. 503, 61 Pac. 349, 1127.

[d] **The fiscal court has no power to appoint a stenographer for such court under Ky. St., see 331e, subsec. 17, authorizing the county court to appoint stenographers to attend its hearings.** Woodruff *v.* Goldbach, 153 Ky. 411, 155 S. W. 729, 156 S. W. 115.

16. See following notes.

[a] **Time for Request.**—The request to have testimony reported must be made at the beginning of the trial and before any of the testimony is given.



erly requested by the parties or their attorneys,<sup>17</sup> or even in the absence of any such request.<sup>18</sup>

b. *Discretion of Court.*—The necessity and advisability of having all or any portion of the proceedings taken by a reporter is a matter which usually rests in the court's sound discretion,<sup>19</sup> and its ruling is not reviewable,<sup>20</sup> unless perhaps there is a palpable and prejudicial abuse of such discretion.<sup>21</sup> But in some states the party is entitled to have proceedings reported as a matter of right,<sup>22</sup> and the denial of such privilege will result in reversal regardless of the merits of the portion of the record omitted.<sup>23</sup> The requests of the party to have certain proceedings reported and the court's refusal thereof may be shown by affidavits or other competent evidence.<sup>24</sup>

*Durke v. Crane*, 112 La. 156, 36 So. 306.

17. *La.*—*Durke v. Crane*, 112 La. 156, 36 So. 306. *Mass.*—*Churchill v. Palmer*, 115 Mass. 310. *Tex.*—*Otto v. Wren* (Tex. Civ. App.), 184 S. W. 350.

18. *Peoples v. Garrison & Son*, 143 Ga. 384, 85 S. E. 119.

19. *Ind.*—*Adams v. State*, 156 Ind. 596, 59 N. E. 24; *Chicago & S. E. Ry. Co. v. McEwen*, 35 Ind. App. 251, 71 N. E. 926. *Ia.*—*State v. Frost*, 95 Iowa 448, 64 N. W. 401. *La.*—*Rapier v. Guedry*, 136 La. 443, 67 So. 322. *Mo.*—*State v. Pagels*, 92 Mo. 300, 4 S. W. 931. *Neb.*—*Home Fire Ins. Co. v. Galley*, 43 Neb. 71, 61 N. W. 84. *Ore.*—*Tallmadge v. Hooper*, 37 Ore. 503, 61 Pac. 349, 1127. *Tex.*—*Andrews v. State* (Tex. Crim.), 76 S. W. 918; *Robertson v. Ellis*, 38 Tex. Civ. App. 146, 84 S. W. 1097. *W. Va.*—*Weigand v. Alliance Supply Co.*, 44 W. Va. 133, 28 S. E. 803.

[a] It is not mandatory that every case should be reported. *Peoples v. Garrison & Son*, 143 Ga. 384, 85 S. E. 119.

20. *Mo.*—*State v. Pagels*, 92 Mo. 300, 4 S. W. 931. *Neb.*—*Home Fire Ins. Co. v. Galley*, 43 Neb. 71, 61 N. W. 84. *Tex.*—*Schoenfeldt v. State*, 30 Tex. App. 695, 18 S. W. 640.

[a] Refusal to delay trial until a stenographer is obtained not ground for reversal. *Home Fire Ins. Co. v. Galley*, 43 Neb. 71, 61 N. W. 84.

[b] Refusal to supply an official reporter to take down the evidence does not (1) deprive a party of a fair and impartial trial. *Chicago & S. E. Ry. Co. v. McEwen*, 35 Ind. App. 251, 71 N. E. 926. (2) Not reversible error unless prejudice results. *Home Fire*

*Ins. Co. v. Galley*, 43 Neb. 71, 61 N. W. 84.

21. *State v. Dreany*, 65 Kan. 292, 69 Pac. 182.

[a] If a proper bill of exceptions is prepared notwithstanding the absence of a stenographer no prejudicial error results from refusal to delay trial to obtain stenographer. *Home Fire Ins. Co. v. Galley*, 43 Neb. 71, 61 N. W. 84; *Andrews v. State* (Tex. Crim.), 76 S. W. 918.

[b] Where opportunity to procure a stenographer in place of the official one who was absent, is given to defendant, there is no error in proceeding with the trial without a stenographer. *Nelson v. State*, 48 Tex. Crim. 471, 88 S. W. 807.

[c] Refusal to require report of closing arguments is not prejudicial error, where the affidavits as to what was said are not denied. *People v. King*, 276 Ill. 138, 114 N. E. 601.

22. *Helm v. State*, 11 Okla. Crim. 404, 146 Pac. 1083; *Corliss v. State*, 12 Okla. 526, 159 Pac. 1015.

23. *Helm v. State*, 11 Okla. Crim. 404, 146 Pac. 1083; *Walker v. State*, 6 Okla. Crim. 370, 118 Pac. 1005; *Corliss v. State*, 12 Okla. 526, 159 Pac. 1015.

[a] Where the court excuses the reporter and he is not in the court room, to report the proceedings requested, and therefore the court denies the request, it is ground for reversal. *Corliss v. State*, 12 Okla. 526, 159 Pac. 1015.

[b] Refusal to require report of voir dire examination, ground for reversal. *Helm v. State*, 11 Okla. Crim. 404, 146 Pac. 1083.

24. *People v. King*, 276 Ill. 138, 114 N. E. 601; *Helm v. State*, 11 Okla. Crim. 404, 146 Pac. 1083; *Corliss v.*

**Mandamus** will not issue to control the court in the exercise of its judicial function in respect to appointing stenographers.<sup>25</sup>

**Prohibition** is a proper remedy to prevent the court from directing the taking of stenographic notes in a proceeding in which the use of a stenographer is not authorized.<sup>26</sup>

**4. Continuance or Postponement To Obtain.**—The court is not required to delay or postpone the proceedings to obtain a stenographer.<sup>27</sup>

**B. QUALIFYING.**—The stenographer may be required by law to make oath or affidavit that he will properly discharge his duties,<sup>28</sup> and to file a bond conditioned to the same effect.<sup>29</sup>

**C. REMOVAL OF STENOGRAPHERS.**—**1. By Judge in His Discretion.** The court or judge entrusted with the appointment of stenographers and reporters may in his discretion<sup>30</sup> remove them at any time,<sup>31</sup> and the power may also be exercised by the successor of such appointing judge.<sup>32</sup>

**2. By Legal Proceedings.**<sup>33</sup>—**Quo warranto** is available to remove an official stenographer who holds the office without authority.<sup>34</sup>

**III. DUTIES OF STENOGRAPHERS.**—**A. IN GENERAL.**—The duties of official stenographers and reporters, which are in a general way outlined in the statutes,<sup>35</sup> are performed under the direction of the judge or judicial officer presiding at the trial or hearing.<sup>36</sup>

**B. DUTY TO ATTEND TRIAL.**—The official stenographic reporter

State, 12 Okla. 526, 159 Pac. 1015.

[a] **Affidavit of persons present** who know the facts. *Corliss v. State*, 12 Okla. 526, 159 Pac. 1015.

25. *Rapier v. Guedry*, 136 La. 443, 67 So. 322.

26. *Com. v. Berry*, 29 Ky. L. Rep. 234, 92 S. W. 936.

[a] **Taking of testimony before a grand jury**, by stenographer, prevented. *Com. v. Berry*, 29 Ky. L. Rep. 234, 92 S. W. 936.

27. *Mason v. State*, 168 Ala. 48, 53 So. 153.

28. *State v. Hitchcock*, 171 Mo. App. 109, 153 S. W. 546. See *supra*, 1.

29. *State v. Hitchcock*, 171 Mo. App. 109, 153 S. W. 546.

30. *Ex parte Hill*, 196 Ala. 462, 71 So. 994.

31. *Ala.*—*Ex parte Hill*, 196 Ala. 462, 71 So. 994. *Ill.*—*People v. Kelley*, 134 Ill. App. 642. *Mo.*—*State v. McKay*, 249 Mo. 249, 155 S. W. 396, Ann. Cas. 1914D, 97.

32. *People v. Kelley*, 134 Ill. App. 642.

[a] **Appointing Judge Deceased.** *People v. Kelley*, 134 Ill. App. 642.

33. **As to the proceeding analogous to a contempt** proceeding which was

provided under earlier statutes for the removal of stenographers, see *Ex parte Hill*, 196 Ala. 462, 71 So. 994.

34. *People v. Kelley*, 134 Ill. App. 642; *State v. McKay*, 249 Mo. 249, 155 S. W. 396, Ann. Cas. 1914D, 97.

35. *Ga.*—*Seaboard Air Line Ry. v. Memory*, 126 Ga. 183, 55 S. E. 15. *N. Y.*—*Moynahan v. City of New York*, 205 N. Y. 181, 98 N. E. 482; *Griffin v. Flank*, 79 Misc. 415, 140 N. Y. Supp. 122. *Okla.*—*Methvine v. Fisher*, 168 Pac. 702; *Corliss v. State*, 12 Okla. 526, 159 Pac. 1015. *Tex.*—*Burden v. State*, 70 Tex. Crim. 349, 156 S. W. 1196. *Wis.*—*Gilchrist v. Brande*, 58 Wis. 184, 15 N. W. 817.

36. *Colo.*—*Keady v. Owers*, 30 Colo. 1, 69 Pac. 509. *Ga.*—*Seaboard Air-Line Ry. v. Memory*, 126 Ga. 183, 55 S. E. 15. *Ill.*—*People v. King*, 276 Ill. 133, 114 N. E. 601. *Okla.*—*Corliss v. State*, 12 Okla. Crim. 526, 159 Pac. 1015; *Ansatubby v. Pennington*, 46 Okla. 221, 148 Pac. 828. *S. C.*—*Ryner-son v. Allison*, 30 S. C. 534, 9 S. E. 656.

[a] **An appellate court** has no control over stenographers employed in courts below. *Charles Brooks & Co. v. Gentry*, 106 Miss. 506, 64 So. 214.

must attend all sessions of court<sup>37</sup> and be present at all times during the progress of the proceedings which he is under obligation to report.<sup>38</sup>

C. DUTY TO REPORT PROCEEDINGS. — It is the stenographer's duty, under direction of the court,<sup>39</sup> to make full and correct shorthand notes of all or such portions of the testimony<sup>40</sup> and other proceedings in the case<sup>41</sup> as may be desired.

D. PRESERVING AND TRANSCRIBING NOTES. — 1. In General. — That the notes so taken by the stenographer may be available for future use

37. Ark.—Mullett *v.* Morris, 117 Ark. 377, 174 S. W. 1161. Ga.—Seaboard A. L. Ry. *v.* Memory, 126 Ga. 183, 55 S. E. 15. Tex.—Robertson *v.* Ellis, 38 Tex. Civ. App. 146, 84 S. W. 1097.

38. Smith *v.* Jewell, 71 Conn. 473, 42 Atl. 657.

[a] His absence for two or three minutes unknown to the judge, and while the judge is addressing the jury, will not invalidate the proceedings. Smith *v.* Jewell, 71 Conn. 473, 42 Atl. 657.

[b] The stenographer may be dismissed, however, after he has taken stenographic notes of those things required by the statute. Koyer *v.* Willmon, 12 Cal. App. 87, 106 Pac. 599.

[c] That during the argument of counsel, he need not be present. See Smith *v.* Jewell, 71 Conn. 473, 42 Atl. 657; Kearney *v.* State, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344.

39. People *v.* King, 276 Ill. 138, 114 N. E. 601; Helm *v.* State, 11 Okla. Crim. 404, 146 Pac. 1083; Walker *v.* State, 6 Okla. Crim. 370, 118 Pac. 1005; Corliss *v.* State, 12 Okla. Crim. 526, 159 Pac. 1015.

40. Ark.—Mullett *v.* Morris, 117 Ark. 377, 174 S. W. 1161. Colo.—Keady *v.* Owers, 30 Colo. 1, 69 Pac. 509, ordered by court. Ga.—Seaboard Air-Line Ry. *v.* Memory, 126 Ga. 183, 55 S. E. 15. Okla.—Methvine *v.* Fisher, 166 Pac. 702; Corliss *v.* State, 12 Okla. Crim. 526, 159 Pac. 1015. Ore.—Tallmadge *v.* Hooper, 37 Ore. 503, 61 Pac. 349, 1127. P. E.—People *v.* Santiago, 16 Porto Rico 446. S. C.—Rynerson *v.* Allison, 30 S. C. 534, 9 S. E. 656. Tex.—Otto *v.* Wren (Tex. Civ. App.), 184 S. W. 350.

41. Ark.—Mullett *v.* Morris, 117 Ark. 377, 174 S. W. 1161. Colo.—Keady *v.* Owers, 30 Colo. 1, 69 Pac. 509. Ga.—Seaboard Air-Line Ry. *v.* Memory, 126

Ga. 183, 55 S. E. 15. Okla.—Walker *v.* State, 6 Okla. Crim. 370, 118 Pac. 1005; Methvine *v.* Fisher, 166 Pac. 702. Ore.—Tallmadge *v.* Hooper, 37 Ore. 503, 510, 61 Pac. 349, 1127. S. C.—Rynerson *v.* Allison, 30 S. C. 534, 538, 9 S. E. 656. Tex.—Robertson *v.* Ellis, 38 Tex. Civ. App. 146, 84 S. W. 1097. Wis.—Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 817.

[a] Original documentary evidence may be embraced in the stenographers report. Newnom *v.* Williamson, 46 Tex. Civ. App. 615, 103 S. W. 656.

[b] All the objections and exceptions made by counsel in good faith must be taken down. Methvine *v.* Fisher (Okla.), 166 Pac. 702; Anoa-tubby *v.* Pennington, 46 Okla. 221, 148 Pac. 828.

[c] Voir dire examination should be reported. Helm *v.* State, 11 Okla. Crim. 404, 146 Pac. 1083.

[d] The charge of the court must be taken down. Seaboard Air-Line Ry. *v.* Memory, 126 Ga. 183, 55 S. E. 15.

[e] Remarks of judge of or concerning the cause made to the jury or to the counsel in their presence (1) should be taken. Norwegian L. T. Church *v.* Krelsovitch, 147 App. Div. 108, 131 N. Y. Supp. 845; Gilchrist *v.* Brande, 58 Wis. 184, 15 N. W. 817. (2) But where the judge's remarks have no reference to or connection with the case, they should not be reported and a refusal of court to permit to allow stenographer to take them is not error. Dabney *v.* Hathaway, 51 Okla. 658, 152 Pac. 77.

[f] Comment and colloquy between court and counsel in a suit to quiet title at special term need not be reported. Norwegian L. T. Church *v.* Krelsovitch, 147 App. Div. 108, 131 N. Y. Supp. 845.



and reference particularly in the preparation of papers on review,<sup>42</sup> the duty is imposed upon the stenographer of preserving them,<sup>43</sup> and under some statutes he must file them with the clerk of the court where the trial is had.<sup>44</sup>

**2. Transcribing Notes.**—*a. Duty To Make Transcription.* Stenographers and reporters must transcribe their shorthand notes of the proceedings,<sup>45</sup> or such portions thereof as may be required.<sup>46</sup> Though the duty in this respect is one clearly implied from the nature of the stenographer's office,<sup>47</sup> it is usually imposed by express statutory provision requiring the stenographer to transcribe his notes within a certain time after trial,<sup>48</sup> or when ordered so to do by the court or

[g] **Arguments of counsel** should be reported. *People v. King*, 276 Ill. 138, 114 N. E. 601.

[h] **All of the proceedings of every character** from the beginning to the close of the case to be reported. *Corliss v. State*, 12 Okla. Crim. 526, 159 Pac. 1015.

[i] **The test as to what should be reported** is, might the matter in question properly be a part of a case made for appeal or proceedings in error. *Dabney v. Hathaway*, 51 Okla. 658, 152 Pac. 77.

[j] **The examination of jurors** (1) upon voir dire, and the challenges and exceptions of counsel are a part of the proceedings, and defendant is entitled to have them taken by the reporter. *Corliss v. State*, 12 Okla. Crim. 526, 159 Pac. 1015; *Helm v. State*, 11 Okla. Crim. 404, 146 Pac. 1083. (2) That they need not be taken down, see *Smith v. Jewell*, 71 Conn. 473, 42 Atl. 657; *Seaboard Air Line Ry. v. Memory*, 126 Ga. 183, 55 S. E. 15; *Kearney v. State*, 101 Ga. 803, 29 S. E. 127, 65 Am. St. Rep. 344.

42. See *infra*, V, B.

43. *Otto v. Wren* (Tex. Civ. App.), 184 S. W. 350; *Robertson v. Ellis*, 38 Tex. Civ. App. 146, 84 S. W. 1097.

[a] **For a Period of Four Years.** *Otto v. Wren* (Tex. Civ. App.), 184 S. W. 350.

44. *Tallmadge v. Hooper*, 37 Ore. 503, 61 Pac. 349, 1127.

**Filing transcript of notes**, see *infra*, III, D, 2, e.

45. *U. S.*—*Thiede v. Utah*, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237. *Ark.*—*Mullett v. Morris*, 117 Ark. 377, 174 S. W. 1161. *Cal.*—*Gjurich v. Fieg*, 160 Cal. 331, 116 Pac. 745. *Colo.*

*Keady v. Owers*, 30 Colo. 1, 69 Pac. 509. *Ga.*—*Seaboard Air Line Ry. v. Memory*, 126 Ga. 183, 55 S. E. 15.

*Idaho.*—*Keane v. Pittsburg L. M. Co.*, 18 Idaho 711, 112 Pac. 214. *Miss.*—*Charles Brooks & Co. v. Gentry*, 106 Miss. 506, 64 So. 214; *Johnson v. Ward*, 102 Miss. 464, 59 So. 806. *Mo.*—*State v. Hitchcock*, 171 Mo. App. 109, 153 S. W. 546. *N. Y.*—*Griffin v. Flank*, 79 Misc. 415, 140 N. Y. Supp. 122. *Okla.*—*Board of Comrs. v. De Armond*, 55 Okla. 618, 155 Pac. 592. *Ore.*—*Tallmadge v. Hooper*, 37 Ore. 503, 61 Pac. 349, 1127. *Tex.*—*Burden v. State*, 70 Tex. Crim. 349, 156 S. W. 1196; *Otto v. Wren* (Tex. Civ. App.), 184 S. W. 350; *Routledge v. Elmendorf*, 54 Tex. Civ. App. 174, 116 S. W. 156; *Ben C. Jones & Co. v. Smith*, 49 Tex. Civ. App. 637, 109 S. W. 1111.

[a] **No obligation to prepare a bill of exceptions** rests upon them, they are required only to transcribe the evidence and certain proceedings. *Mullett v. Morris*, 117 Ark. 377, 174 S. W. 1161.

[b] **Criminal Cases.**—*Trefts v. McDougald*, 15 Cal. App. 584, 115 Pac. 655; *Moynahan v. City of New York*, 205 N. Y. 181, 98 N. E. 482.

[c] **More than one copy to the district attorney** at the expense of the county, not authorized. *Moynahan v. City of New York*, 205 N. Y. 181, 98 N. E. 482.

46. *Idaho.*—*Keane v. Pittsburg Lead Min. Co.*, 18 Idaho 711, 112 Pac. 214. *Mass.*—*Churchill v. Palmer*, 115 Mass. 310. *Miss.*—*But see Johnson v. Ward*, 102 Miss. 464, 59 So. 806.

47. *Keady v. Owers*, 30 Colo. 1, 69 Pac. 509.

48. *Ark.*—*Mullett v. Morris*, 117 Ark. 377, 174 S. W. 1161. *Ore.*—*Tall-*

upon request,<sup>49</sup> of persons entitled to the transcript.<sup>50</sup>

b. *Within What Time.*—Stenographers must transcribe their notes within such time as the court may designate in his order therefor,<sup>51</sup> or within a certain time after demand for the transcript,<sup>52</sup> or within a certain period after trial<sup>53</sup> or judgment,<sup>54</sup> or notice of ap-

madge v. Hooper, 37 Ore. 503, 61 Pac. 349, 1127. **P. R.**—People v. Santiago, 16 Porto Rico 446.

[a] *Within Twenty Days After Trial.*—Mullett v. Morris, 117 Ark. 377, 174 S. W. 1161.

49. **Ark.**—Mullett v. Morris, 117 Ark. 377, 174 S. W. 1161. **Colo.**—Keady v. Owers, 30 Colo. 1, 69 Pac. 509. **Ga.**—Seaboard Air-Line Ry. v. Memory, 126 Ga. 183, 55 S. E. 15. **Idaho.**—Keane v. Pittsburg Lead Min. Co., 18 Idaho 711, 112 Pac. 214. **Mass.**—Churchill v. Palmer, 115 Mass. 310. **Miss.**—Johnson v. Ward, 102 Miss. 464, 59 So. 806. **Mo.**—State v. Hitchcock, 171 Mo. App. 109, 153 S. W. 546. **Okla.**—Board of Comrs. v. De Armond, 55 Okla. 618, 155 Pac. 592. **Ore.**—Tallmadge v. Hooper, 37 Ore. 503, 61 Pac. 349, 1127. **P. E.**—People v. Santiago, 16 Porto Rico 446. **Tex.**—Otto v. Wren (Tex. Civ. App.), 184 S. W. 350; Routledge v. Elmendorf, 54 Tex. Civ. App. 174, 116 S. W. 156; Ben C. Jones & Co. v. Smith, 49 Tex. Civ. App. 637, 109 S. W. 1111.

[a] *Appellate court cannot order the stenographer of the trial court to transcribe his notes.* Baker v. Readicker, 84 Kan. 489, 115 Pac. 112.

[b] *Time To Request.*—It makes no difference "whether a request for the transcription is made at the time of the trial or afterwards. If no such request is made at that time, the stenographer's notes are required to be filed as a part of the record and a subsequent transcription thereof, certified to by him, is merely the putting into more intelligible form what is already a part of the record." Tallmadge v. Hooper, 37 Ore. 503, 61 Pac. 349, 1127.

[c] *Notice in writing must be given and served upon the stenographer of the fact that a copy of his notes is required.* New Orleans & N. E. R. Co. v. Catts, 109 Miss. 340, 68 So. 483.

50. **Cal.**—Trefts v. McDougald, 15 Cal. App. 584, 115 Pac. 635. **Idaho.**—Keane v. Pittsburg Lead Min. Co., 18 Idaho 711, 112 Pac. 214. **Kan.**—Underwood Typewriter Co. v. Andreson, 85 Kan. 867, 118 Pac. 879. **Miss.**—New

Orleans & N. E. R. Co. v. Catts, 109 Miss. 340, 68 So. 483. **Okla.**—Board of Comrs. v. De Armond, 55 Okla. 618, 155 Pac. 592. **P. E.**—People v. Santiago, 16 Porto Rico 446.

[a] *The court, or either party, or his attorney may request to have notes transcribed.* Seaboard Air-Line Ry. v. Memory, 126 Ga. 183, 55 S. E. 15; Tallmadge v. Hooper, 37 Ore. 503, 61 Pac. 349, 1127.

[b] *A transcript from day to day as the trial advances may be ordered by the court.* Moynahan v. City of New York, 205 N. Y. 181, 98 N. E. 482.

[c] *To defendant in criminal case.* Moynahan v. City of New York, 205 N. Y. 181, 98 N. E. 482.

[d] *To District Attorney.*—Moynahan v. City of New York, 205 N. Y. 181, 98 N. E. 482.

[e] *To judge presiding at the trial.* Moynahan v. City of New York, 205 N. Y. 181, 98 N. E. 482.

[f] *To Attorney-General.*—Moynahan v. City of New York, 205 N. Y. 181, 98 N. E. 482.

[g] *Appellant.*—Though the code does not expressly require that a party taking an appeal shall procure a transcript of stenographer's notes, it seems to be the clear implication that he should do so. Baker v. Readicker, 84 Kan. 489, 115 Pac. 112.

51. Kelley v. Clark, 21 Idaho 231, 121 Pac. 95.

52. Johnson v. Ward, 102 Miss. 464, 59 So. 806.

[a] *Within twenty days after demand.* Mullett v. Morris, 117 Ark. 377, 174 S. W. 1161.

[b] *With "reasonable diligence," upon request.* Moynahan v. City of New York, 205 N. Y. 181, 98 N. E. 482; Griffin v. Flank, 79 Misc. 415, 140 N. Y. Supp. 122.

53. See *supra*, III, D, 2, a.

54. Moynahan v. City of New York, 205 N. Y. 194, 98 N. E. 487.

[a] *In capital cases the defendant's attorney must upon his request be furnished a transcript within ten days after judgment.* Moynahan v. City of

peal,<sup>55</sup> in accordance with provisions of the statute.

c. *Prepayment of Fees*.—Except on pauper's appeals<sup>56</sup> the stenographer may refuse to comply with the request for a transcript until his fees are paid or tendered.<sup>57</sup>

d. *Form of Transcript*.—The form of the transcript depends to some extent upon the statute. It should be in longhand<sup>58</sup> or typewritten,<sup>59</sup> and must set out the evidence in the form required by statute.<sup>60</sup>

**IV. PERFORMANCE OF DUTIES.**—A. COMPELLING PERFORMANCE.—1. *Order of Court*.—The court may, upon its own motion or upon application of an interested party, order the stenographer to perform any of his prescribed duties,<sup>61</sup> or stand committed for contempt.<sup>62</sup>

2. *Mandamus*.<sup>63</sup>—Mandamus is an appropriate remedy to compel the performance of the duties imposed upon a stenographer by law.<sup>64</sup>

New York, 205 N. Y. 194, 98 N. E. 487.

55. *Gjurich v. Fieg*, 160 Cal. 331, 116 Pac. 745.

[a] *Within twenty days after notice of appeal*. *Gjurich v. Fieg*, 160 Cal. 331, 116 Pac. 745.

56. *State v. Hitchcock*, 171 Mo. App. 109, 153 S. W. 546; *Burden v. State*, 70 Tex. Crim. 349, 156 S. W. 1196; *Otto v. Wren* (Tex. Civ. App.), 184 S. W. 350. See generally the title "*Paupers*."

57. *Mo.*—*State v. Hitchcock*, 171 Mo. App. 109, 153 S. W. 546. *N. Y.* *Griffin v. Flank*, 79 Misc. 415, 140 N. Y. Supp. 122. *P. R.*—*People v. Santiago*, 16 Porto Rico 446.

[a] *A successor to the stenographer who took the notes is not compelled to transcribe them at the rates provided by law for his predecessor*. *Griffin v. Flank*, 79 Misc. 415, 140 N. Y. Supp. 122.

[b] *Criminal Case*.—*Moynahan v. City of New York*, 205 N. Y. 181, 98 N. E. 482.

58. *State v. Hitchcock*, 171 Mo. App. 109, 153 S. W. 546; *People v. Santiago*, 16 Porto Rico 446.

59. *Ark.*—*Mullett v. Morris*, 117 Ark. 377, 174 S. W. 1161. *Idaho*. *Keane v. Pittsburg Lead Min. Co.*, 18 Idaho 711, 112 Pac. 214. *Ore.*—*Tallmadge v. Hooper*, 37 Ore. 503, 61 Pac. 349, 1127. *P. R.*—*People v. Santiago*, 16 Porto Rico 446.

60. *Idaho*.—*Keane v. Pittsburg Lead Min. Co.*, 18 Idaho 711, 112 Pac. 214. *P. R.*—*People v. Santiago*, 16 Porto Rico 446. *Tex.*—*Otto v. Wren* (Tex. Civ. App.), 184 S. W. 350; *Routledge*

*v. Elmendorf*, 54 Tex. Civ. App. 174, 116 S. W. 156.

[a] *A true copy of the testimony required*. *Keane v. Pittsburg Lead Min. Co.*, 18 Idaho 711, 112 Pac. 214.

[b] *Evidence in Question and Answer Form*.—*Burden v. State* (Tex. Crim.), 156 S. W. 1196; *Otto v. Wren* (Tex. Civ. App.), 184 S. W. 350.

[c] *Transcript in narrative form* (1) held proper. *Ben C. Jones & Co. v. Smith*, 49 Tex. Civ. App. 637, 109 S. W. 1111. (2) Elsewhere held not sufficient in narrative form though requested in that form by appellant. *Keane v. Pittsburg Lead Min. Co.*, 18 Idaho 711, 112 Pac. 214.

61. *Charles Brooks & Co. v. Gentry*, 106 Miss. 506, 64 So. 214; *Burden v. State*, 70 Tex. Crim. 349, 156 S. W. 1196.

[a] *Transcribing Notes*.—*State v. Hitchcock*, 171 Mo. App. 109, 153 S. W. 546; *Burden v. State*, 70 Tex. Crim. 349, 156 S. W. 1196.

[b] *But court cannot compel a private stenographer of accused to transcribe his notes*. *State v. Vicknair*, 118 La. 963, 43 So. 635.

[c] *An appellate court has no jurisdiction to entertain such motion in respect to a stenographer employed in the court below*. *Charles Brooks & Co. v. Gentry*, 106 Miss. 506, 64 So. 214.

62. *State v. Hitchcock*, 171 Mo. App. 109, 153 S. W. 546; *Burden v. State*, 70 Tex. Crim. 349, 156 S. W. 1196.

63. See generally the title "*Mandamus*."

64. *Keady v. Owers*, 30 Colo. 1, 69 Pac. 509; *Otto v. Wren* (Tex. Civ.



It will issue in a proper case to compel the judge to order a transcription of the stenographer's notes,<sup>65</sup> or against the stenographer himself to compel him to furnish a transcript.<sup>66</sup>

**B. FAILURE TO PERFORM.**<sup>67</sup> — **1. Effect of.** — A new trial should be granted where the proceedings have not been reported as provided by law,<sup>68</sup> or where a stenographer's transcript has not been provided to the party entitled thereto upon his request,<sup>69</sup> provided the appellant is thereby deprived of his bill of exceptions or statement of case.<sup>70</sup> A trial in a criminal case may proceed though the transcript of notes taken on the preliminary examination has not been filed as required.<sup>71</sup>

**2. Penalty for.** — Under some statutes a party aggrieved by a stenographer's failure to perform his required duty, may pursue him for a prescribed penalty,<sup>72</sup> or sue on his bond.<sup>73</sup>

**V. USE OF STENOGRAPHER'S NOTES.** — **A. IN GENERAL.** Reports of stenographers may be of service wherever there arises a question as to the testimony or proceedings they record. Reference is frequently made to them at subsequent stages of the same trial or hear-

App.), 184 S. W. 350; *Rice v. Roberts* (Tex. Civ. App.), 177 S. W. 149; *Routledge v. Elmendorf*, 54 Tex. Civ. App. 174, 116 S. W. 156.

65. *Keady v. Owers*, 30 Colo. 1, 69 Pac. 509; *Otto v. Wren* (Tex. Civ. App.), 184 S. W. 350.

66. *Otto v. Wren* (Tex. Civ. App.), 184 S. W. 350.

[a] **Though ordered not to do so** by the trial court. *Keady v. Owers*, 30 Colo. 1, 69 Pac. 509.

[b] **On paupers appeal** the stenographer may be compelled by mandamus to furnish the transcript free of charge. *Otto v. Wren* (Tex. Civ. App.), 184 S. W. 350.

[c] **Where a partial one is offered** the stenographer may be compelled to furnish a full, true and correct one in lieu thereof. *Keady v. Owers*, 30 Colo. 1, 69 Pac. 509.

67. **Compelling performance**, see *supra*, IV, A.

68. *Corliss v. State*, 12 Okla. Crim. 526, 159 Pac. 1015. See generally the title "New Trial."

[a] **Refusal to grant a new trial** under the circumstances is ground for reversal as a matter of right. *Corliss v. State*, 12 Okla. Crim. 526, 159 Pac. 1015.

69. *Neb.*—*Mathews v. Mulford*, 53 Neb. 252, 73 N. W. 661; *Holland v. Chicago, B. & Q. R. Co.*, 52 Neb. 100, 71 N. W. 989; *Curran v. Wilcox*, 10 Neb. 449, 6 N. W. 762. *Pa.*—*James v.*

*French*, 5 Pa. Co. Ct. 270. *Tex.*—*Burden v. State*, 70 Tex. Crim. 343, 156 S. W. 1196. *Wyo.*—*Richardson v. State*, 15 Wyo. 465, 89 Pac. 1027.

[a] **Material part of evidence lost** by official stenographer. *Barton v. Burbank*, 119 La. 224, 43 So. 1614.

[b] **Failure to file transcript in time** not excused by the fact the stenographer was too busy to transcribe the evidence. *Stewart v. Davis*, 44 Mo. App. 562.

70. *Stewart v. Davis*, 44 Mo. App. 562; *Butts v. Anderson*, 19 Okla. 367, 91 Pac. 906.

[a] **That the judge may sign the bill of exceptions** notwithstanding the stenographer's failure to furnish a transcript. See *State v. Gaslin*, 32 Neb. 291, 49 N. W. 353.

[b] **If by affidavits and examination of witnesses** the testimony and other proceedings at the trial can be brought before the appellate court, a new trial will not be granted because of the loss of the stenographer's notes. *Walker v. Baermann*, 44 App. Div. 587, 61 N. Y. Supp. 91.

71. *Thiede v. Utah*, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237.

72. *Johnson v. Ward*, 102 Miss. 464, 59 So. 806.

[a] **For failure to transcribe notes** upon request. *Johnson v. Ward*, 102 Miss. 464, 59 So. 806.

73. *Johnson v. Ward*, 102 Miss. 464, 59 So. 806.

ing,<sup>74</sup> and they may be used on a new trial of the case,<sup>75</sup> or in the preparation of the appellate record.<sup>76</sup>

**B. USE ON APPEAL. — 1. In General.** — Practically the only purpose for which the stenographer's notes are now required and authorized to be transcribed is for use in appellate court.<sup>77</sup>

**2. How Made Available. — a. Generally.** — To be available on a review of the case, the stenographer's notes must be brought before the higher court in the manner prescribed by statute or rule of court.<sup>78</sup> It is, in general, essential that they be regularly brought up with the record.<sup>79</sup> If not a part thereof,<sup>80</sup> they should be properly incorporated into the bill of exceptions,<sup>81</sup> or statement and abstract of case.<sup>82</sup>

**b. Transcribing, Settling and Filing.** — A party desiring to have the stenographer's notes made part of the record, or otherwise brought into the transcript on appeal, must, pursuant to statute, have the notes properly transcribed,<sup>83</sup> certified to,<sup>84</sup> settled and allowed by the

74. Ala.—*Loudermilk v. State*, 4 Ala. App. 167, 58 So. 180. Mass.—*Churchill v. Palmer*, 115 Mass. 310. N. Y.—*Moynahan v. City of New York*, 205 N. Y. 181, 98 N. E. 482. Tex.—*Robertson v. Ellis*, 38 Tex. Civ. App. 146, 84 S. W. 1097.

75. *Duthey v. State*, 131 Wis. 178, 111 N. W. 222, 10 L. R. A. (N. S.) 1032. See *People v. Santiago*, 16 Porto Rico 446.

76. See *infra*, V, B.

77. *Snyder v. State*, 86 Ark. 456, 111 S. W. 465; *Kelley v. Clark*, 21 Idaho 231, 121 Pac. 95.

[a] Upon new trial the notes may be used without having been transcribed. *Kelley v. Clark*, 21 Idaho 231, 121 Pac. 95.

78. Cal.—*Williams v. Lane*, 158 Cal. 39, 109 Pac. 873. Idaho.—*Furey v. Taylor*, 27 Idaho 605, 127 Pac. 676. Kan.—*Underwood Typewriter Co. v. Anderson*, 85 Kan. 867, 118 Pac. 879. N. J.—*Hauser v. Squire*, 81 N. J. L. 287, 81 Atl. 263. N. C.—*Bucken v. South & W. R. Co.*, 157 N. C. 443, 73 S. E. 137.

79. See *infra*, V, B, 2, c.

[a] The trial judge cannot of his own motion send them up as part of the record. *Green v. Dunn*, 162 N. C. 340, 78 S. E. 211.

80. As part of record, see *infra*, V, B, 2, c.

81. See *infra*, V, B, 2, c.

82. See the title "Statement and Abstract of Case."

83. See *supra*, III, D, 2.

84. U. S.—*Thiede v. Utah*, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237.

Ark.—*Mullett v. Morris*, 117 Ark. 377, 174 S. W. 1161. Ore.—*Tallmadge v. Hooper*, 37 Ore. 503, 61 Pac. 349, 1127. Tex.—*Burden v. State*, 70 Tex. Crim. 349, 156 S. W. 1196.

[a] Must Be Exemplified.—*Lippitt v. Bidwell*, 87 Conn. 608, 89 Atl. 347.

[b] Certified to (1) by judge (*Leatherwood v. Richardson*, 11 Ariz. 278, 94 Pac. 1110; *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981; *Williams v. Lane*, 158 Cal. 39, 109 Pac. 873; *Lapique v. Superior Court*, 18 Cal. App. 50, 122 Pac. 80), after having been (2) filed with the clerk. *Gjurich v. Fieg*, 160 Cal. 331, 116 Pac. 745.

[c] Certified to (1) by stenographer. U. S.—*Thiede v. Utah*, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237. Ark.—*Mullett v. Morris*, 117 Ark. 377, 174 S. W. 1161; *Snyder v. State*, 86 Ark. 456, 111 S. W. 465. Tex.—*Otto v. Wren* (Tex. Civ. App.), 184 S. W. 350. (2) And his certificate is entitled to the same faith and credit as that of any other officer of the court. *Tallmadge v. Hooper*, 37 Ore. 503, 61 Pac. 349, 1127.

[d] Certification of official stenographer not sufficient. *Williams v. Lane*, 158 Cal. 39, 109 Pac. 873; *Rynerson v. Allison*, 30 S. C. 534, 9 S. E. 656.

[e] Certificate of Judge or Stenographer.—*In re Skillman's Est.* (Iowa), 134 N. W. 1064.

[f] Prior to 1907, however, an uncertified transcript of the reporter's notes, while it did not serve as a bill of exceptions, was sufficient to serve

judge,<sup>85</sup> and filed with the clerk.<sup>86</sup> The party is sometimes required to file with the clerk a copy of his request upon the stenographer for a transcript together with a statement as to how it was served.<sup>87</sup>

Notice of filing, where required, should be given,<sup>88</sup> unless waived by the party entitled thereto.<sup>89</sup>

as a statement of the evidence. *Leatherwood v. Richardson*, 11 Ariz. 278, 94 Pac. 1110.

[g] A certificate in shorthand is not sufficient. *In re Skillman's Est.* (Iowa), 134 N. W. 1064.

85. **U. S.**—*Samuel H. Cottrell & Son v. Smokeless Fuel Co.*, 148 Fed. 594, 78 C. C. A. 366, 9 L. R. A. (N. S.) 1187. **Ark.**—*Snyder v. State*, 86 Ark. 456, 111 S. W. 465. **Cal.**—*Williams v. Lane*, 158 Cal. 39, 109 Pac. 873; *Lapique v. Superior Court*, 18 Cal. App. 50, 122 Pac. 80. **Idaho.**—*Chapman v. A. H. Averill Mach. Co.*, 27 Idaho 313, 147 Pac. 785; *Furey v. Taylor*, 27 Idaho 695, 127 Pac. 676; *Edwards v. Anderson*, 23 Idaho 508, 130 Pac. 1001; *Strand v. Crooked River Min. & Mill. Co.*, 23 Idaho 577, 131 Pac. 5; *Grisinger v. Hubbard*, 21 Idaho 469, 122 Pac. 853, Ann. Cas. 1913E, 87. **Ky.**—*Louisville & A. R. Co. v. Phillips*, 148 Ky. 49, 145 S. W. 1105. **Tex.**—*Newnom v. Williamson*, 46 Tex. Civ. App. 615, 103 S. W. 656.

[a] *Mandamus* will not issue to compel the judge to settle the stenographer's transcript where such transcript was not properly served upon the adversary as required by statute. *Boise-Payette Lumb. Co. v. McCarthy*, 31 Idaho 305, 170 Pac. 920.

86. **U. S.**—*Samuel H. Cottrell & Son v. Smokeless Fuel Co.*, 148 Fed. 594, 78 C. C. A. 366, 9 L. R. A. (N. S.) 1187. **Ark.**—*Mullett v. Morris*, 117 Ark. 377, 174 S. W. 1161; *Snyder v. State*, 86 Ark. 456, 111 S. W. 465. **Cal.**—*Gjurich v. Fieg*, 160 Cal. 331, 116 Pac. 745. **Ky.**—*Louisville & A. R. Co. v. Phillips*, 148 Ky. 49, 145 S. W. 1105; *Postal Tel. Co. v. Louisville Cotton Oil Co.*, 136 Ky. 843, 122 S. W. 852, 125 S. W. 266. **Miss.**—*Johnson v. Ward*, 102 Miss. 464, 59 So. 806. **N. Y.**—*Moynahan v. City of New York*, 205 N. Y. 194, 98 N. E. 487. **Ore.**—*Tallmadge v. Hooper*, 37 Ore. 503, 61 Pac. 349, 1127. **P. R.**—*People v. Santiago*, 16 Porto Rico 446. **Tex.**—*Burden v. State*, 70 Tex. Crim. 349, 156 S. W. 1196; *Newnom v. Williamson*, 46 Tex. Civ. 615, 103 S. W. 656.

[a] That his charges are not prepared does not justify the stenographer in refusing to file his transcript. *Gjurich v. Fieg*, 160 Cal. 331, 116 Pac. 745.

[b] **Time To File.**—(1) the certified transcript is to be filed with the clerk within such reasonable time as may be fixed by written order of the court (*Burden v. State*, 70 Tex. Crim. 349, 156 S. W. 1196; *Otto v. Wren* (Tex. Civ. App.), 184 S. W. 350), or (2) within time specified in statute. *Thiede v. Utah*, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237. (3) Transcript of preliminary examination within ten days after the close of the examination. *Thiede v. Utah*, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237.

[c] Where defendant convicted of murder in second degree a copy of the transcript cannot be furnished his attorney at public expense. *Moynahan v. City of New York*, 205 N. Y. 194, 98 N. E. 487.

[d] Court has no inherent power to order a copy of stenographer's minutes supplied to defendant's attorney at public expense. *Moynahan v. City of New York*, 205 N. Y. 194, 98 N. E. 487.

87. *New Orleans & N. E. R. Co. v. Catts*, 109 Miss. 340, 68 So. 483.

[a] **Time To File.**—The statute does not in express terms limit the time in which to file such copy with the clerk. It need not be filed within the 30 day period given the appellant to demand the stenographic notes. *New Orleans & N. E. R. Co. v. Catts*, 109 Miss. 340, 68 So. 483.

88. *Bliss v. Brown*, 78 Kan. 467, 96 Pac. 945; *Scarborough v. Harrison Naval Stores Co.*, 95 Miss. 497, 51 So. 274, 52 So. 143.

[a] **Notice by clerk** to each attorney interested. *Scarborough v. Harrison Naval Stores Co.*, 95 Miss. 497, 51 So. 274, 52 So. 143.

[b] **Same Notice As in Case Made.** *Bliss v. Brown*, 78 Kan. 467, 96 Pac. 945.

89. *Scarborough v. Harrison Naval*



Service of the stenographer's transcript upon the adversary or his attorney is sometimes made necessary.<sup>90</sup>

Amendments and Corrections. — The transcribed notes are subject to amendment and correction by the trial court.<sup>91</sup>

c. *As Part of Record or Transcript Thereof.* — The stenographer's notes when thus transcribed, authenticated and filed,<sup>92</sup> may become a part of the record,<sup>93</sup> or may serve in lieu of a bill of exceptions,<sup>94</sup> or are made part of the bill of exceptions,<sup>95</sup> or statement and abstract of

Stores Co., 95 Miss. 497, 51 So. 274, 52 So. 143.

[a] If the notes are examined and approved by the party entitled to notice, it is sufficient. *Scarborough v. Harrison Naval Stores Co.*, 95 Miss. 497, 51 So. 274, 52 So. 143.

90. *Boise-Payette Lumb. Co. v. McCarthy*, 31 Idaho 305, 170 Pac. 920; *Bohannon Dredging Co. v. England*, 30 Idaho 721, 168 Pac. 12.

[a] Must be served within five days after it is received from the clerk. *Boise-Payette Lumb. Co. v. McCarthy*, 31 Idaho 305, 170 Pac. 920.

[b] Service Mandatory. — *Boise-Payette Lumb. Co. v. McCarthy*, 31 Idaho 305, 170 Pac. 920.

91. Cal.—*Gjurich v. Fieg*, 160 Cal. 331, 116 Pac. 745. Kan.—*Underwood Typewriter Co. v. Anderson*, 85 Kan. 867, 118 Pac. 879; *Bliss v. Brown*, 78 Kan. 467, 96 Pac. 945. Pa.—*Taylor v. Preston*, 79 Pa. 436.

92. See *supra*, V, B, 2, b.

93. Cal.—*Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981; *Gjurich v. Fieg*, 160 Cal. 331, 116 Pac. 745. Conn.—*Lippitt v. Bidwell*, 87 Conn. 608, 89 Atl. 347. Kan.—*Underwood Typewriter Co. v. Anderson*, 85 Kan. 867, 118 Pac. 879; *Baker v. Readicker*, 84 Kan. 489, 115 Pac. 112; *Bliss v. Brown*, 78 Kan. 467, 96 Pac. 945. N. C. *Green v. Dunn*, 162 N. C. 340, 78 S. E. 211. Ore.—*Tallmadge v. Hooper*, 37 Ore. 503, 61 Pac. 349, 1127. Tex.—*Newnom v. Williamson*, 46 Tex. Civ. App. 615, 103 S. W. 656.

[a] Though no notice of filing of the stenographer's transcript is given as prescribed by statute, they nevertheless become part of the record, where they were in fact examined and approved by the adversary's attorney. *Scarborough v. Harrison Naval Stores Co.*, 95 Miss. 497, 51 So. 274, 52 So. 143.

[b] Direction of court in writing necessary to make the stenographer's

report part of the record. *Newnom v. Williamson*, 46 Tex. Civ. App. 615, 103 S. W. 656.

94. Ariz.—*Leatherwood v. Richardson*, 11 Ariz. 278, 94 Pac. 1110. Cal.—*Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981; *Williams v. Lane*, 158 Cal. 39, 109 Pac. 873. Idaho—*Boise-Payette Lumb. Co. v. McCarthy*, 31 Idaho 305, 170 Pac. 920; *Chapman v. A. H. Averil Mach. Co.*, 27 Idaho 313, 147 Pac. 785; *Strand v. Crooked River Min. & Mill. Co.*, 23 Idaho 577, 131 Pac. 5; *Grisinger v. Hubbard*, 21 Idaho 469, 122 Pac. 853, Ann. Cas. 1913E, 87. Ky.—*Graves' Committee v. Lyons*, 166 Ky. 446, 179 S. W. 413; *Louisville & A. R. Co. v. Phillips*, 148 Ky. 49, 145 S. W. 1105; *Postal Tel. Co. v. Louisville Cotton Oil Co.*, 136 Ky. 843, 122 S. W. 852, 125 S. W. 266.

[a] Order of court showing the approval and the filing of stenographer's transcript, necessary. *Graves' Committee v. Lyons*, 166 Ky. 446, 179 S. W. 413.

[b] Whether appeal taken under the old or the new method, the authenticated stenographer's transcript may be used instead of a bill of exceptions. *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981.

95. U. S.—*Samuel H. Cottrell & Son v. Smokeless Fuel Co.*, 148 Fed. 594, 78 C. C. A. 366, 9 L. R. A. (N. S.) 1187. Ark.—*Mullett v. Morris*, 117 Ark. 377, 174 S. W. 1161; *Snyder v. State*, 86 Ark. 456, 111 S. W. 465. Ind.—*Huntington v. Griffith*, 142 Ind. 280, 41 N. E. 8; *Big Creek Stone Co. v. Wolf*, 138 Ind. 496, 38 N. E. 52. Ia.—*In re Skillman's Est.*, 134 N. W. 1064; *Croddy v. Chicago, R. I. & P. Ry. Co.*, 91 Iowa 598, 60 N. W. 214; *Croddy v. Chicago, etc. R. Co.*, 91 Iowa 598, 60 N. W. 214. Ohio.—*Newark Natural Gas & Fuel Co. v. City of Newark*, 92 Ohio St. 393, 111 N. E. 150. P. R. *People v. Santiago*, 16 Porto Rico 446.

[a] By Attachment and Reference.

case,<sup>96</sup> depending upon the local practice.

**3. Consideration and Disposition of, in Reviewing Court.—a.** *Where Filing Omitted or Irregular.*—Where no stenographer's transcript, or else an irregular one, is filed, the reviewing court may, upon timely objection,<sup>97</sup> refuse to consider the matters which the transcript would bring up,<sup>98</sup> or it may strike the irregular transcript from the record,<sup>99</sup> or even dismiss the appeal altogether,<sup>1</sup> unless the evidence and other proceedings pertinent to the appeal are otherwise preserved,<sup>2</sup> or it appears that the only questions raised are such that the stenographer's transcript is not required for their determination.<sup>3</sup>

**b. Force and Effect of Notes.**—Notes properly taken by reporters

Newark Natural Gas & Fuel Co. v. City of Newark, 92 Ohio St. 393, 111 N. E. 150.

[b] Stenographer's transcript alone is not a sufficient bill of exceptions (Mullett v. Morris, 117 Ark. 377, 174 S. W. 1161; Dozier v. Grayson-McLeod Lumb. Co., 100 Ark. 244, 140 S. W. 7; Moore v. State, 65 Ark. 330, 46 S. W. 127; People v. Santiago, 16 Porto Rico 446; People v. Eligier, 9 Porto Rico 357), nor (2) a statement of the case. People v. Santiago, 16 Porto Rico 446; People v. Eligier, 9 Porto Rico 357.

96. See the title "Statement and Abstract of Case."

97. Furey v. Taylor, 27 Idaho 605, 127 Pac. 676.

[a] After the cause is brought on for hearing in the appellate court, it is too late to object to an irregular stenographer's transcript. Furey v. Taylor, 27 Idaho 605, 127 Pac. 676.

98. Snyder v. State, 86 Ark. 456, 111 S. W. 465; Underwood Typewriter Co. v. Anderson, 85 Kan. 867, 118 Pac. 879.

[a] Transcribed Report Not Filed. Underwood Typewriter Co. v. Anderson, 85 Kan. 867, 118 Pac. 879.

[b] Not settled and approved by judge. Furey v. Taylor, 27 Idaho 605, 127 Pac. 676.

[c] Where not certified to by judge as required, the reporter's transcript cannot be considered. Williams v. Lane, 158 Cal. 39, 109 Pac. 873.

[d] Certified in shorthand instead of in longhand. In re Skillman's Est. (Iowa), 134 N. W. 1064.

[e] Failure to serve stenographer's transcript on adversary. Boise-Payette Lumb. Co., 32 Ky. L. Rep. 465, 105 S. 170 Pac. 920.

99. Leslie County v. Burt & Brabb Lumb. Co., 32 Ky. L. Rep. 465, 105 S. W. 1188; Southern R. Co. v. Thurman,

25 Ky. L. Rep. 804, 76 S. W. 499; Newark Natural Gas & Fuel Co. v. City of Newark, 92 Ohio St. 393, 111 N. E. 150.

[a] Not settled and allowed by judge. Strand v. Crooked River Min. & Mill. Co., 23 Idaho 577, 131 Pac. 5.

[b] It is proper to strike the stenographer's transcript from the record, where the record "fails to show that the stenographer's transcript of the evidence was filed in the circuit court, indorsed as filed, or directed to be filed by an order of that court. Nor is it referred to, identified by, or made a part of, the record." Leslie County v. Burt & Brabb Lumb. Co., 32 Ky. L. Rep. 465, 105 S. W. 1188.

1. Edwards v. Anderson, 23 Idaho 508, 130 Pac. 1001; Hauser v. Squire, 81 N. J. L. 287, 81 Atl. 263.

[a] Not settled by judge as required by statute. Chapman v. A. H. Averill Mach. Co., 27 Idaho 313, 147 Pac. 785; Edwards v. Anderson, 23 Idaho 508, 130 Pac. 1001.

[b] Improper Form.—Unless the stenographer's notes of the evidence are in condensed narrative form as required, the appeal may be dismissed. Bucken v. South & W. R. Co., 157 N. C. 443, 73 S. E. 137.

2. See *infra*, this note.

[a] Where another stenographer than the official one was procured by appellant to transcribe the evidence and each party filed an abstract based thereon, the appeal will not be dismissed, though the official stenographer failed to file his transcript. Baker v. Readicker, 84 Kan. 489, 115 Pac. 112.

3.—Hauser v. Squire, 81 N. J. L. 287, 81 Atl. 263.

[a] The burden is on appellant to show that the stenographer's transcript is not required. Hauser v. Squire, 81 N. J. L. 287, 81 Atl. 263.

and stenographers and preserved in the manner prescribed by statute are regarded as the best evidence,<sup>4</sup> or as prima facie evidence<sup>5</sup> of what took place at the trial or hearing, but they cannot supply the place of a finding or conclusion of the lower court.<sup>6</sup>

**VI. COMPENSATION OF STENOGRAPHERS.**—A. IN GENERAL.—The compensation of stenographers is in general regulated by statute,<sup>7</sup> which as a rule provides for its taxation and collection as costs.<sup>8</sup>

B. REMEDIES TO RECOVER.—In some states a stenographer is entitled to a summary judgment<sup>9</sup> for his unpaid fees. He may also recover them in an ordinary action,<sup>10</sup> or procure a writ of mandamus to compel the public official charged with the ministerial duty of paying the fees, to perform the same.<sup>11</sup>

4. *Taylor v. Preston*, 79 Pa. 436; *People v. Santiago*, 16 Porto Rico 446.

[a] Yet the judge's certified statement as to what happened at the time will control the stenographer's notes made up under the court's direction. *Taylor v. Preston*, 79 Pa. 436.

5. *Lippitt v. Bidwell*, 87 Conn. 608, 89 Atl. 347; *Tallmadge v. Hooper*, 37 Ore. 503, 61 Pac. 349, 1127.

6. *Lippitt v. Bidwell*, 87 Conn. 608, 89 Atl. 347.

[a] What facts were determined and what conclusions of law were drawn, cannot be determined by the appellate court from the stenographer's notes. *Lippitt v. Bidwell*, 87 Conn. 608, 89 Atl. 347.

7. *Ariz.*—*Van Veen v. Graham County*, 13 Ariz. 167, 108 Pac. 252. *Cal.*—*Irrgang v. Ott*, 9 Cal. App. 440, 99 Pac. 528. *Ga.*—*Seaboard Air-Line Ry. v. Memory*, 126 Ga. 183, 55 S. E. 15. *Idaho.*—*Keane v. Pittsburg Lead Min. Co.*, 18 Idaho 711, 112 Pac. 214. *Mont.*—*State ex rel. Schneider v. Cunningham*, 39 Mont. 165, 101 Pac. 962. *N. Y.*—*People ex rel. McDermott v. Board of Estimate*, 72 Misc. 456, 131 N. Y. Supp. 294. *Okla.*—*Meyer v. Clift*, 123 Pac. 1042. *Pa.*—*Russel v. City of Philadelphia*, 236 Pa. 560, 84 Atl. 1101. *Tex.*—*Otto v. Wren* (Tex. Civ. App.), 184 S. W. 350; *Shock v. Colorado County*, 52 Tex. Civ. App. 473, 115 S. W. 61; *Ben C. Jones & Co. v. Smith*, 49 Tex. Civ. App. 637, 109 S. W. 1111.

[a] In absence of statute fixing compensation reasonable compensation allowed. *In re Murtaugh*, 128 N. Y. Supp. 850.

[b] City charter provisions controlling as to stenographers at pre-

liminary examinations before police judges. *Trefts v. McDougald*, 15 Cal. App. 584, 115 Pac. 655.

8. See generally the title "Costs."

9. *Seaboard Air-Line Ry. v. Memory*, 126 Ga. 183, 55 S. E. 15.

[a] No notice to show cause necessary. *Seaboard Air-Line Ry. v. Memory*, 126 Ga. 183, 55 S. E. 15.

10. *N. Y.*—*Moynahan v. City of New York*, 205 N. Y. 181, 98 N. E. 482; *Finch v. Wells*, 66 Misc. 384, 123 N. Y. Supp. 667; *Eckstein v. Schleimer*, 62 Misc. 635, 116 N. Y. Supp. 7. *Okla.*—*Board of Comrs. v. De Armond*, 55 Okla. 618, 155 Pac. 592. *Tex.*—*Etter v. McLennan County* (Tex. Civ. App.), 156 S. W. 251; *Robertson v. Ellis*, 38 Tex. Civ. App. 146, 84 S. W. 1097.

[a] For Transcripts Furnished. *Moynahan v. City of New York*, 205 N. Y. 181, 98 N. E. 482.

[b] Defect of Parties.—Where the parties to a suit have become jointly liable for stenographer's fees, he must sue them jointly. *Finch v. Wells*, 66 Misc. 384, 123 N. Y. Supp. 667.

11. *Cal.*—*Elder v. McDougald*, 145 Cal. 740, 79 Pac. 429. *Me.*—*Tower v. Haslam*, 84 Me. 86, 24 Atl. 587; *Harmon v. Harmon*, 63 Me. 437. *Mont.*—*State ex rel. Schneider v. Cunningham*, 39 Mont. 165, 101 Pac. 962. *N. Y.*—*O'Sullivan v. Knox*, 54 App. Div. 374, 66 N. Y. Supp. 611. *Okla.*—*Meyer v. Clift*, 123 Pac. 1042. *Utah.*—*State ex rel. Davis v. Cutler*, 34 Utah 99, 95 Pac. 1071; *State ex rel. Davis v. Edwards*, 33 Utah 243, 93 Pac. 720.

[a] Mandamus against city treasurer to compel him to pay compensation of stenographer at preliminary examination. *Elder v. McDougald*, 145 Cal. 740, 79 Pac. 429.



# STIPULATIONS

By the Editorial Staff.

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**I. DEFINITION AND NATURE.**—Stipulations, within the meaning of the present article, are agreements entered into by litigants or their attorneys in reference to the conduct and management of a suit, action or other legal proceeding.<sup>1</sup> They necessarily differ in character and subject matter,<sup>2</sup> ranging all the way from mere admissions of fact simply relieving a party from the inconvenience of making proof<sup>3</sup> to agreements possessing all the essential characteristics of a mutual contract<sup>4</sup> by which each party grants to the other a con-

1. See *In re More's Estate*, 143 Cal. 493, 77 Pac. 407.

The term stipulation is used in admiralty as meaning a recognizance or bond, see the title "Admiralty."

2. See *infra*, IV.

3. See *infra*, IV, B, 4.

4. Ky.—*Conrad's Exr. v. Conrad*, 156 Ky. 231, 160 S. W. 937. N. Y. *People ex rel. New York, etc. R. Co. v. State Board of Tax Comrs.*, 80 Misc. 551, 142 N. Y. Supp. 583; *Ettlinger v.*

cession of some rights as a consideration for those secured.<sup>5</sup> In some respects, however, they are unlike ordinary contracts,<sup>6</sup> and to render them binding and enforceable it is not essential that they be mutually beneficial.<sup>7</sup> Stipulations ordinarily tend to the dispatch of business and avoid trouble and expense;<sup>8</sup> consequently courts look upon them with favor<sup>9</sup> and uphold and enforce them,<sup>10</sup> unless they are in some

Kruger, 147 N. Y. Supp. 37. **Pa.** Bower v. Blessing, 8 Serg. & R. 243.

[a] **Consent of counsel to the stipulation** may be implied from the facts and circumstances, as where the alleged stipulation was read into the record in counsel's presence with his objection, and where no objection was made on revising the record. William H. Low Estate Co. v. Lederer Realty Corp., 39 R. I. 422, 98 Atl. 180.

5. **Cal.**—Scheeline v. Moshier, 172 Cal. 565, 158 Pac. 222. **Mont.**—Washoe Copper Co. v. Hickey, 46 Mont. 363, 128 Pac. 584. **N. H.**—Hanover v. Weare, 2 N. H. 131. **N. Y.**—Deen v. Milne, 113 N. Y. 303, 20 N. E. 861; Burkard v. Stephan Bldg. & Const. Co., 160 App. Div. 50, 144 N. Y. Supp. 775; Popper v. Bingham, 20 Misc. 173, 45 N. Y. Supp. 820. **Tex.**—Mitchell v. Hancock (Tex. Civ. App.), 196 S. W. 694.

[a] **Where the parties have acted in pursuance** of the stipulation it cannot be said to be without consideration. Scheeline v. Moshier, 172 Cal. 565, 158 Pac. 222. See also Lanahan v. Heaver, 77 Md. 605, 26 Atl. 866, 20 L. R. A. 759; Mackey v. Daniel, 59 Md. 484; Ward v. Hollins, 14 Md. 153. Compare Howe v. Lawrence, 22 N. J. L. 99; Ross v. Ferris, 18 Hun (N. Y.) 210.

[b] **A stipulation authorizing a special judge** to try the case is supported by sufficient consideration where a mutual benefit results therefrom to each party by having the time for the trial fixed definitely and the trouble and delay incident to further disqualifications of the regular judge avoided. Washoe Copper Co. v. Hickey, 46 Mont. 363, 128 Pac. 584.

6. See **U. S.**—Lewis v. The Orpheus, 3 Ware 143, 15 Fed. Cas. No. 8,330. **Cal.**—Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227. **Colo.**—Welsh v. Noyes, 10 Colo. 133, 14 Pac. 317. **Ill.**—People v. Spring Lake Drainage & Levee Dist., 253 Ill. 479, 97 N. E. 1042. **Mo.**—Galbreath v. Rogers, 30 Mo. App. 401.

**Tex.**—Paschall v. Penry, 82 Tex. 673, 18 S. W. 154; Hancock v. Winans, 20 Tex. 320.

[a] **Agreements Also With the Court.**—Stipulations between the parties made in open court are not only agreements between the parties, but between them and the court, which the latter is bound to enforce. Meagher v. Gagliardo, 35 Cal. 602; Banks v. American Tract Soc., 4 Sandf. Ch. (N. Y.) 438.

7. Howe v. Lawrence, 22 N. J. L. 99; Mitchell v. Hancock (Tex. Civ. App.), 196 S. W. 694.

[a] **Where plaintiffs stipulate to abide the result of a similar suit** then pending and to be governed by an affirmative judgment for the plaintiff therein, the situation is not void for want of reciprocal obligation on the part of plaintiffs to agree to suffer a judgment in favor of defendant in the event of an adverse decision in the pending case. Mitchell v. Hancock (Tex. Civ. App.), 196 S. W. 694.

8. **U. S.**—Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. ed. 968. **Colo.**—Gibson v. Foster, 24 Colo. App. 252, 133 Pac. 144. **Ill.**—Walton v. Malcolm, 264 Ill. 389, 106 N. E. 211, Ann. Cas. 1915D, 1021; People v. Spring Lake Drainage & Levee Dist., 253 Ill. 479, 97 N. E. 1042. **Tex.**—Porter v. Holt, 73 Tex. 447, 11 S. W. 494; Commonwealth Bonding & Cas. Ins. Co. v. Beavers (Tex. Civ. App.), 186 S. W. 859.

9. **Ill.**—People v. Spring Lake Drainage & Levee Dist., 253 Ill. 479, 97 N. E. 1042. **N. Y.**—Harlem Bridge M. & F. R. Co. v. Westchester, 143 N. Y. 59, 37 N. E. 634; Matter of New York L. & W. R. Co., 98 N. Y. 447; Bagley v. Jennings, 58 Hun 56, 11 N. Y. Supp. 386. **Nev.**—Walsh v. Wallace, 26 Nev. 299, 67 Pac. 914, 99 Am. St. Rep. 692. **Vt.**—State v. Rutland Ry., L. & P. Co., 85 Vt. 91, 81 Atl. 252, Ann. Cas. 1914A, 1305.

10. See *infra*, IV, A; VII, and VIII.



way invalid as being beyond the authority of the attorney to make,<sup>11</sup> or as embracing an improper subject matter.<sup>12</sup>

**II. CAPACITY AND AUTHORITY TO STIPULATE.** — A. **IN GENERAL.** — Within certain limitations,<sup>13</sup> it is always competent for litigants to waive rules of law or statutory provisions made in their favor,<sup>14</sup> but one who is neither a party to the particular proceeding nor the attorney or representative of a party, has no power to make stipulations in respect thereto.<sup>15</sup>

B. **AUTHORITY OF ATTORNEY.** — 1. **In General.** — The powers of an attorney at law in charge of litigation are very broad,<sup>16</sup> and he, in his honest judgment, must control all matters of practice and procedure in the action. Where, therefore, he has been retained pending litigation or in contemplation thereof,<sup>17</sup> and appears as attorney of record in the proceeding,<sup>18</sup> he may, either in or out of court,<sup>19</sup> enter into binding agreements in reference to its prosecution and management,<sup>20</sup> providing such agreements concern the remedy merely; he

11. See *infra*, II, B.

12. See *infra*, IV, A.

13. See *infra*, IV, A.

14. **U. S.**—*Brooklyn Min. & M. Co. v. Miller*, 227 U. S. 194, 33 Sup. Ct. 251, 57 L. ed. 478. **Cal.**—*Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256. **N. Y.**—*Reich v. Cochran*, 151 N. Y. 122, 45 N. E. 367, 56 Am. St. Rep. 607, 37 L. R. A. 805; *In re Cushman*, 177 App. Div. 127, 163 N. Y. Supp. 712.

[a] **Not an Unqualified Right.**—"Besides . . . we do not acknowledge the unqualified right of parties to stipulate for the abrogation of the rules we have prescribed for the convenient dispatch of business." *Reynolds v. Lawrence*, 15 Cal. 359.

15. *Hanscom v. Malden & Melrose Gaslight Co.*, 220 Mass. 1, 107 N. E. 426, Ann. Cas. 1917A, 145.

[a] **A stipulation to be bound by decree** filed by one not a party, is irregular. *Hanscom v. Malden & Melrose Gaslight Co.*, 220 Mass. 1, 107 N. E. 426, Ann. Cas. 1917A, 145.

16. *Cox v. New York Cent., etc. R. Co.*, 63 N. Y. 414. See the title "**Attorneys.**"

17. **U. S.**—*Stone v. Bank of Commerce*, 174 U. S. 412, 19 Sup. Ct. 747, 43 L. ed. 1028. **Ia.**—*Hefferman v. Burt*, 7 Iowa 320, 71 Am. Dec. 445. **Mass.**—*Lord v. Bigelow*, 124 Mass. 185. **N. C.**—*Starr v. Hall*, 87 N. C. 381. **Wash.**—*Haynes v. Tacoma, O. & G. H. R. Co.*, 7 Wash. 211, 34 Pac. 922. **Eng.**—*Wagstaff v. Wilson*, 4 Barn. & Ad. 339,

24 E. C. L. 154, 110 Eng. Reprint 483.

[a] **An attorney employed in contemplation of a suit to be brought** may bind his client by stipulation in relation to the suit to the same extent as if he had stipulated after the suit was instituted. *Hefferman v. Burt*, 7 Iowa 320, 71 Am. Dec. 445.

[b] **Stipulation by general attorney** for railroad. *Thompson v. Ft. Worth & R. G. R. Co.*, 31 Tex. Civ. App. 583, 73 S. W. 29.

[c] **An attorney cannot delegate his authority in this respect.** *Wright v. Evans*, 53 Ala. 103; *Crotty v. Eagle's Admr.*, 35 W. Va. 143, 13 S. E. 59.

18. *Earhart v. United States*, 30 Ct. Cl. (U. S.) 343.

[a] **One not an attorney of record but who has authority from the attorney of record to conduct the litigation** may enter into stipulations. *Illinois Steel Co. v. Warras*, 141 Wis. 119, 123 N. W. 656. See also *Mahoney v. County Comrs.*, 144 Mass. 459, 11 N. E. 689; *Kingston Bank v. Roosa*, 2 How. Pr. (N. Y.) 8.

19. **Ky.**—*Conrad's Exr. v. Conrad*, 156 Ky. 231, 160 S. W. 937. **Mass.**—*Lewis v. Sumner*, 13 Mete. 269. **Mo.**—*Davis v. Hall*, 90 Mo. 659, 3 S. W. 382. **Mont.**—*Washoe Copper Co. v. Hickey*, 46 Mont. 363, 128 Pac. 584.

20. **U. S.**—*Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125; *Bonnifield v. Thorp*, 71 Fed. 924; *Pierce v. Strickland*, 2 Story 292, 19 Fed. Cas. No. 11,147. **Ala.**—*Ex parte Hayes*, 92 Ala. 120, 9

cannot, without express authorization, stipulate away any of his client's substantive rights.<sup>21</sup> An attorney, in so far as his authority as such continues after judgment, may enter into necessary stipula-

- So. 156; *Rosenbaum v. State*, 33 Ala. 354. **Cal.**—*Knowlton v. Mackenzie*, 110 Cal. 183, 42 Pac. 580; *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529; *Preston v. Hill*, 50 Cal. 43, 19 Am. Rep. 647; *Hart v. Spalding*, 1 Cal. 213; *Clemens v. Gregg*, 34 Cal. App. 245, 167 Pac. 294. **D. C.**—*Strong v. District of Columbia*, 3 McArthur 499. **Ga.**—*Perkerson v. Reams*, 84 Ga. 298, 10 S. E. 624. **Ill.**—*Wilson v. Spring*, 64 Ill. 14. **Ind.**—*Whitestown Milling Co. v. Zahn*, 9 Ind. App. 270, 36 N. E. 653. **Ia.**—*Ft. Dodge Lumber Co. v. Rogosch*, 175 Iowa 475, 157 N. W. 189; *Ohlquest v. Farwell*, 71 Iowa 231, 32 N. W. 277. **Kan.**—*Central Branch Union Pac. R. Co. v. Shoup*, 28 Kan. 394, 42 Am. Rep. 163. **Ky.**—*Conrad's Exr. v. Conrad*, 156 Ky. 231, 160 S. W. 937; *Talbot v. McGee*, 4 Mon. 375; *Smith's Heirs v. Dixon*, 3 Met. 438. **La.**—*Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122, 36 Am. Dec. 624. **Me.**—*Benson v. Carr*, 73 Me. 76; *Jenney v. Delesdernier*, 20 Me. 183. **Md.**—*Kent v. Ricards*, 3 Md. Ch. 392. **Mass.**—*Mahoney v. County Comrs.*, 144 Mass. 459, 11 N. E. 689; *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72. **Mich.**—*Brown v. Spiegel*, 155 Mich. 138, 120 N. W. 579. **Minn.**—*Bray v. Doheny*, 39 Minn. 355, 40 N. W. 262. **Miss.**—*Levy v. Brown*, 56 Miss. 83. **Mo.**—*Wonderly v. Martin*, 69 Mo. App. 84; *Nichols, Shepard & Co. v. Jones*, 32 Mo. App. 657. **Mont.**—*Washoe Copper Co. v. Hickey*, 46 Mont. 363, 128 Pac. 584. **Neb.**—*State Bank v. Green*, 8 Neb. 297, 1 N. W. 210. **N. H.**—*White v. Hildreth*, 13 N. H. 104; *Pike v. Emerson*, 5 N. H. 393, 22 Am. Dec. 468; *Alton v. Gilmanton*, 2 N. H. 520. **N. J.**—*Butler v. Kitchen*, 41 N. J. L. 229. **N. Y.**—*Cox v. New York Cent. & H. R. R. Co.*, 63 N. Y. 414; *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; *Morris v. Press Pub. Co.*, 98 App. Div. 143, 90 N. Y. Supp. 673, 15 N. Y. Ann. Cas. 343; *Beardsley v. Pope*, 88 Hun 560, 34 N. Y. Supp. 846, 68 N. Y. St. 784. **N. C.**—*Covington v. Rockingham*, 93 N. C. 134. **Ohio.**—*Garrett v. Hanshue*, 53 Ohio St. 482, 42 N. E. 256, 35 L. R. A. 321. **Pa.**—*Truby v. Seibert*, 12 Pa. 101. **R. I.**—*Wilbur v. Wilbur*, 18 R. I. 634, 30 Atl. 455. **S. C.**—*Daniel v. Ray*, 1 Hill 32. **Tex.**—*Commonwealth Bonding & Cas. Ins. Co. v. Beavers* (Tex. Civ. App.), 186 S. W. 859. **Vt.**—*Vail v. Conant*, 15 Vt. 314. **Wash.**—*Connor v. Seattle*, 82 Wash. 296, 144 Pac. 52; *Haynes v. Tacoma O. & G. H. R. Co.*, 7 Wash. 211, 34 Pac. 922. **Wis.**—*Illinois Steel Co. v. Warras*, 141 Wis. 119, 123 N. W. 656.
- [a] **The client's acquiescence in a stipulation strengthens its binding force.** *Clemens v. Gregg*, 34 Cal. App. 245, 167 Pac. 294.
- [b] **Effect of Statutes as to Filing Stipulations.**—Statutes providing for the filing of stipulations with the clerk or for their entry upon the minutes of the court do not abridge the authority of the attorney but only prescribe the manner of its exercise. *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529; *Preston v. Hill*, 50 Cal. 43, 19 Am. Rep. 647, and see *infra*, III, D.
- [c] **A liberal construction is given to the implied powers of attorneys in respect to stipulations.** *Paxton v. Cobb*, 2 La. 137; *Wieland v. White*, 109 Mass. 392.
- [d] **Stipulations by the attorney general are binding on the state.** **U. S.**—*Campbell v. United States*, 19 Ct. Cl. 426. **Ill.**—*Esmond v. People*, 18 Ill. App. 114. **Ia.**—*State v. Fleming*, 13 Iowa 443. **N. Y.**—*People v. Stephens*, 52 N. Y. 306. **Ore.**—*Oregon v. Davis*, 42 Ore. 34, 71 Pac. 68, 72 Pac. 317. **Tex.**—*Camron v. State*, 32 Tex. Crim. 180, 22 S. W. 682, 40 Am. St. Rep. 763.
21. **U. S.**—*Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125; *Bonnifield v. Thorp*, 71 Fed. 924. **Ala.**—*Ball v. State Bank*, 8 Ala. 590, 42 Am. Dec. 649. **Colo.**—*Hallack v. Loft*, 19 Colo. 74, 34 Pac. 568; *Richardson Drug Co. v. Dunagan*, 8 Colo. App. 308, 46 Pac. 227. **Ill.**—*Wabash St. L. & P. R. Co. v. McDougall*, 126 Ill. 111, 18 N. E. 291, 9 Am. St. Rep. 539, 1 L. R. A. 207. **Ia.**—*De Louis v. Meek*, 2 G. Gr. 55, 50 Am. Dec. 491. **La.**—*Robert v. Commercial Bank*, 12 La. 528, 33 Am. Dec. 570. **Me.**—*Jenney v. Delesdernier*, 20 Me. 183. **Mich.**—*Brown v. Spiegel*, 155 Mich. 138, 120 N. W. 579. **Minn.**

tions in the exercise of such authority,<sup>22</sup> even after the expiration of the term of court at which the judgment was entered.<sup>23</sup>

A stipulation made by a former attorney in the case remains binding and effective,<sup>24</sup> but one whose authority as attorney in the case has terminated, cannot enter into any stipulations which will bind the client.<sup>25</sup>

**2. Consent of Client.**—In so far as the attorney's power to stipulate is exercised in respect to matters of practice and procedure, no express consent of the client is necessary.<sup>26</sup> There is an implied<sup>27</sup> and

Eidam v. Finnegan, 48 Minn. 53, 50 N. W. 933, 16 L. R. A. 507. **N. J.** Dickerson v. Hodges, 43 N. J. Eq. 45, 10 Atl. 111. **N. Y.**—Herzfeld v. Strauss, 24 App. Div. 93, 48 N. Y. Supp. 1016; Carstens v. Barnstorf, 11 Abb. Pr. (N. S.) 442. **Ohio.**—Garrett v. Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L. R. A. 321. **Wis.**—Hathaway v. Milwaukee, 132 Wis. 249, 111 N. W. 570, 112 N. W. 455, 122 Am. St. Rep. 975, 9 L. R. A. (N. S.) 778.

[a] **Substantive property rights** which he is employed to establish and enforce cannot, without special authorization, be surrendered by the attorney. Illinois Steel Co. v. Warras, 141 Wis. 119, 123 N. W. 656; Fosha v. O'Donnell, 120 Wis. 336, 97 N. W. 924.

**Confession of judgment**, see 14 STANDARD PROC. 796, 817.

**Power to consent to judgment**, see 14 STANDARD PROC. 915.

**Power to satisfy judgment**, see 16 STANDARD PROC. 531, 584.

22. Brown v. Arnold, 131 Fed. 723, 67 C. C. A. 125. See *infra*, IV, B, 6, and 7.

**Compare** 3 STANDARD PROC. 858; 16 STANDARD PROC. 531.

23. Brown v. Arnold, 131 Fed. 723, 67 C. C. A. 125.

[a] **Stipulation that the case shall abide the decision** of the reviewing court in another cause, proper though made after the judgment and after the term at which the judgment was rendered. Brown v. Arnold, 131 Fed. 723, 67 C. C. A. 125.

24. **U. S.**—Prout v. Starr, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. ed. 584; *In re* Reed, 117 Fed. 358. **Ala.**—Saltmarsh v. Bower, 34 Ala. 613. **Cal.** Smith v. Whittier, 95 Cal. 279, 30 Pac. 529; Walker v. Felt, 54 Cal. 386. **Ia.** Council Bluffs Loan & Trust Co. v. Jennings, 81 Iowa 470, 46 N. W. 1006; Lockwood v. Blackhawk, 34 Iowa 235.

**Minn.**—Bingham v. Board of Supervisors, 6 Minn. 136. **Miss.**—Saffold v. Horne, 72 Miss. 470, 18 So. 433. **Mo.** McDonough v. Daly, 3 Mo. App. 606. **N. Y.**—People v. Stephens, 52 N. Y. 306; Van Zandt v. Van Zandt, 23 Abb. N. C. 328, 10 N. Y. Supp. 200. **E. I.** Wilbur v. Wilbur, 18 R. I. 654, 30 Atl. 455. **S. C.**—Bollmann v. Bollmann, 6 S. C. 29. **Tex.**—Field & Co. v. Fowler, 62 Tex. 65.

25. **Ind.**—Goben v. Goldsberry, 72 Ind. 44. **N. Y.**—Quinn v. Lloyd, 36 How. Pr. 378, 5 Abb. Pr. (N. S.) 281, 7 Robt. 538. **S. C.**—*Ex parte* Roundtree, 51 S. C. 405, 29 S. E. 66.

**Termination of authority of attorney**, see the title "Attorneys."

[a] **After withdrawal from the case**, the attorney has no power to stipulate. *Ex parte* Roundtree, 51 S. C. 405, 29 S. E. 66.

26. Illinois Steel Co. v. Warras, 141 Wis. 119, 123 N. W. 656. See cases in note following.

27. **U. S.**—Bonnifield v. Thorp, 71 Fed. 924. **Ala.**—*Ex parte* Hayes, 92 Ala. 120, 9 So. 156; Charles v. Miller, 36 Ala. 141. **Ia.**—Ohlquest v. Farwell, 71 Iowa 231, 32 N. W. 277. **La.**—Paxton v. Cobb, 2 La. 137. **Mass.**—Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72. **Minn.**—Bray v. Doheny, 39 Minn. 355, 40 N. W. 262. **Mo.**—Davis v. Hall, 90 Mo. 659, 3 S. W. 382; North Missouri R. Co. v. Stephens, 36 Mo. 150, 88 Am. Dec. 138. **Neb.**—State Bank v. Green, 8 Neb. 297, 1 N. W. 210. **N. Y.**—Gorham v. Gale, 7 Cow. 739, 17 Am. Dec. 549. **Ohio.**—Garrett v. Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L. R. A. 321. **Okla.**—Turner v. Fleming, 37 Okla. 75, 130 Pac. 551, Ann. Cas. 1915B, 831, 45 L. R. A. (N. S.) 265. **Tex.**—Willis v. Chowning, 90 Tex. 617, 40 S. W. 395, 59 Am. St. Rep. 842. **Vt.**—Vail v. Conant, 15 Vt. 314.



exclusive<sup>28</sup> power to make such stipulations and agreements within its scope will be enforced although contrary to the client's instructions.<sup>29</sup> He cannot, however, contrary to the express wishes and directions of the client waive substantive legal rights guaranteed the client by law,<sup>30</sup> although, of course, the client may by express authorization empower him to make such stipulations,<sup>31</sup> or may subsequently ratify them.<sup>32</sup>

The presumption is that an attorney stipulating for a party has authority to do so,<sup>33</sup> such presumption, being indulged as well to uphold the action of the court<sup>34</sup> as to protect the other party to the stipulation.<sup>35</sup>

C. AUTHORITY OF PARTY. — A litigant who is not represented by

28. See *infra*, II, C.

29. Ark.—Wood *v.* Wood, 59 Ark. 441, 27 S. W. 641, 43 Am. St. Rep. 42, 28 L. R. A. 157. Ga.—Williams *v.* Simmons, 79 Ga. 649, 7 S. E. 133; Lewis *v.* Gunn, 63 Ga. 542. Neb.—State Bank *v.* Green, 8 Neb. 297, 1 N. W. 210. N. Y. Herbert *v.* Lawrence, 18 N. Y. Supp. 95, 21 Civ. Proc. 336, 42 N. Y. St. 406; Anonymous, 1 Wend. 108. N. C. Pierce *v.* Perkins, 17 N. C. 250.

See *infra*, II, C.

30. Cal.—Knowlton *v.* Mackenzie, 110 Cal. 183, 42 Pac. 580. Ill.—Lyman *v.* Kaul, 275 Ill. 11, 113 N. E. 944. Minn.—Schaefer *v.* Schoenborn, 94 Minn. 490, 103 N. W. 501.

Waiver as to incompetent's rights, see *infra*, II, B, 3.

[a] Right to jury trial regarded as a right which counsel cannot waive contrary to the wishes of his client. See Lyman *v.* Kaul, 275 Ill. 11, 113 N. E. 944. Compare the title "Juries and Jurors."

[b] Mistake as to Consent.—But where an attorney stipulates to dismiss an action upon the mistaken assumption that his client has expressly authorized him to do so, the client is not necessarily bound thereby, but may have the case reinstated on motion. Schaefer *v.* Schoenborn, 94 Minn. 490, 103 N. W. 501.

31. Washoe Copper Co. *v.* Hickey, 46 Mont. 363, 128 Pac. 584.

32. Rotberg *v.* Hebron, 157 N. Y. Supp. 788.

33. U. S.—Osborn *v.* Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Hill *v.* Mendenhall, 21 Wall. 453, 22 L. ed. 616; Alexandria Canal Co. *v.* Swann, 5 How. 83, 12 L. ed. 60. Ark.—Wood *v.* Wood, 59 Ark. 441, 27 S. W.

641, 43 Am. St. Rep. 42, 28 L. R. A. 157. Cal.—Knowlton *v.* Mackenzie, 110 Cal. 183, 42 Pac. 580; Garrison *v.* McGowan, 48 Cal. 592. Ga.—Perkerson *v.* Reams, 84 Ga. 298, 10 S. E. 624; Williams *v.* Simmons, 79 Ga. 649, 7 S. E. 133. Kan.—Reynolds *v.* Fleming, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86. La.—Taylor *v.* New Orleans, 41 La. Ann. 891, 6 So. 723; Dangerfield's Exx. *v.* Thruston's Heirs, 8 Mart. (N. S.) 232. Md.—Kelso *v.* Steiger, 75 Md. 376, 24 Atl. 18; Kent *v.* Ricards, 3 Md. Ch. 392. Mass.—Steffe *v.* Old Colony R. Co., 156 Mass. 262, 30 N. E. 1137; Lewis *v.* Sumner, 13 Mete. 269. Mica. Norberg *v.* Heineman, 59 Mich. 210, 26 N. W. 481. Neb.—Vorce *v.* Page, 28 Neb. 294, 44 N. W. 452; State Bank *v.* Green, 8 Neb. 297, 1 N. W. 210. N. H.—Manchester Bank *v.* Fellows, 28 N. H. 302. N. M.—Coler *v.* Santa Fe, 6 N. M. 88, 27 Pac. 619. N. Y.—American Ins. Co. *v.* Oakley, 9 Paige 496, 38 Am. Dec. 561. Ore.—Carter *v.* Koshland, 12 Ore. 492, 8 Pac. 556.

[a] Even after judgment, should a new warrant of attorney be necessary to enable an attorney to make a stipulation, it will be presumed *prima facie* that such authority was given, where the attorney agreed to and signed the stipulation. Brown *v.* Arnold, 131 Fed. 723, 67 C. C. A. 125.

[b] The burden is upon the party disputing the authority of an attorney who has made a stipulation, to show that such authority did not exist. Brown *v.* Arnold, 131 Fed. 723, 67 C. C. A. 125; Valle *v.* Picton, 91 Mo. 207, 3 S. W. 860.

34. Knowlton *v.* Mackenzie, 110 Cal. 183, 42 Pac. 580.

35. Knowlton *v.* Mackenzie, 110 Cal. 183, 42 Pac. 580.

an attorney of record may himself enter into all proper stipulations in reference to the conduct of the suit,<sup>36</sup> and even where he appears by attorney, he may stipulate as to matters involving the subject matter of the action.<sup>37</sup> Where, however, an attorney is retained in the suit, its conduct and management are within his exclusive control and stipulation by the client in respect thereto will, where the attorney objects, be disregarded.<sup>38</sup> But the client may expressly author-

36. **Cal.**—Estate of Arguello, 50 Cal. 308. **Idaho.**—Koepl v. Ruppert, 29 Idaho 223, 158 Pac. 519. **Ill.**—Connett v. Chicago, 114 Ill. 233, 29 N. E. 280; Ives v. Ashelby, 26 Ill. App. 244. **Ia.**—Chapman v. Coats, 26 Iowa 288. **Me.**—Hearne v. Brown, 67 Me. 156. **Minn.**—Albee v. Hayden, 25 Minn. 267. **Miss.**—Mosely v. Jamison, 71 Miss. 456, 14 So. 529. **N. H.**—Kinsley v. Norris, 62 N. H. 652. **N. Y.**—Coughlin v. New York Cent. & H. R. R. Co., 71 N. Y. 443, 27 Am. Rep. 75; Pilger v. Gou, 21 How. Pr. 155, 12 Abb. Pr. 244; Montgomery v. Ellis, 6 How. Pr. 326; Wells v. Lane, 15 Wend. 99. **Pa.**—Rogers v. Playford, 12 Pa. 181; Horton v. Stanley, 1 Miles 418. **Wis.**—Sullivan v. Bruhling, 70 Wis. 388, 36 N. W. 23.

37. **U. S.**—Holker v. Parker, 7 Cranch 436, 3 L. ed. 396. **Colo.**—Hallack v. Loft, 19 Colo. 74, 34 Pac. 568; Richardson Drug Co. v. Dunagan, 8 Colo. App. 308, 46 Pac. 227. **Fla.**—Mitchell v. Cotten, 3 Fla. 134. **Ind.**—Repp v. Wiles, 3 Ind. App. 167, 29 N. E. 441. **Ia.**—Martin v. Capital Ins. Co., 85 Iowa 643, 52 N. W. 534. **Kan.**—Herriman v. Shomon, 24 Kan. 387, 36 Am. Rep. 261. **Mass.**—Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72. **Mich.**—Wright v. Hake, 38 Mich. 525. **Miss.**—Mosely v. Jamison, 71 Miss. 456, 14 So. 529. **Neb.**—Stoll v. Sheldon, 13 Neb. 207, 13 N. W. 201. **N. J.**—Dickerson v. Hodges, 43 N. J. Eq. 45; 10 Atl. 111; Howe v. Lawrence, 22 N. J. L. 99. **N. Y.**—Coughlin v. New York Cent. & H. R. R. Co., 71 N. Y. 443, 27 Am. Rep. 75; Bates v. Voorhees, 20 N. Y. 525; Herzfeld v. Strauss, 24 App. Div. 93, 48 N. Y. Supp. 1016. **Pa.**—North Whitehall v. Keller, 100 Pa. 105, 45 Am. Rep. 361, 12 W. N. C. 177. **Tex.**—Peters v. Lawson, 66 Tex. 336, 17 S. W. 734. **Wash.**—South Bend Land Co. v. Denio, 7 Wash. 303, 35 Pac. 64; Hood v. California Wine Co., 4 Wash. 88, 29 Pac. 768. **W. Va.**—Crotty v. Eagle's Admr., 35 W. Va. 143, 13 S. E. 59. **Wis.**—Sullivan v. Bruhling, 70 Wis. 388, 36

N. W. 23; Dolloff v. Curran, 59 Wis. 332, 18 N. W. 266.

[a] "The cause of action, the claim or demand sued upon, the subject-matter of the litigation, are within the exclusive control of the client; and the attorney may not impair, compromise, settle, surrender, or destroy them without the client's consent." Bonnifield v. Thorp, 71 Fed. 924.

Necessity of consent of client to stipulations involving substantive rights, see *supra*, II, B, 2.

Client's right to dismiss the suit, see the title "Dismissal, Discontinuance and Nonsuit."

38. **U. S.**—Bonnifield v. Thorp, 71 Fed. 924; Nightingale v. Oregon Cent. Ry. Co., 2 Sawy. 338, 18 Fed. Cas. No. 10,264; Earhart v. United States, 30 Ct. Cl. 343. **Ala.**—Prestwood v. Watson, 111 Ala. 604, 20 So. 600; Starke v. Kenan, 11 Ala. 818. **Ark.**—Flynn v. State, 43 Ark. 289. **Cal.**—Crescent Canal Co. v. Montgomery, 124 Cal. 134, 56 Pac. 797; Wylie v. Sierra Gold Co., 120 Cal. 485, 52 Pac. 809; Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227; Board of Commissioners v. Younger, 29 Cal. 147. **Ill.**—Culver v. Cougle, 165 Ill. 417, 46 N. E. 242; Wilson v. Spring, 64 Ill. 14; Windmiller v. Chapman, 38 Ill. App. 276. **Ind.**—McConnell v. Brown, 40 Ind. 384; Hays v. Hynds, 28 Ind. 531; Lake Erie & W. R. Co. v. Rooker, 13 Ind. App. 600, 41 N. E. 470; Whitestown Milling Co. v. Zahn, 9 Ind. App. 270, 36 N. E. 653. **Kan.**—Central Branch Union Pac. R. Co. v. Shoup, 28 Kan. 394, 42 Am. Rep. 163. **Ky.**—Talbot v. McGee, 4 Mon. 375. **Md.**—Farmers' Bank v. Sprigg, 11 Md. 389. **Mass.**—Moulton v. Bowker, 115 Mass. 36, 15 Am. Rep. 72; Lewis v. Gamage, 1 Pick. 347; Lewis v. Sumner, 13 Metc. 269. **Mich.**—Jackson v. Cole, 81 Mich. 440, 45 N. W. 826; People v. Pratt, 15 Mich. 184. **Minn.**—Bray v. Doheny, 39 Minn. 355, 40 N. W. 262. **Mo.**—State v. Hawkins, 28 Mo. 366; Moling v. Barnard, 65 Mo. App. 600;

ize his attorney to enter into certain stipulations or ratify stipulations already made.<sup>39</sup>

D. IN BEHALF OF INFANTS AND OTHER INCOMPETENTS. — One who conducts a legal proceeding as next friend, guardian ad litem or attorney for an infant or other incompetent may bind the infant by stipulations concerning matters of procedure.<sup>40</sup> He cannot, however, without the court's consent, surrender any of the substantial property rights of such minor or incompetent.<sup>41</sup> And in the exercise of its control over the rights of minors, the court may set aside or disregard stipulations made on their behalf which are shown to have

Nichols, Shepard & Co. v. Jones, 32 Mo. App. 657. Neb.—McCann v. McLennan, 3 Neb. 25. N. H.—Page v. Brewster, 54 N. H. 184; Hanson v. Hoitt, 14 N. H. 56; Edgerton v. Brackett, 11 N. H. 218; Alton v. Gilmanton, 2 N. H. 520. N. Y.—Van Aernam v. Blustein, 102 N. Y. 355, 7 N. E. 537, 2 N. Y. St. 470; Read v. French, 28 N. Y. 285; Ulster v. Brodhead, 44 How. Pr. 426; Webb v. Dill, 18 Abb. Pr. 264; Anonymous, 1 Wend. 108. N. C.—Greenlee v. McDowell, 39 N. C. 481. Ohio. Garrett v. Hanshue, 53 Ohio St. 482, 42 N. E. 256, 35 L. R. A. 321. Pa. Wilson v. Young, 9 Pa. 101. S. D. Frederick Mill. Co. v. Frederick Farmers' Alliance Co., 20 S. D. 335, 106 N. W. 298. Vt.—Vail v. Conant, 15 Vt. 314. Wis.—State v. Gratiot, 17 Wis. 245.

[a] In the absence of objection by the attorney the court will ordinarily enforce the stipulation. *McBratney v. Rome, W. & O. R. Co.*, 87 N. Y. 467.

39. See *supra*, II, B, 2.

40. U. S.—*Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. ed. 1047. Colo.—*Rarick v. Vandevier*, 11 Colo. App. 116, 52 Pac. 743. Minn. *Eidam v. Finnegan*, 48 Minn. 53, 50 N. W. 933, 16 L. R. A. 507. N. C. *White v. Morris*, 107 N. C. 92, 12 S. E. 80.

See 10 STANDARD PROC. 754, et seq. Stipulations by guardian ad litem, see 10 STANDARD PROC. 754, 759, 760.

[a] Matters of Evidence.—A guardian ad litem has the power to stipulate as to the condition of a bank account, thus obviating the introduction of the bank books. *Rarick v. Vandevier*, 11 Colo. App. 116, 52 Pac. 743.

[b] Jury Trial Waived.—It is competent for the attorney and guardian ad litem to waive a jury trial for infants. *White v. Morris*, 107 N. C. 92,

12 S. E. 80; *Wiley v. Edmondson*, 43 Okla. 1, 133 Pac. 38. But see *Lieserowitz v. West Chicago St. R. Co.*, 80 Ill. App. 248; *In re Harden's Estate*, 88 Misc. 420, 150 N. Y. Supp. 743, special guardian in surrogate's court cannot waive infant's right to a trial by jury in another court. Compare *Hunter v. Empire State Surety Co.*, 261 Ill. 335, 103 N. E. 1052, which, though it does not rule upon the question, decides that if there is error in waiving a jury for an infant it does not invalidate the judgment so as to render it subject to collateral attack.

41. Ark.—*McCloy v. Arnett*, 47 Ark. 445, 2 S. W. 71. Ill.—*Gooch v. Green*, 102 Ill. 507. Ky.—*Tinker v. Ringo's Exrs.*, 11 Ky. L. Rep. 120, 11 S. W. 605. Mo.—*McClure v. Farthing*, 51 Mo. 109.

See 10 STANDARD PROC. 759, 760.

[a] Waiving Right to a Trial.—An agreement to abide the event of another suit, does not bind an infant party unless approved and ratified by the court upon a showing that it is for the interest, or, at least, not prejudicial to the interest of the infant. *Eidam v. Finnegan*, 48 Minn. 53, 50 N. W. 933, 16 L. R. A. 507.

[b] That incompetent testimony, which would amount to a surrender of the incompetent's substantive rights, cannot be admitted under stipulation, see dictum in *Cochran v. Cochran*, 277 Ill. 244, 115 N. E. 142. See also 10 STANDARD PROC. 760.

Admissions in pleadings by infant or insane party, see 12 STANDARD PROC. 757; 13 STANDARD PROC. 607. See also 10 STANDARD PROC. 758, 760.

Judgment against infant or insane person rendered by consent or confession, see 12 STANDARD PROC. 766, 768; 13 STANDARD PROC. 613. See also 10 STANDARD PROC. 874; 14 STANDARD PROC. 917.



been improvidently or fraudulently made.<sup>42</sup> And it may and ought to set aside or disregard agreements which waive or surrender any material right of the minor.<sup>43</sup>

**III. FORM AND REQUISITES.**—A. IN GENERAL.—In order to promote orderly procedure and protect the rights of litigants<sup>44</sup> the method of making and evidencing stipulations has been to a great extent regulated by statutes or rules of court.<sup>45</sup> The statutes are

42. *Eidam v. Finnegan*, 48 Minn. 53, 50 N. W. 933, 16 L. R. A. 507.

43. *Eidam v. Finnegan*, 48 Minn. 53, 50 N. W. 933, 16 L. R. A. 507.

44. **Cal.**—*Merritt v. Wilcox*, 52 Cal. 233; *Borkheim v. North British etc. Ins. Co.*, 38 Cal. 623; *Reese v. Mahoney*, 21 Cal. 305. **Me.**—*Smith v. Wadleigh*, 17 Me. 353. **Mont.**—*Bush v. Baker*, 46 Mont. 535, 129 Pac. 550. **Neb.**—*German-American Ins. Co. v. Buckstaff*, 38 Neb. 135, 56 N. W. 692. **N. Y.**—*Mutual Life Ins. Co. v. O'Donnell*, 146 N. Y. 275, 40 N. E. 787, 48 Am. St. Rep. 796; *Flynn v. Hancock*, 46 Hun 368, 15 N. Y. St. 145. **N. C.**—*Board of Education v. Orr*, 161 N. C. 218, 76 S. E. 693. **Tex.**—*Hancock v. Winans*, 20 Tex. 320.

45. See the statutes and rules of court and the following cases: **U. S.** *Lee v. Simpson*, 42 Fed. 434; *Evans v. State Nat. Bank*, 19 Fed. 676. **Ala.** *G. Ober & Sons Co. v. Thomason Grocery Co.*, 138 Ala. 217, 35 So. 127; *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600. **Cal.**—*Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529; *Merritt v. Wilcox*, 52 Cal. 233; *Peralta v. Mariea*, 3 Cal. 185. **Colo.**—*La Junta & L. Canal Co. v. Hess*, 25 Colo. 513, 55 Pac. 729; *Morse v. Budlong*, 5 Colo. App. 147, 38 Pac. 59. **Conn.**—*Woodruff v. Fellowes*, 35 Conn. 105. **Fla.**—*Palatka & I. R. R. Co. v. State*, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395. **Ga.**—*Lee v. Atlanta St. R. Co.*, 91 Ga. 215, 18 S. E. 136; *Caldwell v. McWilliams*, 65 Ga. 99; *Henderson v. Merritt*, 38 Ga. 232. **Ind.** *American White Bronze Co. v. Clark*, 123 Ind. 230, 23 N. E. 855; *Goben v. Goldsberry*, 72 Ind. 44; *Barnes v. Smith*, 34 Ind. 516. **Ia.**—*Kraner v. Chambers*, 92 Iowa 681, 61 N. W. 373; *Council Bluffs L. & T. Co. v. Jennings*, 81 Iowa 470, 46 N. W. 1006; *Taylor v. Chicago, M. & St. P. R. Co.*, 80 Iowa 431, 46 N. W. 64. **Kan.**—*Anderson v. Burchett*, 48 Kan. 153, 29 Pac. 315. **La.**—*Johnston v. Yale, Jr. & Co.*, 19

**La. Ann.** 212. **Me.**—*Smith v. Wadleigh*, 17 Me. 353. **Mass.**—*Savage v. Blanchard*, 148 Mass. 348, 19 N. E. 396; *Nye v. Old Colony R. Co.*, 124 Mass. 241. **Mich.**—*Sudworth v. Morton*, 137 Mich. 575, 100 N. W. 769; *Suydam v. Dequindre*, Walk. Ch. 23. **Minn.**—*Wells v. Penfield*, 70 Minn. 66, 72 N. W. 816. **Mo.**—*Almeroth v. Bertram-Cady Co.*, 102 Mo. App. 156, 76 S. W. 701. **Mont.**—*Beach v. Spokane etc. Co.*, 21 Mont. 184, 53 Pac. 493; *Rankin v. Campbell*, 1 Mont. 300. **Neb.**—*Kent v. Green*, 43 Neb. 673, 62 N. W. 71; *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135, 56 N. W. 692; *Rich v. State Nat. Bank*, 7 Neb. 201, 29 Am. Rep. 382. **Nev.**—*Stretch v. Montezuma Min. Co.*, 29 Nev. 163, 86 Pac. 445; *Haley v. Eureka County Bank*, 20 Nev. 410, 22 Pac. 1098. **N. H.**—*Olcott v. Banfill*, 7 N. H. 469. **N. J.**—*Union Locomotive & Exp. Co. v. Erie R. Co.*, 37 N. J. L. 23. **N. Y.**—*Mutual Life Ins. Co. v. O'Donnell*, 146 N. Y. 275, 40 N. E. 787, 48 Am. St. Rep. 796; *Schlesinger v. Keene*, 88 N. Y. Supp. 1042. **N. C.**—*Roberts v. Partridge*, 118 N. C. 355, 24 S. E. 15; *Randleman Mfg. Co. v. Simmons*, 97 N. C. 89, 1 S. E. 923. **Pa.**—*Black v. Black*, 206 Pa. 116, 55 Atl. 847; *Reamer's Appeal*, 18 Pa. 510; *Dawson v. Condy*, 7 Serg. & R. 366. **Tex.**—*Less v. Ghio*, 92 Tex. 651, 51 S. W. 502; *Morse v. State*, 39 Tex. Crim. 566, 47 S. W. 645, 50 S. W. 342. **Wash.**—*Livesley v. Pier*, 9 Wash. 658, 38 Pac. 156. **Wis.**—*Burnham v. Smith*, 11 Wis. 258.

As to writing and signing the stipulation, see *infra*, III, B.

Necessity of entry and filing the stipulation, see *infra*, III, D.

[a] The statutes apply to criminal cases to the same extent as to civil cases. **Fla.**—*Steele v. State*, 33 Fla. 348, 354, 14 So. 841. **Ga.**—*Huff v. State*, 29 Ga. 424. **Ia.**—*State v. Stewart*, 74 Iowa 336, 37 N. W. 400. **N. Y.** *People v. Haggerty*, 5 Daly 532. **Tex.**

remedial in character and in consequence are, as a rule, strictly construed.<sup>46</sup>

**B. ORAL OR WRITTEN.**—It is generally required by statute or rule of court<sup>47</sup> that agreements or stipulations in regard to the proceedings in a cause be in writing,<sup>48</sup> signed by the party against whom it is urged or his attorney,<sup>49</sup> and filed with the clerk,<sup>50</sup> or else made in open court and entered on the minutes of the court.<sup>51</sup> The purpose of this requirement is to relieve the presiding judge of the necessity of determining controversies between opposing counsel as to their unexecuted agreements,<sup>52</sup> and it should not be invoked to perpetrate a

*Spencer v. State*, 34 Tex. Crim. 238, 30 S. W. 46, 32 S. W. 690.

[b] Rules of district court not applicable to stipulations in justice's court. *Gulf, C. & S. F. R. Co. v. King*, 80 Tex. 681, 16 S. W. 641.

46. **Cal.**—*Merritt v. Wilcox*, 52 Cal. 238; *Borkheim v. North British*, etc. Ins. Co., 38 Cal. 623. **Ia.**—*Hiller v. Landis*, 44 Iowa 223. **Nev.**—*Haley v. Eureka County Bank*, 20 Nev. 410, 22 Pac. 1098. **N. Y.**—*Bradford v. Downs*, 25 App. Div. 581, 49 N. Y. Supp. 521. **Pa.**—*Powell v. Tobias*, 2 Phila. 274. **Tex.**—*Birdwell v. Cox*, 18 Tex. 535.

47. See *supra*, III, A.

48. **Ark.**—*St. Louis, I. M. & S. R. Co. v. Webster*, 99 Ark. 265, 137 S. W. 1103, 1199, Ann. Cas. 1913D, 141. **Mass.** *Palmer v. Lavers*, 218 Mass. 286, 105 N. E. 1000. **Mont.**—*Bush v. Baker*, 46 Mont. 535, 129 Pac. 550. **Tex.**—*State Fair of Texas v. Cowart* (Tex. Civ. App.), 165 S. W. 1197.

As to jury trial, see 16 STANDARD PROC. 926.

[a] The appellate court will not recognize (1) verbal stipulations made at the trial (*Gulf & S. I. R. Co. v. Meyers*, 114 Miss. 458, 75 So. 244), if (2) denied by opposing counsel. *Lindsey v. Supreme Lodge of Knights of Honor*, 172 N. C. 818, 90 S. E. 1013.

[b] **New York Rule.**—*C. J. Huebel Co. v. Mackinnon*, 186 Mich. 617, 152 N. W. 1098; *Laska v. Harris*, 92 Misc. 150, 155 N. Y. Supp. 104; *Callender v. Dressler-Beard Mfg. Co.*, 152 N. Y. Supp. 645.

[c] "All agreements of parties or their counsel relating either to the merits or conduct of the case in the court, or in reference to a waiver of any of the requirements prescribed by the rules, looking to the proper preparation of an appeal or writ of error for submission" to be in writing

'signed by the parties or their counsel.' " *State Fair of Texas v. Cowart* (Tex. Civ. App.), 165 S. W. 1197.

49. **U. S.**—*Citizens' Bank v. Farwell*, 56 Fed. 570, 6 C. C. A. 24. **Ind.** *Indianapolis D. & W. R. Co. v. Sands*, 133 Ind. 433, 32 N. E. 722. **N. Y.** *Smith v. Bradhurst*, 18 Misc. 546, 41 N. Y. Supp. 1002. **Tex.**—*Strippelman v. Clark*, 11 Tex. 296; *Ingram v. McClure* (Tex. Civ. App.), 151 S. W. 339.

[a] Signed only by the party sought to be bound, sufficient. *High v. Tarver* (Tex. Civ. App.), 25 S. W. 1098.

[b] That signature necessary to constitute a written agreement, see *Citizens' Bank v. Farwell*, 56 Fed. 570, 6 C. C. A. 24; *Randleman Mfg. Co. v. Simmons*, 97 N. C. 89, 1 S. E. 923.

50. See *infra*, III, D.

51. **U. S.**—*Lewis v. Wilson*, 151 U. S. 551, 14 Sup. Ct. 419, 38 L. ed. 267. **Ala.**—*Prestwood v. Watson*, 111 Ala. 604, 20 So. 600. **Cal.**—*Hearne v. De Young*, 111 Cal. 373, 43 Pac. 1108. **Colo.**—*Solomonovich v. Denver Consol. Tramway Co.*, 39 Colo. 282, 89 Pac. 57. **Ga.**—*Caldwell v. McWilliams*, 65 Ga. 99. **Mass.**—*Savage v. Blanchard*, 148 Mass. 348, 19 N. E. 396. **Mont.**—*Bush v. Baker*, 46 Mont. 535, 129 Pac. 550. **Neb.**—*Rich v. State Nat. Bank*, 7 Neb. 201, 29 Am. Rep. 382.

52. **Ala.**—*Prestwood v. Watson*, 111 Ala. 604, 20 So. 600. **Cal.**—*Merritt v. Wilcox*, 52 Cal. 238; *Borkheim v. North British & M. Ins. Co.*, 38 Cal. 623. **Mont.**—*Bush v. Baker*, 46 Mont. 535, 129 Pac. 550. **Neb.**—*German-American Ins. Co. v. Buckstaff*, 38 Neb. 135, 56 N. W. 692. **N. Y.**—*Mutual Life Ins. Co. v. O'Donnell*, 146 N. Y. 275, 40 N. E. 787, 48 Am. St. Rep. 796; *Braisted v. Johnson*, 5 Sandf. 671. **Tex.**—*Hancock v. Winans*, 20 Tex. 320;

wrong<sup>53</sup> by permitting one making an oral stipulation upon which the other has relied and acted to retract and take advantage of acts and omissions of his adversary thereby caused;<sup>54</sup> hence an oral agreement made out of court will be enforced,<sup>55</sup> provided it has been acted upon by the parties,<sup>56</sup> or its terms are admitted or undisputed.<sup>57</sup> But

*American Warehouse Co. v. Hamblin* (Tex. Civ. App.), 146 S. W. 1006.

And see cases in preceding note.

53. *Bush v. Baker*, 46 Mont. 535, 129 Pac. 550.

54. *Cal.*—*Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529. *N. Y.*—*Mutual Life Ins. Co. v. O'Donnell*, 146 N. Y. 275, 40 N. E. 787, 48 Am. St. Rep. 796; *People v. Stephens*, 52 N. Y. 306; *Zwecker v. Levine*, 135 App. Div. 432, 120 N. Y. Supp. 425; *Laska v. Harris*, 92 Misc. 150, 155 N. Y. Supp. 104. *N. C.*—*Parker v. Wilmington & W. R. Co.*, 84 N. C. 118. *Pa.*—*Reamer's Appeal*, 18 Pa. 510. *Tex.*—*Thompson v. Ft. Worth & R. G. R. Co.*, 31 Tex. Civ. App. 583, 73 S. W. 29. *Wis.*—*Burnham v. Smith*, 11 Wis. 258.

55. *Ia.*—*Kraner v. Chambers*, 92 Iowa 681, 61 N. W. 373. *N. Y.*—*Chamberlain v. Fitch*, 2 Cow. 243. *Tex.*—*Gulf C. & S. F. R. Co. v. King*, 80 Tex. 683, 16 S. W. 641.

As to statutes requiring the stipulation to be in writing when made out of court, see *supra*, this subsection.

56. *Ala.*—*Brown v. Jackson*, 42 Ala. 81. *Cal.*—*Coonan v. Loewenthal*, 129 Cal. 197, 61 Pac. 940; *Reclamation Dist. No. 535 v. Hamilton*, 112 Cal. 603, 44 Pac. 1074; *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529. *Colo.*—*Rhoades v. Drummond*, 3 Colo. 374; *Murphy v. Cunningham*, 1 Colo. 467. *Ga.*—*Henderson v. Merritt*, 38 Ga. 232. *Ill.*—*Chicago & N. W. Ry. Co. v. Hintz*, 132 Ill. 265, 23 N. E. 1032. *Miss.*—*White v. Jones*, 83 Miss. 231, 35 So. 450. *N. Y.*—*Mutual Life Ins. Co. v. O'Donnell*, 146 N. Y. 275, 40 N. E. 787, 48 Am. St. Rep. 796; *Deen v. Milne*, 113 N. Y. 303, 20 N. E. 861; *People v. Stephens*, 52 N. Y. 306; *Laska v. Harris*, 92 Misc. 150, 155 N. Y. Supp. 104. *N. C.*—*Parker v. Wilmington & W. R. Co.*, 84 N. C. 118. *N. D.*—*Heald v. Yumisko*, 7 N. D. 422, 75 N. W. 806. *Pa.*—*Reamer's Appeal*, 18 Pa. 510. *Tex.*—*Masterson v. Bockel*, 20 Tex. Civ. App. 416, 51 S. W. 39; *Thompson v. Ft. Worth & R. G. R. Co.*, 31 Tex. Civ. App. 583, 73 S. W.

29. *Wis.*—*Burnham v. Smith*, 11 Wis. 258.

**Waiving jury trial**, see 16 STANDARD PROC. 932, note 16, [a].

[a] **Stipulation to abide the result of an appeal**, though not in writing, cannot be retracted after the other party has acted upon it. *Laska v. Harris*, 92 Misc. 150, 155 N. Y. Supp. 104.

57. *U. S.*—*Evans v. State Nat. Bank*, 19 Fed. 676. *Cal.*—*McLaughlin v. Clausen*, 116 Cal. 487, 48 Pac. 487; *Reclamation Dist. No. 535 v. Hamilton*, 112 Cal. 603, 44 Pac. 1074; *Johnson v. Sweeney*, 95 Cal. 304, 30 Pac. 540; *Reese v. Mahoney*, 21 Cal. 305; *Patterson v. Ely*, 19 Cal. 28. *Colo.*—*Solmonovich v. Denver Consol. Tramway Co.*, 39 Colo. 282, 89 Pac. 57; *Tanquary v. People*, 25 Colo. App. 531, 139 Pac. 1118; *Morse v. Budlong*, 5 Colo. App. 147, 38 Pac. 59. *Conn.*—*Woodruff v. Fellowes*, 35 Conn. 105. *Ga.*—*Lee v. Atlanta St. R. Co.*, 91 Ga. 215, 18 S. E. 136; *Arnold v. Hall*, 70 Ga. 445. *Ill.*—*Chicago & N. W. Ry. Co. v. Hintz*, 132 Ill. 265, 23 N. E. 1032; *Toupin v. Gargnier*, 12 Ill. 79. *Ia.*—*Council Bluffs L. & T. Co. v. Jennings*, 81 Iowa 470, 46 N. W. 1006; *Taylor v. Chicago M. & St. P. R. Co.*, 80 Iowa 431, 46 N. W. 64; *Hardin v. Iowa R. & C. Co.*, 78 Iowa 726, 43 N. W. 543, 6 L. R. A. 52. *Mo.*—*Almeroth v. Bertram Cady Co.*, 102 Mo. App. 156, 76 S. W. 701. *Mont.*—*Beach v. Spokane Ranch, etc. Co.*, 21 Mont. 184, 53 Pac. 493; *Stewart v. Miller*, 1 Mont. 301. *N. J.*—*Caldwell v. Estell*, 20 N. J. L. 326. *N. Y.*—*Brady v. Martin*, 11 N. Y. Supp. 424, 19 Civ. Proc. 134, 33 N. Y. St. 425. *N. C.*—*Roberts v. Partridge*, 118 N. C. 355, 24 S. E. 15; *Pipkin v. McArtan*, 122 N. C. 194, 29 S. E. 334; *Graham v. Edwards*, 114 N. C. 228, 19 S. E. 150; *Le Due v. Moore*, 113 N. C. 275, 18 S. E. 70; *Sondley v. Asheville*, 112 N. C. 694, 17 S. E. 534; *Hutchison v. Rumpf*, 83 N. C. 441. *S. C.*—*Ex parte Pearson*, 79 S. C. 302, 60 S. E. 706. *Tex.*—*Field & Co. v. Fowler*, 62 Tex. 65; *Birdwell v. Cox*, 18 Tex. 535. *Wis.*—*Burnham v. Smith*, 11 Wis. 258.



the court may refuse to enforce an executory oral agreement made out of court where its terms are in dispute.<sup>58</sup> In the absence of any such rule of court or of statute requiring the particular stipulation to be in writing, it is valid and binding though made orally.<sup>59</sup>

[a] **Oral stipulation for nolle prosequi enforceable, when not disputed.** *Tanquary v. People*, 25 Colo. App. 531, 139 Pac. 1118.

58. **U. S.**—*Evans v. State Nat. Bank*, 19 Fed. 676. **Ala.**—*Prestwood v. Watson*, 111 Ala. 604, 20 So. 600. **Cal.** *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529; *Merritt v. Wilcox*, 52 Cal. 238; *Borkheim v. North British etc. Ins. Co.*, 38 Cal. 623. **Colo.**—*Morse v. Budlong*, 5 Colo. App. 147, 38 Pac. 59. **Conn.** *Woodruff v. Fellowes*, 35 Conn. 105. **Fla.**—*Palatka & I. R. R. Co. v. State*, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395. **Ga.**—*Pinnebad v. Pinnebad*, 129 Ga. 267, 58 S. E. 879; *Lee v. Atlanta St. R. Co.*, 91 Ga. 215, 18 S. E. 136. **Ill.**—*Hamilton v. Stafford*, 78 Ill. App. 54. **Ind.**—*American White Bronze Co. v. Clark*, 123 Ind. 230, 23 N. E. 855; *Goben v. Goldsberry*, 72 Ind. 44. **Ia.** *Searles v. Lux*, 86 Iowa 61, 52 N. W. 327; *Taylor v. Chicago, M. & St. P. R. Co.*, 80 Iowa 431, 46 N. W. 64. **Kan.** *Clark v. Dekker*, 43 Kan. 692, 23 Pac. 956. **Me.**—*Smith v. Wadleigh*, 17 Me. 353. **Mass.**—*Nye v. Old Colony R. Co.*, 124 Mass. 241. **Mich.**—*Burgard v. Burgard*, 175 Mich. 565, 141 N. W. 549; *Sudworth v. Morton*, 137 Mich. 575, 100 N. W. 769; *Suydam v. Dequindre Walk*, 23. **Miss.**—*Gulf & S. I. R. Co. v. Meyers*, 114 Miss. 458, 75 So. 244; *Bramlett v. Adams*, 96 Miss. 61, 50 So. 489. **Mont.**—*Bush v. Baker*, 46 Mont. 535, 129 Pac. 550. **Neb.**—*German-American Ins. Co. v. Buckstaff*, 38 Neb. 135, 56 N. W. 692; *Haylen v. Missouri Pac. R. Co.*, 28 Neb. 660, 44 N. W. 873. **Nev.**—*Stretch v. Montezuma Min. Co.*, 29 Nev. 163, 86 Pac. 445; *Haley v. Eureka County Bank*, 20 Nev. 410, 22 Pac. 1098. **N. H.**—*Olcott v. Banfill*, 7 N. H. 469; *Fernald v. Ladd*, 4 N. H. 370. **N. Y.**—*Laska v. Harris*, 92 Misc. 150, 155 N. Y. Supp. 104; *Calender v. Dressler-Beard Mfg. Co.*, 152 N. Y. Supp. 645; *Pringle v. Dean*, 128 N. Y. Supp. 1051; *Notman v. J. M. Guffey Petroleum Co.*, 128 N. Y. Supp. 20. **N. C.**—*Lindsey v. Supreme Lodge of Knights of Honor*, 172 N. C. 818, 90 S. E. 1013; *Board of Education v. Orr*, 161 N. C. 218, 76 S. E. 693; *State*

*ex rel. Pipkin v. McArtan*, 122 N. C. 194, 29 S. E. 334; *Smith v. Smith*, 119 N. C. 311, 25 S. E. 877; *Roberts v. Partridge*, 118 N. C. 355, 24 S. E. 15. **Pa.**—*Powell v. Tobias*, 2 Phila. 274. **S. C.**—*Dunklin v. Whitlaw*, 1 McCord 492. **Tex.**—*Ingram v. McClure* (Tex. Civ. App.), 151 S. W. 339; *American Warehouse Co. v. Hamblen* (Tex. Civ. App.), 146 S. W. 1006; *Manowitz v. Gaenslen* (Tex. Civ. App.), 142 S. W. 963. **Wash.**—*Eisenberg v. Nichols*, 57 Wash. 560, 107 Pac. 371; *Livesley v. Pier*, 9 Wash. 658, 38 Pac. 156.

[a] **Oral stipulation between clients to discontinue, not enforceable.** *Calender v. Dressler-Beard Mfg. Co.*, 152 N. Y. Supp. 645.

[b] **Oral stipulation waiving briefs not enforceable.** *State Fair of Texas v. Cowart* (Tex. Civ. App.), 165 S. W. 1197.

[c] **Oral stipulation waiving prior stipulation as to time for serving a counter case on appeal.** *Board of Education v. Orr*, 161 N. C. 218, 76 S. E. 693.

[d] **Extending Time To Bring Suit to Trial.**—*Central Pac. R. Co. v. Riley*, 31 Cal. App. 394, 160 Pac. 844.

59. **U. S.**—*Lewis v. Wilson*, 151 U. S. 551, 14 Sup. Ct. 419, 38 L. ed. 267. **Cal.**—*Wall v. Mines*, 130 Cal. 27, 62 Pac. 386; *Hearne v. De Young*, 111 Cal. 373, 43 Pac. 1108. **Conn.**—*Woodruff v. Fellowes*, 35 Conn. 105. **Ga.** *Caldwell v. McWilliams*, 65 Ga. 99. **Ill.** *Culver v. Cogle*, 165 Ill. 417, 46 N. E. 242; *Henchey v. Chicago*, 41 Ill. 136; *Toupin v. Gargnier*, 12 Ill. 79; *Chapman v. Shattuck*, 8 Ill. 49. **Ind.**—*Welch v. Bennett*, 39 Ind. 136. **Ia.**—*Kraner v. Chambers*, 92 Iowa 681, 61 N. W. 373. **Me.**—*Smith v. Wadleigh*, 17 Mé. 353. **Mass.**—*Savage v. Blanchard*, 148 Mass. 348, 19 N. E. 396. **N. H.**—*Alton v. Gilmanton*, 2 N. H. 520. **N. Y.** *William Randall & Sons v. Garfield W. Mills*, 178 App. Div. 196, 165 N. Y. Supp. 125; *Fish v. Delaware, L. & W. R. Co.*, 158 App. Div. 92, 143 N. Y. Supp. 365; *Chamberlain v. Fitch*, 2 Cow. 243. **S. C.**—*McNeil v. Birtwhistle*, 2 Brev. 274. **Tex.**—*Gulf, C. & S. F. R. Co. v. King*, 80 Tex. 681, 16

**C. DEFINITENESS AND CERTAINTY.**—A stipulation, to be enforceable by the court should be definite and certain in character,<sup>60</sup> and not be merely the expression of a legal opinion or conclusion.<sup>61</sup>

**D. ENTRY OR FILING.**—Statutes or court rules usually require stipulations to be entered upon the minutes of the court or filed with the clerk.<sup>62</sup> The object of such requirements is to preserve such a record of the stipulation as will preclude any question concerning its character or effect and to enable the court to ascertain its extent from the record.<sup>63</sup> They do not aim to enlarge or abridge the authority of the attorney in making stipulations but only prescribe the manner of its exercise.<sup>64</sup>

**Time To File.**—The statute may prescribe within what time the attorney must file a stipulation,<sup>65</sup> otherwise mere delay<sup>66</sup> in doing so

S. W. 641. **Wis.**—*State v. Eschweiler*, 158 Wis. 25, 147 N. W. 1008.

[a] **A colloquy between counsel** may (1) amount to a stipulation. *Ward v. Goetz*, 33 Cal. App. 595, 165 Pac. 1022. (2) Thus where counsel responded "all right" to a statement of his adversary as to what the question involved was, it, in effect amounted to a stipulation as to the issue involved. *Ward v. Goetz*, 33 Cal. App. 595, 165 Pac. 1022.

[b] **An agreement of the parties** waiving appeal held not to be within the statute requiring agreements of attorneys relative to the action to be in writing. *Palmer v. Lavers*, 218 Mass. 286, 105 N. E. 1000.

[c] **In furtherance of justice**, the court may enforce an oral stipulation of attorneys. *State v. Eschweiler*, 158 Wis. 25, 147 N. W. 1008.

[d] **Oral Stipulation To Dismiss.** *Olson v. Williams*, 185 Mich. 294, 151 N. W. 1043.

60. *Bailey v. Montgomery*, 177 App. Div. 777, 165 N. Y. Supp. 159.

61. *Jensen v. Northwestern Underwriter's Assn.*, 35 N. D. 223, 159 N. W. 611.

62. **Cal.**—*Wall v. Mines*, 130 Cal. 27, 62 Pac. 386; *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529; *Merritt v. Wilcox*, 52 Cal. 238; *Borkheim v. North British & M. Ins. Co.*, 38 Cal. 623; *Clemens v. Gregg*, 34 Cal. App. 245, 167 Pac. 294. **Ill.**—*Gershenow v. West Chicago St. R. Co.*, 103 Ill. App. 591. **Ky.**—*Conrad's Exr. v. Conrad*, 156 Ky. 231, 160 S. W. 937; *Moore's Trustees v. Howe's Heirs*, 4 Mon. 199. **Nev.** *Seawell v. Cohn*, 2 Nev. 308. **N. H.** *Olcott v. Banfill*, 7 N. H. 469. **Tex.**

*Ingram v. McClure* (Tex. Civ. App.), 151 S. W. 339. **Wis.**—*Hathaway v. Milwaukee*, 132 Wis. 249, 111 N. W. 570, 112 N. W. 455, 122 Am. St. Rep. 975, 9 L. R. A. (N. S.) 778.

[a] **Nature of Statute.**—"It would be no misnomer to call the statute a statute of frauds. It declares such agreements null and void, unless they are in writing and filed with the clerk, or have been entered in the minutes of the court." *Borkheim v. North British & M. Ins. Co.*, 38 Cal. 623.

[b] **Stipulations must be filed in the appellate court** when they relate to the conduct of proceedings therein. *Steele v. State*, 33 Fla. 348, 354, 14 So. 841.

63. *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529.

[a] **As Part of Record.**—When filed the stipulation becomes a part of the record. *Watson v. Hemphill*, 99 Ga. 121, 25 S. E. 262.

64. *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529; *Preston v. Hill*, 50 Cal. 43, 19 Am. Rep. 647.

65. *Conrad's Exr. v. Conrad*, 156 Ky. 231, 160 S. W. 937.

[a] **The court may by nunc pro tunc order** (1) enter the stipulation as of record. *Conrad's Exr. v. Conrad*, 156 Ky. 231, 160 S. W. 937. (2) That a nunc pro tunc entry will not suffice where an oral stipulation is disputed see *Ia.*—*Hiller v. Landis*, 44 Iowa 223. **Ind.**—*Kelley v. Adams*, 120 Ind. 340, 22 N. E. 317. **N. C.**—*Pipkin v. McArtan*, 122 N. C. 194, 29 S. E. 334.

66. **Cal.**—*Dougherty v. Freirmuth*, 68 Cal. 240, 9 Pac. 98; *Clemens v. Gregg*, 34 Cal. App. 245, 167 Pac. 294. **Ky.**—*Chambers v. Simpson's Admx.*, 1

does not invalidate the stipulation, particularly where no one is injured by the delay.<sup>67</sup>

**Failure To Enter or File.**<sup>68</sup> — Failure to enter or file the stipulation does not necessarily invalidate it, for the court will enforce it where it has been so far acted upon by the parties that it would be inequitable not to do so.<sup>69</sup>

**IV. SUBJECT MATTER OF STIPULATION.** — **A. GENERAL LIMITATIONS.** — Stipulations cover a wide field. Courts favor them and will enforce them whenever it would be safe and equitable to do so.<sup>70</sup> As heretofore seen, the attorney must confine his agreements within the scope of his authority as such,<sup>71</sup> and neither he nor his client can require the court to recognize agreements which contravene public policy.<sup>72</sup> They cannot stipulate as to what the public<sup>73</sup>

Mon. 112. **N. Y.**—Schell *v.* Devlin, 82 N. Y. 333.

[a] **Filed three years after they** were entered into. Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529.

67. Clemens *v.* Gregg, 34 Cal. App. 245, 167 Pac. 294.

68. Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529.

69. **Cal.**—Reclamation Dist. No. 535 *v.* Hamilton, 112 Cal. 603, 44 Pac. 1074; Smith *v.* Whittier, 95 Cal. 279, 30 Pac. 529; Hawes *v.* Clark, 84 Cal. 272, 24 Pac. 116. **Ill.**—Chicago & N. W. Ry. Co. *v.* Hintz, 132 Ill. 265, 23 N. E. 1032. **N. C.**—Parker *v.* Wilmington & W. R. Co., 84 N. C. 118. **Tex.**—Thompson *v.* Ft. Worth & R. G. R. Co., 31 Tex. Civ. App. 583, 73 S. W. 29.

70. See *supra*, I.

71. See *supra*, II, B.

72. **Cal.**—Uhler *v.* Boyd, 41 Cal. 60. **Colo.**—Murphy *v.* People, 3 Colo. 147. **Dak.**—McCormack *v.* Phillips, 4 Dak. 506, 34 N. W. 39. **Ga.**—Augusta & S. R. Co. *v.* Lark, 97 Ga. 800, 25 S. E. 175. **Ill.**—Kohn *v.* Columbia Nat. Bank, 165 Ill. 316, 46 N. E. 208. **Ky.**—Spaulding *v.* Hill, 115 Ky. 1, 72 S. W. 307. **Mich.**—Utter *v.* Travellers Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913; Harris *v.* Sweetland, 48 Mich. 110, 11 N. W. 830. **N. J.**—Wilson *v.* King, 23 N. J. Eq. 150. **N. Y.**—Real Estate Corp. *v.* Harper, 174 N. Y. 123, 66 N. E. 660; Hine *v.* New York Elev. R. Co., 149 N. Y. 154, 43 N. E. 414; *In re* Cushman, 177 App. Div. 127, 163 N. Y. Supp. 712. **Tex.**—Mitchell *v.* Hancock (Tex. Civ. App.), 196 S. W. 694; Morse *v.* State, 39 Tex. Crim. 566, 47 S. W. 645, 50 S. W. 342. **Utah.**—State *v.* Mortensen, 26 Utah 312, 73 Pac.

562. **W. Va.**—James' Sons & Co. *v.* Gott, 55 W. Va. 223, 47 S. E. 649. **Wis.**—*In re* Stickney's Will, 108 Wis. 99, 84 N. W. 23.

[a] **Preventing Impartial Justice.** "All agreements relating to proceedings in the court, civil or criminal, which may involve anything inconsistent with the full and impartial course of justice therein, are void, though not open to the actual charge of corruption." Thompson *v.* Buffington, 7 Ohio N. P. 134.

[b] **Stipulation to mitigate convict's sentence**, made by the prosecuting attorney. Murphy *v.* People, 3 Colo. 147.

73. **U. S.**—Bear River Paper & Bag Co. *v.* Petoskey, 241 Fed. 53, 154 C. C. A. 53. **Ariz.**—Graves *v.* Alsap, 1 Ariz. 274, 25 Pac. 836. **Cal.**—San Francisco Lumber Co. *v.* Bibb, 139 Cal. 325, 73 Pac. 864. **Colo.**—Breeze *v.* Haley, 11 Colo. 351, 18 Pac. 551. **Ia.**—Hutchins *v.* Hanna, 159 N. W. 199; Ford *v.* Dille, 174 Iowa 243, 156 N. W. 513. **Miss.**—Jones *v.* Madison, 72 Miss. 777, 18 So. 87. **Mo.**—Wells *v.* Covenant Mut. Ben. Assn., 126 Mo. 630, 29 S. W. 607. **N. D.**—Prescott *v.* Brooks, 94 N. W. 88. **Tenn.**—Holms *v.* Johnston, 12 Heisk. 155.

But see Matter of Cullinan, 113 App. Div. 485, 99 N. Y. Supp. 374.

[a] **Applicability of Statute.**—A stipulation of counsel as to the applicability of a statute is not binding upon the courts. Rousseau *v.* Brotherhood of American Yeomen, 177 Mich. 568, 143 N. W. 626.

[b] **Stipulation that taxes became liens** on personal property of the owner. Bear River Paper & Bag Co. *v.* Petoskey, 241 Fed. 53, 154 C. C. A. 53.

[c] **Application of Law to Facts.**



domestic law is, or as to its validity or constitutionality,<sup>74</sup> or confer a jurisdiction which cannot be sustained under the law,<sup>75</sup> and the court may, in any case, refuse to sanction stipulations which surrender the safeguards of statutes and rules of court not designed merely for the protection of litigants.<sup>76</sup>

**B. STIPULATIONS AS TO PARTICULAR MATTERS.—1. In General.** The law as to stipulations has been incidentally touched upon and applied in numerous other titles in this work to which reference should be made.<sup>77</sup> The following matters, among others, have been made the subject of stipulation: agreed statement of facts,<sup>78</sup> abatement of the action,<sup>79</sup> the form of the remedy,<sup>80</sup> amendments,<sup>81</sup> abiding<sup>82</sup> the result

A stipulation that, "if the law of Michigan controls, the contract is invalid; if the law of New York, it is valid," upheld. *Fish v. Delaware, L. & W. R. Co.*, 158 App. Div. 92, 143 N. Y. Supp. 365.

74. *Fla.*—*Wade v. Atlantic Lumber Co.*, 51 Fla. 638, 41 So. 72. *Mich.* Attorney General *v. Rice*, 64 Mich. 385, 31 N. W. 203. *N. C.*—*Gatlin v. Tarboro*, 78 N. C. 119. *Wyo.*—*State ex rel. Sullivan v. Schnitger*, 16 Wyo. 479, 95 Pac. 698.

75. See *infra*, IV, B, 1, and 17 STANDARD PROC. 691.

76. *Mitchell v. Hancock* (Tex. Civ. App.), 196 S. W. 694. Compare *infra*, IV, B, 7.

[a] Provisions requiring objections and exceptions to court's charge before it is read to the jury are intended (1) to guard against the commission of errors in the trial and to avoid unnecessary appeals and agreements to waive them need not be enforced. *Needham v. Cooney* (Tex. Civ. App.), 173 S. W. 979. (2) Unless objections to evidence are made, exceptions to its admission cannot be saved by stipulation. *Halley v. State*, 108 Ark. 224, 158 S. W. 121.

[b] A stipulation permitting a supplemental answer to be filed after the trial, and considered as filed prior to the trial, does not bind the court, where the issues would thereby be materially changed, and the appellate court be compelled to decide questions not determined by the trial court. *Great Northern Ry. Co. v. United States*, 218 Fed. 302, 134 C. C. A. 98.

[c] Facts as to Referendum.—The parties cannot stipulate as to facts accompanying the submission of a measure to a referendum vote and call upon the court to decide as to the validity

of the law. *Allen v. State*, 14 Ariz. 458, 130 Pac. 1114, 44 L. R. A. (N. S.) 468.

[d] Judicial functions cannot be delegated to the clerk or other officer by stipulation. *Dubuc v. Lazell, Dalley & Co.*, 182 N. Y. 482, 75 N. E. 401. Compare 16 STANDARD PROC. 694, 698, 704, 641.

[e] Treating One Proceeding as Another.—(1) Agreements of counsel to treat one step in the proceeding as another, is a practice not to be commended. *Hosley v. Schillinglaw*, 176 Iowa 106, 154 N. W. 910. (2) As for example, treating a motion as a demurrer. *Hosley v. Schillinglaw*, 176 Iowa 106, 154 N. W. 910.

[f] Account.—A complicated account which should properly be referred to a master may not be stated by the court even upon stipulation of the parties. *Barnes v. Barnes*, 202 Ill. App. 289 (*affirming*, 282 Ill. 593, 118 N. E. 1004); *French v. Gibbs*, 105 Ill. 523; *Riner v. Touslee*, 62 Ill. 266.

77. See particular titles and the index to this work.

78. See *infra*, IV, B, 4, a.

79. See the title "Survival."

Plea in Abatement.—Consent to waive right to interpose plea in abatement, see 1 STANDARD PROC. 63.

80. Changing from rem to personam by stipulation, see 1 STANDARD PROC. 420.

81. See *infra*, IV, B, 3.

Amendments of indictment or information, see 12 STANDARD PROC. 543, 547, 560.

Amending record on appeal, see 2 STANDARD PROC. 383; 4 STANDARD PROC. 368.

Amendment of judgment, see *infra*, IV, B, 6, c.

82. See *infra*, IV, B, 2.

of another suit, continuances,<sup>83</sup> adjournments,<sup>84</sup> dismissals and discontinuances,<sup>85</sup> nolle prosequi,<sup>86</sup> jurisdiction,<sup>87</sup> venue,<sup>88</sup> removal of causes,<sup>89</sup> pleadings,<sup>90</sup> process,<sup>91</sup> parties,<sup>92</sup> as well as issues,<sup>93</sup> de-

83. **U. S.**—*Alsop v. McCombs*, 235 Fed. 507, 149 C. C. A. 53. **Mich.**—*Detroit v. Detroit United Ry.*, 172 Mich. 496, 138 N. W. 215. **Tex.**—*Mitchell v. Hancock* (Tex. Civ. App.), 196 S. W. 694.

See generally the title "**Continuances.**"

[a] **Dismissal not warranted by stipulation** that case be continued to await the disposition of another suit. *Alsop v. McCombs*, 235 Fed. 507, 149 C. C. A. 53.

84. *Hunt v. Hunt*, 154 App. Div. 833, 139 N. Y. Supp. 413; *Ettlinger v. Kruger*, 147 N. Y. Supp. 37.

[a] **Hearing of motion postponed without prejudice.** *Hunt v. Hunt*, 154 App. Div. 833, 139 N. Y. Supp. 413.

85. **Cal.**—*Central Pac. R. Co. v. Riley*, 31 Cal. App. 394, 160 Pac. 844. **Mich.**—*Olson v. Williams*, 185 Mich. 294, 151 N. W. 1043. **N. Y.**—*Burkard v. Stephan Bldg. & Const. Co.*, 160 App. Div. 50, 144 N. Y. Supp. 775. **Okla.**—*Harjo v. Black*, 49 Okla. 566, 153 Pac. 1137.

See the title "**Dismissal, Discontinuance and Non-suit.**"

[a] **Oral stipulation dismissing suit set aside in equity.** *C. J. Huebel Co. v. Mackinnon*, 186 Mich. 617, 152 N. W. 1098.

[b] **Oral stipulation made in open court binding.** *Olson v. Williams*, 185 Mich. 294, 151 N. W. 1043.

[c] **The period for bringing actions to trial is not extended by a stipulation dropping the case from the calendar.** *Central Pac. R. Co. v. Riley*, 31 Cal. App. 394, 160 Pac. 844.

[d] **Oral stipulation for discontinuance, unenforceable.** *Callender v. Dressler-Beard Mfg. Co.*, 152 N. Y. Supp. 645.

86. *Tanquary v. People*, 25 Colo. App. 531, 139 Pac. 1118. See the title "**Nolle Prosequi.**"

[a] **Oral stipulation not to prosecute, enforced.** *Tanquary v. People*, 25 Colo. App. 531, 139 Pac. 1118.

87. See 17 STANDARD PROC. 691.

**Consent to acts at chambers or in vacation**, see 16 STANDARD PROC. 611, 614, 629; 6 STANDARD PROC. 47.

**As to powers of judge out of court**, see 16 STANDARD PROC. 617.

[a] **Special Judge.**—The attorneys may stipulate to a hearing or trial before a special judge. *Morgan v. Lewis*, 172 Ky. 813, 189 S. W. 1118; *Washoe Copper Co. v. Hickey*, 46 Mont. 363, 128 Pac. 584.

[b] **Changing Hearing to Another Court.**—Stipulation that a motion to vacate made in the county court be heard in the district court. *Lobe v. Bartaschawich*, 37 N. D. 572, 164 N. W. 276.

[c] **Defense of adequate legal remedy waived by stipulation.** *Central Trust Co. v. Owsley*, 188 Ill. App. 505.

88. See the title "**Venue.**"

**Consent to change of venue**, see 5 STANDARD PROC. 33.

[a] **Venue fixed by consent in a particular county.** **Ill.**—*Pierson v. Finney*, 37 Ill. 29; *People ex rel. Coberly v. Seates*, 4 Ill. 351. **Ind.**—*Center v. Marion*, 110 Ind. 579, 10 N. E. 291; *Garrigan v. Dickey*, 1 Ind. App. 421, 27 N. E. 713. **Ia.**—*Milner v. Chicago, etc. R. Co.*, 77 Iowa 755, 42 N. W. 567; *Davidson v. Wheeler*, *Morris* 238. **Ky.** *Salter v. Salter's Creditors*, 6 Bush. 624. **Mich.**—*Simpson v. Circuit Judge*, 81 Mich. 116, 45 N. W. 595. **Miss.** *Wessinger v. Mausur & Tibbetts Imp. Co.*, 75 Miss. 64, 21 So. 757; *Choat v. Billingsly*, *Walk*. 420. **Nev.**—*Lyon v. Washoe*, 6 Nev. 241. **Tex.**—*Burnley v. Cook*, 13 Tex. 586, 65 Am. Dec. 79; *Ft. Worth Board of Trade v. Cooke*, 6 Tex. Civ. App. 324, 25 S. W. 330; *Lewy & Co. v. Karger*, 3 Wils. Civ. Cas. §109. **Wash.**—*Kane v. Kane*, 35 Wash. 517, 77 Pac. 842. **Can.**—*Dulmage v. White*, 22 Can. L. T. 260, 4 Ont. L. Rep. 121.

89. See 22 STANDARD PROC. 850.

90. See *infra*, IV, B, 3.

91. See *infra*, IV, B, 3.

92. See *infra*, IV, B, 3.

93. See *infra*, this note.

[a] **Limiting the Issues.**—**U. S.** *Connell Bros. Co. v. H. Diederichsen & Co.*, 213 Fed. 737, 130 C. C. A. 251. **Cal.**—*Ward v. Goetz*, 33 Cal. App. 595, 165 Pac. 1022; *Conwell v. Varain*, 20 Cal. App. 521, 130 Pac. 23. **Ga.**—*Wor-*

fenses,<sup>94</sup> evidence,<sup>95</sup> proceedings on the trial or hearing,<sup>96</sup> the judgment or decree,<sup>97</sup> the review,<sup>98</sup> and numerous other matters that arise in the conduct of a legal proceeding.<sup>99</sup>

**2. Abiding Result of Another Suit.**—The parties or their attorneys may stipulate to abide the result of a pending suit involving the same issues and agree that the adjudication rendered therein shall control the determination of their own suit.<sup>1</sup> They may also agree

sham *v.* Ligon, 147 Ga. 39, 92 S. E. 756; Evans *v.* Thompson, 143 Ga. 61, 84 S. E. 128. **Ill.**—Wagner *v.* Chicago & A. R. Co., 265 Ill. 245, 106 N. E. 809, Ann. Cas. 1916A, 778. **Me.**—Thompson *v.* Bowes, 115 Me. 6, 97 Atl. 1. **N. Y.** Bailey *v.* Montgomery, 177 App. Div. 777, 165 N. Y. Supp. 159. **Okl.** Georgia Home Ins. Co. *v.* Halsey, 37 Okla. 678, 133 Pac. 202. **Tex.**—Houston Oil Co. *v.* Wing (Tex. Civ. App.), 194 S. W. 221. **Vt.**—Brown *v.* Aitken, 90 Vt. 569, 99 Atl. 265.

[b] **As to Scope of General Issue or General Denial.**—Schuyler County *v.* Missouri Bridge & Iron Co., 256 Ill. 348, 100 N. E. 239; Truman's Pioneer Stud Farm *v.* Baker, 176 Ill. App. 524.

[c] **Stipulation that all evidence may be introduced by defendant under the general issue which would be admissible under any proper pleadings and that plaintiff shall be entitled to introduce all evidence which would be admissible under any proper set of replications and rejoinders.** Truman's Pioneer Stud Farm *v.* Baker, 176 Ill. App. 524.

[d] **Questions of law not excluded by stipulation confining the issue to a single question.** Bailey *v.* Montgomery, 177 App. Div. 777, 165 N. Y. Supp. 159.

**Enlarging issues by failure to object,** see 20 STANDARD PROC. 706; 8 STANDARD PROC. 996.

94. Brown *v.* Spiegel, 155 Mich. 138, 120 N. W. 579. See also *infra*, IV, B, 3.

[a] **Permitting damages arising from levy of attachment to be set off in the same suit in which they arose against plaintiff's claim.** Brown *v.* Spiegel, 155 Mich. 138, 120 N. W. 579.

[b] **So as to dispose of their differences in one suit, it is proper to stipulate for the setting up of a defense which would not be otherwise permissible.** Brown *v.* Spiegel, 155 Mich. 138, 120 N. W. 579; Floyd *v.* Mann, 146 Mich. 356, 109 N. W. 679,

95. See *infra*, IV, B, 4.

96. See *infra*, IV, B, 5.

97. See *infra*, IV, B, 6.

98. See *infra*, IV, B, 7.

99. See *infra*, this note.

[a] **Theory of Case.**—(1) The attorneys may stipulate to submit the case on a certain theory. Olson *v.* Moulster, 137 Minn. 96, 162 N. W. 1068. (2) As for example, where they submit it as an action of conversion. Olson *v.* Moulster, 137 Minn. 96, 162 N. W. 1068.

[b] **Receivers.**—Stipulations as to the duties of a receiver. People *v.* Winkler, 174 Cal. 133, 162 Pac. 109.

1. **U. S.**—Knott *v.* St. Louis S. I. M. & S. R. Co., 230 U. S. 509, 33 Sup. Ct. 984, 57 L. ed. 1595; Prout *v.* Starr, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. ed. 584; Little *v.* Giles, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. ed. 269; Brown *v.* Arnold, 131 Fed. 723, 67 C. C. A. 125. **Ala.**—*Ex parte* Lawrence, 34 Ala. 446. **Cal.**—Gilmore *v.* American Cent. Ins. Co., 67 Cal. 366, 7 Pac. 781. **Ga.** Commercial Union Assur. Co. *v.* Chattahoochee Lumb. Co., 130 Ga. 191, 60 S. E. 554; Jarrett *v.* McLaughlin, 123 Ga. 256, 51 S. E. 329; People's Bank *v.* Merchants' etc. Bank, 116 Ga. 279, 42 S. E. 490. **Ill.**—Alton *v.* Foster, 207 Ill. 150, 69 N. E. 783; Dilworth *v.* Curtis, 139 Ill. 508, 29 N. E. 361; McKinley *v.* Wilmington Star Min. Co., 7 Ill. App. 386. **Ind.**—Kimberlin *v.* Tow, 133 Ind. 696, 33 N. E. 770. **Ia.** Rogers *v.* Alexander, 2 G. Gr. 443. **Kan.**—Crockett *v.* Gray, 31 Kan. 346, 2 Pac. 809; Edwards *v.* Cary, 20 Kan. 414. **Me.**—Cummings *v.* Smith, 50 Me. 568, 79 Am. Dec. 629. **Mass.**—Campbell *v.* Talbot, 132 Mass. 174; Hodges *v.* Pingree, 108 Mass. 585; Higginson *v.* Gray, 8 Mass. 385. **Mich.**—Auditor General *v.* Smith, 95 Mich. 132, 54 N. W. 641. **Minn.**—Abbott *v.* Anheuser-Busch Brew. Assn., 60 Minn. 266, 62 N. W. 286; Eidam *v.* Finnegan, 48 Minn. 53, 50 N. W. 933, 16 L. R. A. 507. **Miss.**—Moore *v.* Martin, 18 So.



that the determination on appeal in one case shall be controlling in another.<sup>2</sup>

**3. Pleadings, Process and Parties.**—The court will recognize and enforce proper stipulations made with reference to the pleadings,<sup>3</sup> the notice or process,<sup>4</sup> or the parties.<sup>5</sup>

119. **Mo.**—North Missouri R. Co. v. Stephens, 36 Mo. 150, 88 Am. Dec. 138; Dowling v. Wheeler, 117 Mo. App. 169, 93 S. W. 924; St. Joseph v. Hax, 55 Mo. App. 293. **Neb.**—Abbott v. Lane, 4 Neb. (Unof.) 629, 95 N. W. 599. **N. Y.**—Mutual Life Ins. Co. v. O'Donnell, 146 N. Y. 275, 40 N. E. 787, 48 Am. St. Rep. 796; Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 21 Am. St. Rep. 716, 10 L. R. A. 684; Laska v. Harris, 92 Misc. 150, 155 N. Y. Supp. 104. **N. D.**—Mooney v. Williams, 9 N. D. 329, 83 N. W. 237. **Ore.**—Small v. Lutz, 34 Ore. 131, 55 Pac. 529, 58 Pac. 79. **Pa.**—Haubert v. Haworth, 78 Pa. 78; Weisberger v. Safety Mutual Fire Ins. Co., 61 Pa. Super. 608. **S. C.**—Brown v. Peckman, 55 S. C. 555, 33 S. E. 732. **Tex.**—Watrous' Heirs v. McKie, 54 Tex. 65; Commonwealth Bonding & Cas. Ins. Co. v. Beavers (Tex. Civ. App.), 186 S. W. 859. **Wis.**—Wakeley v. Delaplaine, 15 Wis. 554.

[a] **Form of such stipulation**, see Commonwealth Bonding & Cas. Ins. Co. v. Beavers (Tex. Civ. App.), 186 S. W. 859.

[b] **Such stipulation is within the scope of the general power of attorneys who are conducting several cases of a single class which involves the same issue.** Brown v. Arnold, 131 Fed. 723, 67 C. C. A. 125.

[c] **Jury trial waived by such a stipulation.** Cummings v. Smith, 50 Me. 568, 79 Am. Dec. 629.

[d] **The other case must be a pending one and not one which is merely contemplated.** Stone v. Bank of Commerce, 174 U. S. 412, 19 Sup. Ct. 747, 43 L. ed. 1028.

[e] **Made After Judgment.**—Brown v. Arnold, 131 Fed. 723, 67 C. C. A. 125.

2. Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 21 Am. St. Rep. 716, 10 L. R. A. 684.

3. Hansford v. Stone-Ordean-Wellis Co., 201 Fed. 185; Morgan v. Lewis, 172 Ky. 813, 189 S. W. 1118.

Extending time to plead, see the

title "**Time To Plead.**" Extending time to file affidavit of merits, see 1 STANDARD PROC. 704.

[a] **Agreement To Waive Pleadings.** Lawrence McFadden Co. v. Philadelphia, 59 Pa. Super. 44.

[b] **Verification of pleadings waived.** West v. Berry, 98 Ga. 402, 25 S. E. 508; Needham v. Cooney (Tex. Civ. App.), 173 S. W. 979.

[c] **That a reply to an original answer should stand as a reply to an amended answer.** Acme Coal Co. v. Northrup Nat. Bank, 23 Wyo. 66, 146 Pac. 593.

[d] **Stipulation to waive objections to the sufficiency of the pleadings.** Ill. Miller v. McManis, 57 Ill. 126. Ia. Goodenow v. Foster, 108 Iowa 508, 79 N. W. 288. Mass.—Ramsay v. Lebow, 220 Mass. 227, 107 N. E. 926. Miss. Worsham v. McLeod, 11 So. 107. N. Y. Reich v. Cochran, 74 Hun 551, 26 N. Y. Supp. 443, 57 N. Y. St. 159. Ore. Radford v. First Nat. Bank, 71 Ore. 84, 142 Pac. 362. See also 21 STANDARD PROC. 410.

[e] **Stipulation to withdraw special pleas.** Schuyler County v. Missouri Bridge & Iron Co., 256 Ill. 348, 100 N. E. 239.

[f] **Permitting an Amendment of Pleading.**—Brown v. Spiegel, 155 Mich. 138, 120 N. W. 579.

[g] **Amendment to permit a defense to be set up.** Brown v. Spiegel, 155 Mich. 138, 120 N. W. 579.

4. Greenlee v. McDowell, 39 N. C. 481. See the title "**Service of Process and Papers.**"

[a] **Dissolution of attachment permitted.** Brown v. Spiegel, 155 Mich. 138, 120 N. W. 579.

**Conferring jurisdiction by consent,** see 15 STANDARD PROC. 700.

5. N. Y.—Fletcher v. Massachusetts Ben. L. Assn., 78 Hun 311, 29 N. Y. Supp. 173, 60 N. Y. St. 118. Ohio. Hughes v. Watson, 10 Ohio 127. Tex. Delk v. Punchard, 64 Tex. 360.

[a] **Stipulation that a certain person was a party to a suit.** Gibson v.

**4. Stipulations as to Evidence.** — a. *In General.* — In matters relating to evidence, the power to stipulate is very frequently invoked and covers a wide range. The time to take testimony may be extended by stipulation;<sup>6</sup> the truth or existence of certain facts may be admitted;<sup>7</sup> an agreed statement of facts entered into;<sup>8</sup> the number of

Foster, 24 Colo. App. 252, 133 Pac. 144.

**6.** Fortney v. Carter, 203 Fed. 454, 121 C. C. A. 514.

[a] Where equity rules fix a period within which to take testimony, the parties may by stipulation extend the time. Fortney v. Carter, 203 Fed. 454, 121 C. C. A. 514.

**7.** Cal.—Palm v. Planada Dev. Corp., 175 Cal. 771, 167 Pac. 381; Gordon v. Cadwalader, 172 Cal. 254, 156 Pac. 471. Ill.—Aurora Brewing Co. v. Industrial Board, 277 Ill. 142, 115 N. E. 207; Curtis v. Donnelly, 273 Ill. 79, 112 N. E. 293; Mid-City Trust & Savings Bank v. National Surety Co., 202 Ill. App. 6; Backman v. Cleveland, C. C. & St. L. Ry. Co., 174 Ill. App. 269. Ia.—Dwight v. City of Des Moines, 174 Iowa 178, 156 N. W. 336. Mass.—Day v. Old Colony Trust Co., 228 Mass. 225, 117 N. E. 252. Mich.—Weinberg v. Stratton, 172 Mich. 55, 137 N. W. 676. Mo.—Brandenburger v. Puller, 266 Mo. 534, 181 S. W. 1141; State ex rel. Sav. Tr. Co. v. Hallen (Mo. App.), 196 S. W. 1067. Mont.—Spaulding v. Stone, 46 Mont. 483, 129 Pac. 327. N. H. Colby v. American Express Co., 77 N. H. 548, 94 Atl. 198. N. J.—Decker v. George W. Smith & Co., 88 N. J. L. 630, 96 Atl. 915. N. Y.—Bump v. Hanigan, 152 N. Y. Supp. 966. Ore.—Bridal Veil Lumb. Co. v. Pacific Coast Cas. Co., 75 Ore. 57, 145 Pac. 671; Hutcheon v. West Coast Life Ins. Co., 67 Ore. 12, 135 Pac. 179. Tex.—Angelina County Lumber Co. v. Hines (Tex. Civ. App.), 184 S. W. 596.

[a] The fact of ownership, stipulated to. Sowell v. London Assur. Corp., 32 Cal. App. 443, 163 Pac. 242.

[b] That territory was no license territory, stipulated. People v. Nolan, 34 Cal. App. 545, 167 Pac. 642.

[c] Stipulation that evidence offered on one claim against an estate should be considered in all other claims. *In re Cushman*, 177 App. Div. 127, 163 N. Y. Supp. 712.

[d] That Notice of Mechanic's Lien

Was Given.—Gilbert v. Croshaw, 178 Ill. App. 10.

[e] Validity of bond stipulated. Higdon v. Fields, 6 Ala. App. 281, 60 So. 594.

[f] That facts set forth in the answer are true, stipulated by plaintiff. Day v. Old Colony Trust Co., 228 Mass. 225, 117 N. E. 252.

[g] Proof of execution of instrument waived. Ballard v. Bank of Roanoke, 187 Ala. 335, 65 So. 356.

[h] Copy of insurance policy stipulated to be true copy. Pacific C. C. Co. v. Industrial Acc. Com., 176 Cal. 24, 167 Pac. 539.

**8.** U. S.—Clason v. Matko, 223 U. S. 646, 32 Sup. Ct. 392, 56 L. ed. 588; Hackfeld & Co. v. United States, 197 U. S. 442, 25 Sup. Ct. 456, 49 L. ed. 826; Helena Waterworks Co. v. Helena, 195 U. S. 383, 25 Sup. Ct. 40, 49 L. ed. 245; Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831, 34 L. ed. 210; Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. ed. 835; Burnham v. North Chicago St. Ry. Co., 88 Fed. 627, 32 C. C. A. 64. Ala.—Wilcox v. San Jose Fruit Packing Co., 113 Ala. 519, 21 So. 376, 59 Am. St. Rep. 135; Prestwood v. Watson, 111 Ala. 604, 20 So. 600. Ark.—Adams v. Eichenberger, 18 S. W. 853. Cal.—Godechaux v. Mulford, 26 Cal. 316, 85 Am. Dec. 178. Colo.—Denver & S. F. R. Co. v. Hannegan, 43 Colo. 122, 95 Pac. 343, 127 Am. St. Rep. 100, 16 L. R. A. (N. S.) 874. Ga.—Luther v. Clay, 100 Ga. 236, 28 S. E. 46, 39 L. R. A. 95. Ill.—Rigdon v. More, 242 Ill. 256, 89 N. E. 992, 134 Am. St. Rep. 328; Laugel v. Bushnell, 197 Ill. 20, 63 N. E. 1086, 58 L. R. A. 266; Catlin v. Traders' Ins. Co., 83 Ill. App. 40. Ind.—Tippecanoe v. Mitchell, 131 Ind. 370, 30 N. E. 409, 15 L. R. A. 520; Citizens' Ins. Co. v. Harris, 108 Ind. 392, 9 N. E. 299; Oppenheim v. Pittsburg, C. & St. L. Ry. Co., 85 Ind. 471. Me.—Machias Hotel Co. v. Fisher, 56 Me. 321; Moore v. Philbrick, 32 Me. 102, 52 Am. Dec. 642. Md.—Birney v. New York etc. Tel. Co., 18 Md. 341, 81 Am. Dec. 607. Mass.—Smith v. Tenny-

witnesses,<sup>9</sup> or the evidence to be taken,<sup>10</sup> limited; objections to the admission or exclusion of evidence waived,<sup>11</sup> as that evidence taken<sup>12</sup> in

son, 219 Mass. 508, 107 N. E. 423, Ann. Cas. 1916B, 121; *Morse v. Fraternal Acc. Assn.*, 190 Mass. 417, 77 N. E. 491, 112 Am. St. Rep. 337; *McKenzie v. Gleason*, 184 Mass. 452, 69 N. E. 1076, 100 Am. St. Rep. 566; *Collins v. Waltham*, 151 Mass. 196, 24 N. E. 327. **Mich.**—*Drovers' Nat. Bank v. Blue*, 110 Mich. 31, 67 N. W. 1105, 64 Am. St. Rep. 327. **N. Y.**—*People v. Hyatt*, 172 N. Y. 176, 64 N. E. 825, 92 Am. St. Rep. 706, 60 L. R. A. 774. **Ohio.**—*Garrett v. Hanshue*, 53 Ohio St. 482, 42 N. E. 256, 35 L. R. A. 321; *Ish v. Crane*, 13 Ohio St. 574. **Okla.**—*Loman v. Paullin*, 51 Okla. 294, 152 Pac. 73; *Longmeyer v. Lawrence*, 50 Okla. 457, 150 Pac. 905. **Tenn.**—*Provident Loan Bank v. Parham*, 137 Tenn. 483, 194 S. W. 570. **Tex.**—*White v. Love* (Tex. Civ. App.), 174 S. W. 913. **Utah.**—*Volker-Scowercroft Lumb. Co. v. Vance*, 36 Utah 348, 103 Pac. 970, Ann. Cas. 1912A, 124, 24 L. R. A. (N. S.) 321. **Va.**—*Hodge's Exr. v. First Nat. Bank*, 22 Gratt. (63 Va.) 51; *Dearing's Admx. v. Rucker*, 18 Gratt. (59 Va.) 426.

**Operation and effect of such stipulation**, see *infra*, VIII, B.

[a] **An agreed statement of facts** is simply the result of an agreement of the parties as to what the evidence in the case will prove. *Witz v. Dale*, 129 Ind. 120, 27 N. E. 498.

[b] **Distinguished from "agreed case,"** see *Witz v. Dale*, 129 Ind. 120, 27 N. E. 498.

[c] **Definiteness and certainty** is required in the statement. *Blankinship v. Oklahoma City etc. Power Co.*, 4 Okla. 242, 43 Pac. 1088; *State v. Connor*, 86 Tex. 133, 23 S. W. 1103.

9. *Ryan v. New York*, 154 N. Y. 328, 48 N. E. 512.

10. *Ryan v. New York*, 154 N. Y. 328, 48 N. E. 512.

11. **Ala.**—*O'Kelley v. Clark*, 184 Ala. 391, 63 So. 948; *Thompson v. Thompson*, 91 Ala. 591, 8 So. 419, 11 L. R. A. 443. **Mich.**—*Weinberg v. Stratton*, 172 Mich. 55, 137 N. W. 676. **Minn.**—*Finch, Van Slyek & McConville v. Le Sueur Co-op. Co.*, 128 Minn. 73, 150 N. W. 226. **Miss.**—*Yazoo & M. V. R. Co. v. Sibley*, 111 Miss. 21, 71 So. 167. **N. C.**—*Parker v. Atlantic C. L.*

*R. Co.*, 133 N. C. 335, 45 S. E. 658, 63 L. R. A. 827. **Tex.**—*Crews v. Powers* (Tex. Civ. App.), 184 S. W. 363.

[a] **That testimony of an absent witness** be used. *State v. Fooks*, 63 Iowa 452, 21 N. W. 773.

[b] **Allowing copies of papers** to be read instead of originals. **Ga.**—*Central R. & Bkg. Co. v. Gamble*, 77 Ga. 584, 3 S. E. 287. **Ill.**—*Mosher v. Scofield*, 55 Ill. App. 271. **Ia.**—*Curl v. Watson*, 25 Iowa 35, 95 Am. Dec. 763. **Mass.**—*Boardman v. Kibbee*, 10 Cush. 545. **Tex.**—*Mackey v. Armstrong*, 84 Tex. 159, 19 S. W. 463; *Hall v. Haywood*, 77 Tex. 4, 13 S. W. 612.

[c] **Judgment in another proceeding** admitted in evidence by stipulation. *First Nat. Bank v. Clark's Estate*, 59 Colo. 455, 149 Pac. 612.

[d] **Stipulation that letters** written by accused be admitted without calling the persons to whom they were written as witnesses. *Holmes v. State*, 82 Neb. 406, 118 N. W. 99.

12. **U. S.**—*Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. ed. 584; *Pacific R. Co. v. Ketchum*, 101 U. S. 289, 25 L. ed. 932. **Ala.**—*Thompson v. Thompson*, 91 Ala. 591, 8 So. 419, 11 L. R. A. 443. **Cal.**—*Nathan v. Dierssen*, 146 Cal. 63, 79 Pac. 739; *People v. Brennan*, 121 Cal. 495, 53 Pac. 1098; *Kalkman v. Baylis*, 23 Cal. 303; *McCann v. McCann*, 20 Cal. App. 564, 129 Pac. 966. **Colo.**—*Magnes v. Sioux City Nursery etc. Co.*, 14 Colo. App. 219, 59 Pac. 879. **Ill.**—*Thomas v. Adams*, 59 Ill. 223. **Ind.**—*Robbins v. Spencer*, 140 Ind. 483, 38 N. E. 522, 40 N. E. 263. **Ind. Ter.**—*Noble v. Worthy*, 1 Ind. Ter. 523, 42 S. W. 431. **Ia.**—*Pitts v. Lewis*, 81 Iowa 51, 46 N. W. 739. **La.**—*Thompson v. Parent*, 15 La. Ann. 57. **Me.**—*Haynes v. Hayward*, 41 Me. 488. **Miss.**—*Saffold v. Horne*, 72 Miss. 470, 18 So. 433. **Mo.**—*Carroll v. Paul's Admr.*, 19 Mo. 102. **N. Y.**—*Ryan v. New York*, 154 N. Y. 328, 48 N. E. 512. **S. D.**—*Distad v. Shanklin*, 15 S. D. 507, 90 N. W. 151. **Tex.**—*Lee v. Wharton*, 11 Tex. 61. **Vt.**—*Weldon Hotel Co. v. Seymour*, 54 Vt. 582. **Va.**—*Unis v. Charlton's Admr.*, 12 Gratt. (53 Va.) 484. **Wis.**—*United States Express Co. v. Jenkins*, 73 Wis. 471, 41 N. W. 957.



another trial, or in a former trial of the same case<sup>13</sup> may be used; or that the competency of witnesses is admitted.<sup>14</sup> Limitations on the power to stipulate as to these matters are imposed in the case of incompetent parties and their representatives.<sup>15</sup>

b. *Depositions.*—Depositions may be taken pursuant to an agreement of the parties or their attorneys and without an order or a commission.<sup>16</sup> It is also proper to stipulate to take depositions before certain named officers,<sup>17</sup> or to take them after the time allowed by

[a] That evidence taken in unlawful detainer case between the parties could be used in an action to quiet title. *McCann v. McCann*, 20 Cal. App. 564, 129 Pac. 966.

13. **U. S.**—*Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. ed. 584. **Colo.**—*Magnes v. Sioux City etc. Co.*, 14 Colo. App. 219, 59 Pac. 879. **Conn.**—*Erwin v. English*, 57 Conn. 562, 19 Atl. 238. **Ia.**—*Furlong v. Carraher*, 108 Iowa 492, 79 N. W. 277; *State v. Olds*, 106 Iowa 110, 76 N. W. 644; *State v. Polson*, 29 Iowa 133. **Miss.**—*Saffold v. Horne*, 72 Miss. 470, 18 So. 433. **N. Y.**—*Ryan v. New York*, 154 N. Y. 328, 48 N. E. 512. **S. D.**—*Davis v. Davis*, 29 S. D. 420, 137 N. W. 283. **Wis.**—*United States Express Co. v. Jenkins*, 73 Wis. 471, 41 N. W. 957; *Hinckley v. Beckwith*, 23 Wis. 328.

[a] A stipulation that any and all testimony taken in a former case, involving the same questions could be used means that all testimony in such case whether taken before or after stipulation, is admissible. **U. S.**—*Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. ed. 584. **Colo.**—*Magnes v. Sioux City N. & S. Co.*, 14 Colo. App. 219, 59 Pac. 879. **Conn.**—*Erwin v. English*, 57 Conn. 562, 19 Atl. 238. **Ind.**—*State Nat. Bank v. Bennett*, 8 Ind. App. 679, 36 N. E. 551. **Ia.**—*Furlong v. Carraher*, 108 Iowa 492, 79 N. W. 277; *State v. Olds*, 106 Iowa 110, 76 N. W. 644; *State v. Polson*, 29 Iowa 133.

[b] As to the effect of such stipulation as carrying or waiving objections or the right to object on the ground of incompetency, see **Ariz.**—*Walker v. Gray*, 6 Ariz. 359, 57 Pac. 614. **Ind.**—*Robbins v. Spencer*, 140 Ind. 483, 38 N. E. 522, 40 N. E. 263. **S. D.**—*Davis v. Davis*, 29 S. D. 420, 137 N. W. 283.

14. *Chankalian v. Powers*, 89 App. Div. 395, 85 N. Y. Supp. 753.

15. See *supra*, II, B, 3, and the cross-references there made. See also 10 STANDARD PROC. 760.

16. **Cal.**—*People v. Grundell*, 75 Cal. 301, 17 Pac. 214; *Palmer v. Uncas Min. Co.*, 70 Cal. 614, 11 Pac. 666. **Ga.**—*Shorter v. Marshall*, 49 Ga. 31. **Ill.**—*Robinson v. Savage*, 124 Ill. 266, 15 N. E. 850. **Ind.**—*Connersville v. Wadleigh*, 7 Blackf. 102, 41 Am. Dec. 214. **La.**—*Philibert v. Wood*, 2 Mart. (O. S.) 204. **Md.**—*Colvin v. Warford*, 18 Md. 273; *Chambers v. Chalmers*, 4 Gill & J. 420, 23 Am. Dec. 572. **Mich.**—*Crone v. Angell*, 14 Mich. 340; *Knight v. Emmons*, 4 Mich. 554. **Mo.**—*Seymour v. Farrell*, 51 Mo. 95; *Delisle v. McGillivray*, 24 Mo. App. 680. **N. Y.**—*Hays v. Phelps*, 1 Sandf. 64.

[a] The right to object to the competency of witnesses upon deposition is not waived by such a stipulation. *Chambers v. Chalmers*, 4 Gill & J. (Md.) 420, 23 Am. Dec. 572.

[b] In Criminal Cases.—**Cal.**—*People v. Grundell*, 75 Cal. 301, 17 Pac. 214. **Ill.**—*Richardson v. People*, 31 Ill. 170. **Ind.**—*Butler v. State*, 97 Ind. 378. **N. Y.**—*People v. Restell*, 3 Hill 289; *Wightman v. People*, 67 Barb. 44. **Tex.**—*Cline v. State*, 36 Tex. Crim. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850.

17. **Ala.**—*Bryant v. Ingraham*, 16 Ala. 116. **Cal.**—*Consolidated Lumber Co. v. Fidelity & Dep. Co.*, 161 Cal. 397, 119 Pac. 506. **Ill.**—*B. Schwinger & Co. v. Redman*, 187 Ill. App. 254. **La.**—*Morrison v. White*, 16 La. Ann. 100. **Mass.**—*Coffin v. Jones*, 13 Pick. 441. **Mich.**—*Knight v. Emmons*, 4 Mich. 554. **Nev.**—*Blackie v. Cooney*, 8 Nev. 41. **Va.**—*McGuire v. Pierce*, 9 Gratt. (50 Va.) 167. **Wash.**—*Nasser v. Gaston*, 70 Wash. 685, 127 Pac. 470.

[a] Before a single justice of the peace in cases where two justices are required by law. *Lockwood v. Brush*, 6 Dana (Ky.) 433; *Watson v. Stueker*, 5 Dana (Ky.) 581; *Johnson v. Rankin*, 3 Bibb. (Ky.) 86; *Gillespie v. Gillespie's Heirs*, 2 Bibb (Ky.) 89.

statute<sup>18</sup> to take them upon shorter notice than that prescribed by statute;<sup>19</sup> or to adjourn the taking.<sup>20</sup> The form and manner of taking the depositions may be the subject of stipulations,<sup>21</sup> and objections to their sufficiency may be waived by agreement.<sup>22</sup> Stipulations as to the opening of depositions are valid,<sup>23</sup> and the parties may also agree as to their use in the trial of the cause.<sup>24</sup>

[b] **Presence of Counsel.**—A stipulation to take a deposition upon interrogatories and cross-interrogatories upon a commission construed to imply that it was to be taken by the commissioner without the presence of either party or his counsel. *Nasser v. Gaston*, 70 Wash. 685, 127 Pac. 470.

18. *Sharpless v. Warren* (Tenn. Ch.), 58 S. W. 407.

19. *Ex parte Alexander*, 163 Mo. App. 615, 147 S. W. 521.

20. *Lewin v. Dille*, 17 Mo. 64; *Marshall v. Frisbie*, 1 Munf. (15 Va.) 247.

21. *St. Louis, I. M. & S. R. Co. v. Webster*, 99 Ark. 265, 137 S. W. 1103, 1199, Ann. Cas. 1913D, 141.

[a] **As to who may write the depositions.** *Hurst & Co. v. Larpin*, 21 Iowa 484; *Wertz v. May*, 21 Pa. 274; *Farmers' & Mechanics' Bank v. Woods*, 11 Pa. 99.

[b] **Swearing of witnesses waived by stipulation.** *St. Louis, I. M. & S. R. Co. v. Webster*, 99 Ark. 265, 137 S. W. 1103, 1199, Ann. Cas. 1913D, 141; *Shoemaker v. Smith*, 80 Iowa 655, 45 N. W. 744.

[c] **But a stipulation requiring witnesses to swear to a deposition after it has been reduced to writing is not valid.** *Knapp v. American Hand-Sewed Shoe Co.*, 63 Kan. 698, 66 Pac. 996.

22. **U. S.**—*Livingston v. Pratt*, 15 Fed. Cas. No. 8,417. **Ark.**—*St. Louis, I. M. & S. R. Co. v. Webster*, 99 Ark. 265, 137 S. W. 1103, 1199, Ann. Cas. 1913D, 141. **Conn.**—*Erwin v. English*, 57 Conn. 562, 19 Atl. 238. **Ga.**—*Roberts v. Harris*, 32 Ga. 542. **N. Y.**—*Brown v. Kimball*, 25 Wend. 259.

[a] **Objecting to competency of a deponent** waived by agreement of the parties. *Stebbins v. Sutton*, 2 Stew. (Ala.) 249.

[b] **A stipulation that "the caption and all formalities are expressly waived,"** waives improper signing of the deposition by witnesses. *Chipley v. Green*, 7 Colo. App. 25, 42 Pac. 493.

[c] **Certificate.**—Parties may agree

to waive the certificate or any informalities or omissions therein. **Ia.**—*Shoemaker v. Smith*, 80 Iowa 655, 45 N. W. 744. **Mich.**—*Knight v. Emmons*, 4 Mich. 554. **Nev.**—*Lockhart v. Mackie*, 2 Nev. 294.

[d] **Presence of Parties.**—The parties may stipulate as to the effect of defendant's failure to be present at the examination. *Allan v. Guaranty Oil Co.*, 176 Cal. 421, 168 Pac. 884.

[e] **Objection that deposition was prematurely taken** may be waived by stipulation. *Reed v. Barber*, 110 Ga. 524, 35 S. E. 650.

23. *The Roscius*, 20 Fed. Cas. No. 12,042; *Chalmers v. Pigott*, 1 Ch. Cham. (Can.) 282.

24. **Ala.**—*Stebbins v. Sutton*, 2 Stew. 249. **Cal.**—*Brooks v. Crosby*, 22 Cal. 42. **Conn.**—*Erwin v. English*, 57 Conn. 562, 19 Atl. 238. **Ind.**—*McMullen v. Clark*, 49 Ind. 77; *Estep v. Larsh*, 21 Ind. 183; *Griffin v. Templeton*, 17 Ind. 234. **Ia.**—*Shields v. Guffey*, 9 Iowa 322. **Ky.**—*Wallace v. Bradshaw*, 6 Dana 382. **La.**—*Tremoulet v. Tittermary*, 2 Mart. (O. S.) 317. **Minn.**—*In re Smith*, 34 Minn. 436, 26 N. W. 234. **Mo.**—*Chapman v. Kerr*, 80 Mo. 158. **Pa.**—*Acme Mfg. Co. v. Reed*, 197 Pa. 359, 47 Atl. 205, 80 Am. St. Rep. 832; *Parker v. Farr*, 1 Browne 252. **Wis.**—*Douglass v. Rogers*, 4 Wis. 304.

[a] **Stipulation that depositions taken in other actions be used.** **U. S.**—*Vattier v. Hinde*, 7 Pet. 252, 8 L. ed. 675. **Ill.**—*Parlin & O. Co. v. Hutson*, 198 Ill. 389, 65 N. E. 93; *Bush v. Stanley*, 122 Ill. 406, 13 N. E. 249. **Ia.**—*Borland v. Chicago, M. & St. P. Ry. Co.*, 78 Iowa 94, 42 N. W. 590. **Ky.**—*McIlhenny's Heirs v. Biggerstaff*, 3 Litt. 155. **Me.**—*Smith v. Wadleigh*, 17 Me. 353. **Md.**—*Woodruff v. Munroe*, 33 Md. 146. **Mo.**—*Schmitz v. St. Louis, I. M. & S. R. Co.*, 46 Mo. App. 380. **Wis.**—*Hinckley v. Beckwith*, 23 Wis. 328.

[b] **Stipulation not to admit a deposition in evidence.** *Stevenson v. Illi-*

**5. Conduct of Trial or Hearing.**—Trials and hearings proceed in accordance with court rules and statutory provisions regulating them,<sup>25</sup> but in so far as such regulations are not mandatory, the parties or their attorneys may, by stipulation control the conduct of the proceedings to a large extent.<sup>26</sup> They may stipulate as to the time<sup>27</sup> and place<sup>28</sup> of trial; as to the consolidation of causes;<sup>29</sup> as to the employment<sup>30</sup> and expenses<sup>31</sup> of stenographers; as to juries and jurors,<sup>32</sup> as to reference,<sup>33</sup> as to submitting the case on the pleadings,<sup>34</sup> as to the issues,<sup>35</sup> the evidence,<sup>36</sup> the instructions,<sup>37</sup> the verdict,<sup>38</sup> new trial,<sup>39</sup> and as to any other similar matters which arise in the progress of the trial.<sup>40</sup>

**6. Judgment or Decree.**—*a. Stipulation for Judgment.*—As elsewhere shown, parties may stipulate for judgment.<sup>41</sup> And the attorney

nois Cent. R. Co., 157 Ky. 561, 163 S. W. 747.

25. See the titles "Hearing;" "Trial."

26. Colo.—Haverly I. Min. Co. v. Howcutt, 6 Colo. 574. Dak.—McCormack v. Phillips, 4 Dak. 506, 34 N. W. 39. Minn.—Chezick v. Minneapolis etc. Co., 66 Minn. 300, 68 N. W. 1093. Mo. Boernstein v. Heinrichs, 24 Mo. 27. Neb.—Palmer v. People, 4 Neb. 68. N. Y.—Roberts v. Baumgarten, 126 N. Y. 336, 27 N. E. 470; People v. Rathbun, 21 Wend. 509; Mertens v. Roche, 39 App. Div. 398, 57 N. Y. Supp. 349. Ohio.—Conner v. Drake, 1 Ohio St. 166. Wis.—Beach v. Beckwith, 13 Wis. 21.

27. U. S.—Schultz v. Phenix Ins. Co., 77 Fed. 375. Cal.—Central Pac. R. Co. v. Riley, 31 Cal. App. 394, 160 Pac. 844. Ill.—Jacksonville N. W. & S. E. R. Co. v. Hall, 2 Ill. App. 618. N. Y. Baldwin v. Woolever, 2 How. Pr. 165. Tenn.—Jones v. Kimbro, 6 Humph. 319. Tex.—Travelers' Ins. Co. v. Arant (Tex. Civ. App.), 40 S. W. 853.

[a] To accelerate the time for trial. Schultz v. Phenix Ins. Co., 77 Fed. 375. See also 10 STANDARD PROC. 756, 759.

[b] To extend the time. Central Pac. R. Co. v. Riley, 31 Cal. App. 394, 160 Pac. 844.

28. Shenandoah Nat. Bank v. Read, 86 Iowa 136, 53 N. W. 96; Babcock v. Wolf, 70 Iowa 676, 28 N. W. 490; Hawkins v. Richmond Cedar Works, 122 N. C. 87, 30 S. E. 13.

29. Triest v. Enslen, 106 Ala. 180, 17 So. 356; Schleuter v. Sherman Bros. & Co., 169 Ill. App. 386.

30. People ex rel. New York etc. R. Co. v. State Board of Tax Comrs., 80 Misc. 557, 142 N. Y. Supp. 583. See the title "Stenographers."

31. People ex rel. New York etc. R. Co. v. State Board of Tax Comrs., 80 Misc. 557, 142 N. Y. Supp. 583.

32. See generally the title "Juries and Jurors."

Waiver of jury by infant, see *supra*, II, B, 3.

33. U. S.—Grant v. National Bank, 232 Fed. 201. Cal.—Daverkosen v. Kelley, 43 Cal. 477. Me.—Hearne v. Brown, 67 Me. 156. N. H.—Weare v. Putnam, 56 N. H. 49. N. Y.—Saranac Land & Timber Co. v. Roberts, 100 Misc. 511, 166 N. Y. Supp. 8. Tex. Hughes v. Christy, 26 Tex. 230.

See the title "References."

As waiver of jury, see 16 STANDARD PROC. 937.

34. Ingram v. Gill, 145 Ala. 666, 39 So. 736; Blackgrove v. Flaherty, 46 Misc. 468, 92 N. Y. Supp. 257.

35. See *supra*, IV, B, 1; IV, B, 3 and 4.

36. See *supra*, IV, B, 4.

37. Waiving the necessity for making objections as a condition to the right of review, see *supra*, IV, A.

38. See *infra*, this note.

[a] That the verdict be received by the clerk in the absence of the judge, stipulated. Dubuc v. Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401.

39. See 18 STANDARD PROC. 310, note 42 [a].

[a] Waiver of statutory right to new trial, by agreement. See Walton v. Malcolm, 264 Ill. 389, 106 N. E. 211, Ann. Cas. 1915D, 1021, and 20 STANDARD PROC. 579.

40. See cases in preceding notes.

41. See 14 STANDARD PROC. 913, et seq. Compare *supra*, II, B, 3.



of a party may, within certain limitations, stipulate for entry of judgment,<sup>42</sup> and such a judgment is properly one by consent.<sup>43</sup> They may fix by their agreement the amount of the judgment and stipulate as to the damages to be assessed,<sup>44</sup> or as to the measure of damages.<sup>45</sup>

b. *Costs.*—Stipulations as to costs will be enforced, as, for instance, those permitting certain items to be taxed as costs,<sup>46</sup> or waiving costs.<sup>47</sup>

c. *Amendment, Modification, and Setting Aside.*—The judgment may be amended or modified pursuant to stipulation,<sup>48</sup> and the parties may by agreement have it vacated and set aside.<sup>49</sup>

d. *Conclusiveness of Adjudication.*—It is competent for the parties or their attorneys to make agreements relating to the finality and conclusiveness of a judgment, decree or order.<sup>50</sup>

42. Cal.—*Clemens v. Gregg*, 34 Cal. App. 245, 167 Pac. 294. Ill.—*Mangler v. Maryland Cas. Co.*, 201 Ill. App. 560. Ind.—*Weaver v. Ferguson* (Ind. App.), 117 N. E. 659. Ia.—*Nelson v. McMillan*, 176 Iowa 561, 156 N. W. 327. Mass. New York Cent. & H. R. R. v. *Clarke*, 228 Mass. 274, 117 N. E. 322. N. M. *Allredge v. Allredge*, 20 N. M. 472, 151 Pac. 311. Ore.—*Holmboe v. Morgan*, 69 Ore. 395, 138 Pac. 1084. Wash. Puget Sound Bridge & Dredging Co. v. *Guardian Cas. & Guar. Co.*, 90 Wash. 96, 155 Pac. 771; *Cogswell v. Cogswell*, 70 Wash. 178, 126 Pac. 431.

See 14 STANDARD PROC. 915. But see *supra*, II, B, 3.

[a] That judgment be entered at a certain term. *In re Robinson*, 116 Me. 125, 100 Atl. 373.

[b] That judgment follows stipulation presumed where it recites the stipulation. Puget Sound Bridge & Dredging Co. v. *Guardian Cas. & Guar. Co.*, 90 Wash. 96, 155 Pac. 771.

Entry in vacation, see 13 STANDARD PROC. 13, 252.

43. *Erlanger v. Southern Pac. R. Co.*, 109 Cal. 395, 42 Pac. 31.

Consent judgments, see the title "Judgments."

Judgments of dismissal, see the title "Dismissal, Discontinuance and Non-suit."

44. *Planters' Fire Ins. Co. v. Crockett*, 115 Ark. 606, 170 S. W. 1012; *Tuttle v. Davis*, 114 Me. 109, 95 Atl. 513.

45. *People v. New York Cent. & H. R. R. Co.*, 213 N. Y. 136, 107 N. E. 55; *Goodman v. New York Rys. Co.*, 88 Misc. 95, 150 N. Y. Supp. 702; *Connor v. Seattle*, 82 Wash. 296, 144 Pac. 52.

46. *In re Griggs*, 227 Fed. 795, 142 C. C. A. 319; *In re McManus' Estate* (Mo. App.), 199 S. W. 422.

[a] Stipulation that referees fees be taxed as costs. *Schawacker v. McLaughlin*, 139 Mo. 333, 40 S. W. 935; *In re McManus' Estate* (Mo. App.), 199 S. W. 422.

[b] Agreement to allow stenographer's fees as costs. *Schawacker v. McLaughlin*, 139 Mo. 333, 40 S. W. 935; *In re McManus' Estate* (Mo. App.), 199 S. W. 422; *People ex rel. New York etc. R. Co. v. State Board of Tax Comrs.*, 80 Misc. 557, 142 N. Y. Supp. 583.

47. *Illinois Steel Co. v. Warras*, 141 Wis. 119, 123 N. W. 656.

[a] Costs on amending answer waived. *Illinois Steel Co. v. Warras*, 141 Wis. 119, 123 N. W. 656.

48. See 15 STANDARD PROC. 104.

49. See 15 STANDARD PROC. 172.

[a] An agreement that a judgment by confession be opened, will be respected by the court. *Kelly v. McCormick-Murray Mfg. Co.*, 201 Ill. App. 308.

50. *Brooklyn M. & M. Co. v. Miller*, 227 U. S. 194, 33 Sup. Ct. 251, 57 L. ed. 478; *National City Bank v. Fairbank State Bank*, 173 Iowa 489, 155 N. W. 963.

[a] Pleading Foreign Judgment. It is proper to stipulate that in consideration of a continuance, a judgment obtained in a foreign state may be pleaded. *Brooklyn M. & M. Co. v. Miller*, 227 U. S. 194, 33 Sup. Ct. 251, 57 L. ed. 478.

[b] That decree on motion to dissolve a temporary injunction be deemed a final decree. *National City Bank v.*

e. *Enforcement and Satisfaction.*—Stipulations have been made and enforced as to the proceeds of the judgment,<sup>51</sup> as to execution,<sup>52</sup> as to judicial sales,<sup>53</sup> and as to other matters connected with the enforcement and satisfaction of judgments, decrees and orders.<sup>54</sup>

7. *Proceedings in Review.*—Many matters connected with proceedings for review may be made the subject of stipulation.<sup>55</sup> A stipulation to waive an appeal is proper,<sup>56</sup> as is also one in allowing an appeal in vacation<sup>57</sup> or dismissing an appeal,<sup>58</sup> or waiving the necessity for objections below,<sup>59</sup> or extending the time to take certain steps in the procedure,<sup>60</sup> or waiving a failure to take them in time,<sup>61</sup> or waiving the filing of briefs,<sup>62</sup> or agreements as to the nature and

Fairbank State Bank, 173 Iowa 489, 155 N. W. 963.

51. Cordes v. Harding, 35 Cal. App. 41, 169 Pac. 256.

[a] A stipulation as to the manner of sharing the recovery, is proper. Cordes v. Harding, 35 Cal. App. 41, 169 Pac. 256.

52. Time to issue execution, see 15 STANDARD PROC. 750.

[a] *Stay of Execution.*—A la. Sharp v. Allgood, 100 Ala. 183, 14 So. 16. Cal.—Keys v. Warner, 45 Cal. 60; Moulton v. Ellmaker, 30 Cal. 527. Ill. Dick Co. v. Sherwood Letter File Co., 157 Ill. 325, 42 N. E. 440; Cairo & St. L. R. Co. v. Killenberg, 92 Ill. 142. Md.—Farmers' Bank v. Sprigg, 11 Md. 389. Mont.—Kleinschmidt v. Morse, 1 Mont. 100. N. Y.—Young v. Woop, 160 App. Div. 252, 145 N. Y. Supp. 535; *In re Welch*, 14 Barb. 396, 7 How. Pr. 173; Keating v. Serrell, 5 Daly 278. See also 15 STANDARD PROC. 756.

As to time for redemption from, see 16 STANDARD PROC. 224.

53. See 16 STANDARD PROC. 765.

54. See *infra*, this note.

[a] *Stipulation that rights under the judgment be held in abeyance.* Burr v. Maclay Rancho Water Co., 26 Cal. App. 611, 147 Pac. 990.

[b] *Stipulation to put in escrow a confession of judgment.* London & Southwestern Bank v. White, 162 App. Div. 739, 147 N. Y. Supp. 1009.

[c] *Order for Security for Costs.* Since the statute does not require an order requiring security for costs to be recorded, the parties may stipulate that such an order was made by the justice and also as to the time it was made. Douglas v. District Court, 45 Utah 486, 146 Pac. 562.

55. See *infra*, this section.

As to new trial, see *supra*, IV, B, 5.

56. Ark.—Saleski v. Boyd, 32 Ark.

74. Ia.—Lundon v. Waddick, 98 Iowa 478, 67 N. W. 388. Mass.—Palmer v. Lavers, 218 Mass. 286, 105 N. E. 1000. N. H.—Pike v. Emerson, 5 N. H. 393, 22 Am. Dec. 468. N. Y.—Matter of New York L. & W. R. Co., 93 N. Y. 447; People v. Stephens, 52 N. Y. 306. Pa.—Shisler v. Keavy, 75 Pa. 79. Tex. Johnson v. Halley, 8 Tex. Civ. App. 137, 27 S. W. 750.

[a] *An agreement to abide by a police court decision in consideration of the plaintiff's executing a bond without sureties for the release of his attachment claim, is a valid stipulation which the court will enforce.* Palmer v. Lavers, 218 Mass. 286, 105 N. E. 1000.

[b] *That consent of the client is a necessary prerequisite to the attorney's stipulation, see People v. New York*, 11 Abb. Pr. (N. Y.) 66.

57. Succession of Lefort, 139 La. 51, 71 So. 215, Ann. Cas. 1917E, 769.

58. Ward v. Hollins, 14 Md. 158; South Bend Land Co. v. Denio, 7 Wash. 303, 35 Pac. 64.

59. See 2 STANDARD PROC. 276.

60. *Extending time to settle bills of exceptions, see 4 STANDARD PROC. 340.*

[a] *Extending time for justification of sureties on appeal bond or undertaking.* Bush v. Baker, 46 Mont. 535, 129 Pac. 550; Morin v. Wells, 30 Mont. 76, 75 Pac. 688.

61. See *infra*, this note.

[a] *Failure to serve case on appeal in time.* Lindsey v. Supreme Lodge of Knights of Honor, 172 N. C. 818, 90 S. E. 1013.

[b] *As to time for serving counter case on appeal.* Board of Education v. Orr, 161 N. C. 218, 76 S. E. 693.

62. Adams v. State, 80 Tex. Crim. 632, 192 S. W. 1067.

contents of papers and records to be used on review.<sup>63</sup> But the court is not bound by stipulations as to procedural regulations which are not solely for the benefit of the parties.<sup>64</sup> As for instance, an agreement waiving the necessity of having a bill of exceptions,<sup>65</sup> or a writ of error.<sup>66</sup>

**V. CONSTRUCTION OF STIPULATIONS.** — **In General.** — Stipulations made in furtherance of justice are favored by the courts,<sup>67</sup> and where designed to shorten the litigation and save trouble and expense they should be given a broad and liberal construction,<sup>68</sup> or at any rate they should be accorded a reasonable construction<sup>69</sup> with a

**Necessity of writing, see *supra*, III, B.**

63. *Lewis v. Allen*, 42 Okla. 584, 142 Pac. 384. See 2 STANDARD PROC. 345.

[a] **Stipulation that a case made contains all the evidence offered at the trial.** *Lewis v. Allen*, 42 Okla. 584, 142 Pac. 384. See the titles "Briefs;" "Bills of Exceptions;" "Case on Appeal;" "Statement and Abstract of Case."

64. See *supra*. IV, A.

65. Ill.—*People v. Coultas*, 9 Ill. App. 39. Mo.—*Mangels v. Mangels*, 8 Mo. App. 603. Neb.—*McCathron v. McCathron*, 15 Neb. 144, 17 N. W. 265. N. J.—*Robbins v. Vanderbeck*, 55 N. J. L. 364, 26 Atl. 919. Ore.—*Kimery v. Taylor*, 29 Ore. 233, 45 Pac. 771; *Umatilla Irr. Co. v. Barnhart*, 22 Ore. 389, 30 Pac. 37. Tex.—*McDowell v. Fowler*, 80 Tex. 587, 16 S. W. 431.

66. U. S.—*South Carolina v. Wesley*, 155 U. S. 542, 15 Sup. Ct. 230, 39 L. ed. 254; *Washington Co. v. Durant*, 7 Wall. 694, 19 L. ed. 164. Colo.—*Krippendorf-Dittman Co. v. Trenoweth*, 35 Colo. 481, 84 Pac. 805; *Molandin v. Colorado Cent. R. Co.*, 3 Colo. 173. Ohio.—*Vance v. Goudy*, *Wright* 307; *Brownell v. Skinner*, *Wright* 682.

67. See *supra*, I.

68. *Denunzio Fruit Co. v. Pennsylvania Co.*, 172 Ill. App. 277.

[a] **But agreements waiving constitutional rights are strictly construed.** U. S.—*Burnham v. North Chicago St. Ry. Co.*, 88 Fed. 627, 32 C. C. A. 64. Ill.—*Carthage v. Buckner*, 8 Ill. App. 152. La.—*State v. Touchet*, 33 La. Ann. 1154. Neb.—*Ryan v. Donley*, 69 Neb. 623, 96 N. W. 234. Tex.—*Brown v. Chenoworth*, 51 Tex. 469.

69. U. S.—*Mutual Life Ins. Co. v. Harris*, 97 U. S. 331, 24 L. ed. 959; *King v. Elkhorn & S. R. L. Tr. Co.*, 80

Fed. 333, 25 C. C. A. 449; *Citizens Bank v. Farwell*, 56 Fed. 570, 6 C. C. A. 24; *United States v. Wong Hong*, 71 Fed. 283. Ala.—*Ex parte Hayes*, 92 Ala. 120, 9 So. 156. Cal.—*Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, 16 Pac. 325; *Donner v. Palmer*, 51 Cal. 629. Colo.—*Keator v. Colorado Coal & I. D. Co.*, 3 Colo. App. 188, 32 Pac. 857. Ill. *Walton v. Malcolm*, 264 Ill. 339, 106 N. E. 211, Ann. Cas. 1915D, 1021; *Backman v. Cleveland etc. Ry. Co.*, 174 Ill. App. 269. Minn.—*Pioneer Sav. & L. Co. v. St. Paul F. & M. Ins. Co.*, 68 Minn. 170, 70 N. W. 979. Mo.—*Hall v. Goodnight*, 138 Mo. 576, 37 N. W. 916. Mont.—*Kleinschmidt v. Morse*, 1 Mont. 100. Nev.—*Oneale v. Cleveland*, 3 Nev. 485. N. J.—*Welsh v. Blackwell*, 14 N. J. L. 344. N. M.—*Aldredge v. Aldredge*, 20 N. M. 472, 151 Pac. 311. N. Y.—*People v. New York Cent. & H. R. R. Co.*, 213 N. Y. 136, 107 N. E. 55; *Van Aernam v. Blustein*, 102 N. Y. 355, 7 N. E. 537, 2 N. Y. St. 470; *Brewster v. Manning*, 6 Hun 530. Ore. *Bridal Veil Lumb. Co. v. Pacific Coast Cas. Co.*, 75 Ore. 57, 145 Pac. 671. S. C. *State v. Pacific Guano Co.*, 28 S. C. 63, 5 S. E. 167. Tex.—*White v. McFarlin*, 77 Tex. 596, 14 S. W. 200; *Cox v. Giddings*, 9 Tex. 44. Vt.—*Foster's Exrs. v. Dickerson*, 64 Vt. 233, 24 Atl. 253. Wis.—*Vandyke v. Weil*, 18 Wis. 277.

[a] **The broadest significance should be given to the language of the stipulation where objection is raised for the first time on appeal that its terms do not authorize proceedings taken pursuant to it on the trial.** *Sterling v. Parker-Washington Co.*, 185 Mo. App. 192, 170 S. W. 1156.

[b] **The word "writing" embraces dictation to a stenographer in a stipulation that words used by the trial judge in overruling a motion for a new trial might be supplied in writing by**



view to effecting the intent of the parties.<sup>70</sup> Their purport and scope must, as in ordinary contracts,<sup>71</sup> be ascertained from the language and terms used;<sup>72</sup> construed in the light of the surrounding cir-

the trial court. *State ex rel. Iba v. Ellison*, 256 Mo. 644, 165 S. W. 369.

70. **Ala.**—*G. Ober & Sons Co. v. Thomason Grocery Co.*, 138 Ala. 217, 35 So. 127. **Cal.**—*Pacific Pav. Co. v. Vizelech*, 141 Cal. 4, 74 Pac. 352; *Cooper v. Burch*, 140 Cal. 548, 74 Pac. 37; *Little v. Jacks*, 68 Cal. 343, 8 Pac. 856, 9 Pac. 264, 11 Pac. 128. **Ill.**—*Telluride Power Transmission Co. v. Crane Co.*, 208 Ill. 218, 70 N. E. 319; *Denunzio Fruit Co. v. Pennsylvania Co.*, 172 Ill. App. 277. **Mich.**—*Brown v. Spiegel*, 155 Mich. 138, 120 N. W. 579; *Shaw-Walker Co. v. Fitzsimons*, 148 Mich. 626, 112 N. W. 501. **Mont.**—*Murray v. Butte*, 31 Mont. 177, 77 Pac. 527. **N. M.**—*Aldredge v. Aldredge*, 20 N. M. 472, 151 Pac. 311. **N. Y.**—*Schroeder v. Frey*, 114 N. Y. 266, 21 N. E. 410; *London & Southwestern Bank v. White*, 162 App. Div. 739, 147 N. Y. Supp. 1009.

71. See *infra*, this note.

[a] Rules of construction which regulate the interpretation of contracts generally are applicable. **Ill.**—*Dick Co. v. Sherwood Letter File Co.*, 157 Ill. 325, 42 N. E. 440. **Mo.**—*Hannah v. Baylor*, 27 Mo. App. 302. **Mont.**—*Sweeney v. Great Falls & C. R. Co.*, 11 Mont. 523, 29 Pac. 15. **N. M.**—*Aldredge v. Aldredge*, 20 N. M. 472, 151 Pac. 311. **N. Y.**—*Schroeder v. Frey*, 114 N. Y. 266, 21 N. E. 410.

72. **U. S.**—*Vineyard Land & Stock Co. v. Twin Falls Oakley L. & W. Co.*, 245 Fed. 30, 157 C. C. A. 326. **Cal.**—*Allan v. Guaranty Oil Co.*, 176 Cal. 421, 168 Pac. 884; *Palm v. Planada Dev. Corp.*, 175 Cal. 771, 167 Pac. 381; *Jones v. Luckel*, 174 Cal. 532, 163 Pac. 906; *La Habra Oil Co. v. Francis*, 35 Cal. App. 168, 169 Pac. 401; *Cordes v. Harding*, 27 Cal. App. 474, 150 Pac. 650. **Ill.**—*Kimmel v. Gray*, 196 Ill. App. 406. **Ia.**—*Succession of Lefort*, 139 Ia. 51, 71 So. 215, Ann. Cas. 1917E, 769. **Mich.**—*Weinberg v. Stratton*, 172 Mich. 55, 137 N. W. 676. **N. Y.**—*London & Southwestern Bank v. White*, 162 App. Div. 739, 147 N. Y. Supp. 1009. **Tenn.**—*Provident Loan Bank v. Parham*, 137 Tenn. 483, 194 S. W. 570. **Tex.**—*Rotge v. Simmler* (Tex. Civ. App.), 176 S. W. 614.

[a] Construction of word "unmarried" in stipulation. *Riley v. Lemieux*, 24 Colo. App. 184, 132 Pac. 699.

[b] A stipulation that a copy of an insurance policy was a "true and correct copy" of the policy must be taken to refer to the copy as it read on its face even though it shows erasures and eliminations. *Pacific Coast Cas. Co. v. Industrial Acc. Com.*, 176 Cal. 24, 167 Pac. 539.

[c] Stipulation that employee was subject to Workmen's Compensation Act does not cover the question as to whether the employee is entitled to compensation under the act. *Aurora Brewing Co. v. Industrial Board*, 277 Ill. 142, 115 N. E. 207.

[d] Stipulation that defendant was a gratuitous bailee "at most" does not concede that defendant was a bailee. *Adler v. Planters' Hotel Co.* (Mo. App.), 181 S. W. 1062.

[e] Phrase "recoveries and avails effected in either of said suits," as used in stipulation construed. *Cordes v. Harding*, 27 Cal. App. 474, 150 Pac. 650.

[f] "Market value" as used in stipulation, construed. *People v. New York Cent. & H. R. R. Co.*, 213 N. Y. 136, 107 N. E. 55.

[g] Competency of Witnesses Waived.—A written stipulation which provides for its being read in evidence subject only to objections for incompetency and irrelevancy, waives all objections to the competency as witnesses of the parties to the transaction. *Pensacola State Bank v. Melton*, 210 Fed. 57.

[h] All parts of a stipulation should be construed together. **U. S.**—*J. A. Roebeling's Sons Co. v. Idaho Ry. Light & P. Co.*, 243 Fed. 527, 156 C. C. A. 225; *Second Ward Bank v. Huron*, 80 Fed. 660; *United States v. Wong Hong*, 71 Fed. 283. **Cal.**—*Bank of Healdsburg v. Hitchcock*, 76 Cal. 489, 18 Pac. 648; *San Francisco v. Fulde*, 37 Cal. 349, 99 Am. Dec. 278. **Ill.**—*Dick Co. v. Sherwood L. F. Co.*, 157 Ill. 325, 42 N. E. 440; *Johnson v. Estabrook*, 84 Ill. 75. **Ia.**—*Bond v. Home for Aged Women*, 94 Iowa 458, 62 N. W. 838. **Minn.**—*Christianson v. Nelson*, 76 Minn.

cumstances,<sup>73</sup> and such language, unless used in a technical sense, should be given its ordinary meaning.<sup>74</sup> It should not be so construed as to give the stipulation the effect of an admission of fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished.<sup>75</sup>

36, 78 N. W. 875, 79 N. W. 647. **N. Y.** Matter of Metropolitan El. R. Co., 136 N. Y. 500, 32 N. E. 1043; Lewis v. Yagel, 77 Hun 337, 28 N. Y. Supp. 833, 60 N. Y. St. 23. **Tex.**—Taylor v. Brown, 8 Tex. Civ. App. 261, 27 S. W. 911. **W. Va.**—State v. Larue, 37 W. Va. 828, 17 S. E. 397.

[i] **Parol Evidence.**—Where unambiguous in its terms, parol evidence is inadmissible to show what the intention of the parties to it was. *Ex parte* Hayes, 92 Ala. 120, 9 So. 156; State v. Lefaire, 53 Mo. 470, but ambiguities in the stipulation may ordinarily be cleared up by parol evidence. *Mutual Loan & B. Assn. v. Price*, 19 Fla. 127.

[j] **Invalidity in Part.**—Where the elements of a stipulation are so mutually related that the agreement is an entirety the invalidity of one element will invalidate the entire stipulation. *Weaver v. Ferguson* (Ind. App.), 117 N. E. 659.

73. **U. S.**—Dickerson v. Matheson, 57 Fed. 524, 6 C. C. A. 466. **Conn.** Cumnor v. Sedgwick, 67 Conn. 66, 34 Atl. 763. **Idaho.**—Nez Perce County v. Latah County, 2 Idaho 1131, 31 Pac. 800. **Ill.**—Harding v. Harding, 180 Ill. 481, 54 N. E. 587; Dick Co. v. Sherwood Letter File Co., 157 Ill. 325, 42 N. E. 440; Lake Shore & M. S. R. Co. v. Hessions, 150 Ill. 546, 37 N. E. 905. **Ind.**—Wheat v. Ragsdale, 27 Ind. 191. **Minn.**—Rolf v. Burlington etc. R. Co., 39 Minn. 398, 40 N. W. 267. **Mo.**—Hall v. Goodnight, 138 Mo. 576, 37 S. W. 916. **Neb.**—Abbott v. Lane, 4 Neb. (Unof.) 629, 95 N. W. 599. **N. Y.** Hine v. New York Elevated R. Co., 149 N. Y. 154, 43 N. E. 414; Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 21 Am. St. Rep. 716, 10 L. R. A. 684; Van Aernam v. Blustein, 102 N. Y. 355, 7 N. E. 537, 2 N. Y. St. 470. **Ore.**—Small v. Lutz, 34 Ore. 181, 55 Pac. 529, 58 Pac. 79. **Pa.**—Chase v. Miller, 41 Pa. 403. **Tex.**—Yaws v. Jones, 19 S. W. 443. **Vt.**—Standard Granite Co. v. Aikey, 67 Vt. 116, 30 Atl. 806. **Wash.**—Canada Settlers' L. & T. Co. v. Murray, 20 Wash. 656, 56

Pac. 368. **Wis.**—Wakeley v. Delaplaine, 15 Wis. 554.

74. **Cal.**—Seale v. Ford, 29 Cal. 104. **Mich.**—Wilkins v. Hukill, 115 Mich. 594, 73 N. W. 898. **N. J.**—Welsh v. Blackwell, 14 N. J. L. 344. **N. Y.** Matter of McCusker, 23 Misc. 446, 51 N. Y. Supp. 281; Valentine v. Central Nat. Bank, 10 Abb. N. C. 188. **Pa.** Haubert v. Haworth, 78 Pa. 78. **Wis.** Steele v. Moss, 69 Wis. 496, 34 N. W. 237, 2 Am. St. Rep. 756.

75. **Ark.**—St. Louis, I. M. & S. R. Co. v. Webster, 99 Ark. 265, 137 S. W. 1103, 1199, Ann. Cas. 1913D, 141. **Cal.** People v. Grundell, 75 Cal. 301, 17 Pac. 214. **Md.**—Lanahan v. Heaver, 77 Md. 605, 26 Atl. 866, 20 L. R. A. 759; Dennis v. Exrs. of Dennis, 15 Md. 73, 138. **Mich.**—Peterson v. Swenningston, 178 Mich. 294, 144 N. W. 550. **N. M.**—Aldredge v. Aldredge, 20 N. M. 472, 151 Pac. 311. **N. Y.**—Schroeder v. Frey, 114 N. Y. 266, 21 N. E. 410. **N. C.** Roper Lumb. Co. v. Elizabeth City Lumb. Co., 137 N. C. 431, 49 S. E. 946.

[a] **Right to litigate amount of attorney's fees,** held not to be concluded by a stipulation for entry of judgment. *Aldredge v. Aldredge*, 20 N. M. 472, 151 Pac. 311.

[b] **An agreement to waive pleadings** does not relieve the plaintiff from proving his case with the same measure of proof as if such agreement had not been entered into. *Lawrence McFadden Co. v. Philadelphia*, 59 Pa. Super. 44.

[c] **Waiver of statutory right to new trial** in ejectment, does not operate to waive party's right to object to the competency of evidence admitted by the trial court. *Walton v. Malcolm*, 264 Ill. 389, 106 N. E. 211, Ann. Cas. 1915D, 1021.

[d] **If made in reference to the trial of one cause of action** contained in the complaint it cannot operate to bind the party in reference to another cause of action therein stated. *Palm v. Planada Dev. Corp.*, 175 Cal. 771, 167 Pac. 381.

**Province of Judge and Jury.**<sup>76</sup> — The construction of stipulations, as of other written instruments, is a matter for the court.<sup>77</sup>

**VI. AMENDMENT AND MODIFICATION.** — Upon proper application,<sup>78</sup> and good cause shown,<sup>79</sup> the court may, in its discretion,<sup>80</sup> correct or reform the erroneous or imperfect expression of the stipulation<sup>81</sup> so as to have it conform to the real agreement as intended by the parties in making it.<sup>82</sup>

**VII. WITHDRAWING AND SETTING ASIDE.** — A. IN GENERAL. — Courts are prone to uphold and enforce stipulations,<sup>83</sup> and it is their duty to enforce such agreements where valid.<sup>84</sup> They are not willing to grant relief from them when they are made under a full understanding of the facts existing at the time,<sup>85</sup> yet stipulations are very often improvidently entered into and stand in the way of substantial justice, and the circumstances may justify the court in the exercise of a sound judicial discretion<sup>86</sup> in permitting the parties

76. See generally the title "**Province of Judge and Jury.**"

77. **Mo.**—State *v. Lefavre*, 53 Mo. 470. **Okla.**—Blankinship *v. Oklahoma City, etc. Power Co.*, 4 Okla. 242, 43 Pac. 1088. **S. C.**—Brickman *v. Southern Ry.*, 74 S. C. 306, 54 S. E. 553.

78. See *infra*, this note.

[a] **Relief Obtained on Motion.** Davis *v. Davis*, 29 S. D. 420, 137 N. W. 283.

79. Davis *v. Davis*, 29 S. D. 420, 137 N. W. 283.

[a] **Accident, inadvertence, surprise, mistake** or some similar ground must appear. Davis *v. Davis*, 29 S. D. 420, 137 N. W. 283.

80. Davis *v. Davis*, 29 S. D. 420, 137 N. W. 283.

81. Davis *v. Davis*, 29 S. D. 420, 137 N. W. 283.

82. Davis *v. Davis*, 29 S. D. 420, 137 N. W. 283.

83. Patterson Land Co. *v. Lynn*, 27 N. D. 391, 147 N. W. 256. See also *supra*, I, and IV, A.

84. See *infra*, VIII, A, 3.

85. Conner *v. Belden*, 8 Daly (N. Y.) 257.

86. **U. S.**—Burnham *v. North Chicago St. Ry. Co.*, 88 Fed. 627, 32 C. C. A. 64. **Ala.**—Palliser *v. Home Telephone Co.*, 170 Ala. 341, 54 So. 499; Harvey *v. Thorpe*, 28 Ala. 250, 65 Am. Dec. 344. **Ark.**—Webster *v. Goolsby*, 130 Ark. 141, 197 S. W. 286. **Cal.**—Ward *v. Clay*, 82 Cal. 502, 23 Pac. 50, 227; Richardson *v. Musser*, 54 Cal. 196; Bonds *v. Hickman*, 29 Cal. 460. **Colo.**—Welsh *v. Noyes*, 10 Colo. 133, 14 Pac.

317; Gibson *v. Foster*, 24 Colo. App. 252, 133 Pac. 144. **Fla.**—Hartford F. Ins. Co. *v. Redding*, 47 Fla. 228, 37 So. 62, 110 Am. St. Rep. 118, 67 L. R. A. 518. **Ga.**—Branch *v. Planter's Loan & Sav. Bank*, 75 Ga. 342. **Idaho.**—Koepl *v. Ruppert*, 29 Idaho 223, 158 Pac. 319. **Ill.**—Sullivan *v. Eddy*, 154 Ill. 199, 40 N. E. 482; Brockway *v. McClun*, 148 Ill. App. 465, *affirming* 243 Ill. 196, 90 N. E. 374. **Minn.**—Lieberknecht *v. Great Northern R. Co.*, 110 Minn. 457, 126 N. W. 71; Schaefer *v. Schoenborn*, 94 Minn. 490, 103 N. W. 501; Wells *v. Penfield*, 70 Minn. 66, 72 N. W. 816. **Mo.**—Galbreath *v. Rogers*, 30 Mo. App. 401. **Neb.**—McCarthy *v. Benedict*, 90 Neb. 386, 133 N. W. 410; State Ins. Co. *v. Farmers' Mut. Ins. Co.*, 65 Neb. 34, 90 N. W. 997; Keens *v. Robertson*, 46 Neb. 837, 65 N. W. 897. **N. H.**—Dame *v. Wood*, 74 N. H. 212, 66 Atl. 484; Page *v. Brewster*, 54 N. H. 184. **N. Y.**—Tauziède *v. Jumel*, 138 N. Y. 431, 34 N. E. 274; Morris *v. Press Pub. Co.*, 98 App. Div. 143, 90 N. Y. Supp. 673, 15 N. Y. Ann. Cas. 343; Ettlinger *v. Kruger*, 147 N. Y. Supp. 37. **N. D.**—Northern Pac. R. Co. *v. Barlow*, 20 N. D. 197, 126 N. W. 233, Ann. Cas. 1912C, 763. **Okla.**—Georgia Home Ins. Co. *v. Halsey*, 37 Okla. 678, 133 Pac. 202. **Pa.**—Nesbitt *v. Turner*, 155 Pa. 429, 26 Atl. 750. **S. D.**—Meldrum *v. Kenefick*, 15 S. D. 370, 89 N. W. 863; Randall *v. Burk*, 11 S. D. 40, 75 N. W. 276. **Tex.**—Cullers *v. Platt*, 81 Tex. 258, 16 S. W. 1003; Porter *v. Holt*, 73 Tex. 447, 11 S. W. 494; Hancock *v. Winans*, 20 Tex. 320. **Vt.**—Fauston *v.*



to withdraw from stipulations and in annulling and setting them aside,<sup>87</sup> even after they have been acted upon.<sup>88</sup> It is, moreover, the court's duty to relieve from the stipulation where to enforce it would be inequitable,<sup>89</sup> and when all the parties to the action will by vacating

Richmond, 25 Vt. 446. Wash.—First Nat. Life Assur. Soc. v. Farquhar, 75 Wash. 667, 135 Pac. 619. Wis.—Illinois Steel Co. v. Warras, 141 Wis. 119, 123 N. W. 656; Brown v. Cohn, 88 Wis. 627, 60 N. W. 826; Wells v. American Express Co., 49 Wis. 224, 5 N. W. 333.

[a] It is a judicial discretion to be exercised in promotion of justice and equity. Morris v. Press Pub. Co., 98 App. Div. 143, 90 N. Y. Supp. 673, 15 N. Y. Ann. Cas. 343; Illinois Steel Co. v. Warras, 141 Wis. 119, 123 N. W. 656.

[b] The appellate court will not disturb the trial court's exercise thereof unless it is arbitrary and unreasonable. Ala.—Palliser v. Home Telephone Co., 170 Ala. 341, 54 So. 499. Ark.—Webster v. Goolsby, 130 Ark. 141, 197 S. W. 286. Cal.—Moffitt v. Jordan, 127 Cal. 628, 60 Pac. 175. Idaho.—Koepl v. Ruppert, 29 Idaho 223, 158 Pac. 319. Ill.—McKinley v. Wilmington Star Min. Co., 7 Ill. App. 386. Minn.—Lieberknecht v. Great Northern R. Co., 110 Minn. 457, 126 N. W. 71. Mo.—Robinson v. Bobb, 139 Mo. 346, 40 S. W. 923; Franklin v. National Ins. Co., 43 Mo. 491. Neb.—Lincoln v. Lincoln St. Ry. Co., 67 Neb. 469, 93 N. W. 766. N. H. Colby v. American Express Co., 77 N. H. 548, 94 Atl. 198. N. Y.—Morris v. Press Pub. Co., 98 App. Div. 143, 90 N. Y. Supp. 673, 15 N. Y. Ann. Cas. 343. Okla.—Georgia Home Ins. Co. v. Halsey, 37 Okla. 678, 123 Pac. 202. S. D.—Meldrum v. Kenefick, 15 S. D. 370, 89 N. W. 863. Tex.—Paschall v. Penry, 82 Tex. 673, 18 S. W. 154. Wis.—Illinois Steel Co. v. Warras, 141 Wis. 119, 123 N. W. 656; Sullivan v. Bruhling, 70 Wis. 388, 36 N. W. 23.

[c] Withdrawal of a stipulation as to what issue should be submitted to the court, refused after the issue had been argued to the court. Georgia Home Ins. Co. v. Halsey, 37 Okla. 678, 123 Pac. 202.

[d] Where there are two stipulations and one of them is the consideration for the other, the court may properly refuse to allow one of them to be withdrawn and the other to stand. Kriss v. Union Pac. R. Co., 100 Neb.

501, 161 N. W. 414, Ann. Cas. 1918A, 1122.

87. U. S.—Delaware, L. & W. R. Co. v. Yurkonis, 220 Fed. 429, 137 C. C. A. 23; Burnham v. North Chicago St. Ry. Co., 88 Fed. 627, 32 C. C. A. 64. Ala.—Harvey v. Thorpe, 28 Ala. 250, 65 Am. Dec. 344. Ark.—Webster v. Goolsby, 130 Ark. 141, 197 S. W. 286. Cal.—Ward v. Clay, 82 Cal. 502, 23 Pac. 50, 227. Idaho.—Koepl v. Ruppert, 29 Idaho 223, 158 Pac. 319. Mich. C. J. Huebel Co. v. Mackinnon, 186 Mich. 617, 152 N. W. 1098. Mass. Mann v. United Motor Boston Co., 226 Mass. 495, 116 N. E. 239. Minn.—Schaefer v. Schoenborn, 94 Minn. 490, 103 N. W. 501; Wells v. Penfield, 70 Minn. 66, 72 N. W. 816. N. H.—Colby v. American Express Co., 77 N. H. 548, 94 Atl. 198. N. Y.—Tanzie v. Jumel, 138 N. Y. 431, 34 N. E. 274; Morris v. Press Pub. Co., 98 App. Div. 143, 90 N. Y. Supp. 673, 15 N. Y. Ann. Cas. 343. N. D.—Patterson Land Co. v. Lynn, 27 N. D. 391, 147 N. W. 256. Okla.—Harjo v. Black, 49 Okla. 566, 153 Pac. 1137; Georgia Home Ins. Co. v. Halsey, 37 Okla. 678, 123 Pac. 202. Tex.—Callers v. Platt, 81 Tex. 258, 16 S. W. 1003. Wash.—First Nat. Life Assur. Soc. v. Farquhar, 75 Wash. 667, 135 Pac. 619. Wis.—Illinois Steel Co. v. Warras, 141 Wis. 119, 123 N. W. 656; Wells v. American Express Co., 49 Wis. 224, 5 N. W. 333.

88. Schaefer v. Schoenborn, 94 Minn. 490, 103 N. W. 501.

[a] A strong showing is necessary to in such case. For when one party to a mutual stipulation has on the faith of it so acted in the execution thereof that the status quo cannot be re-established as to one of them, it is only in a plain case of fraud, mistake or oppression that the stipulation should be set aside. Illinois Steel Co. v. Warras, 141 Wis. 119, 123 N. W. 656.

[b] Cause reinstated after dismissal upon stipulation. Schaefer v. Schoenborn, 94 Minn. 490, 103 N. W. 501.

89. Idaho.—Koepl v. Ruppert, 29 Idaho 223, 158 Pac. 319. Tex.—Porter v. Holt, 73 Tex. 447, 11 S. W. 494.

the stipulation, be placed in exactly the same position they were in before it was made.<sup>90</sup> But the agreement should not be set aside<sup>1</sup> at the instance of either party when the party invoking such action has obtained an advantage under it,<sup>91</sup> or when its withdrawal will place the opposite party in a worse position than if it had never been made,<sup>92</sup> and a party may by his conduct and laches be estopped from repudiating a stipulation even though it is one which he had no right to make.<sup>93</sup>

**B. GROUNDS OF RELIEF.**—Some sufficient ground for the exercise of its powers in this respect must be shown,<sup>94</sup> as that the stipulation was thoughtlessly and improvidently made,<sup>95</sup> or induced by fraud,<sup>96</sup> collusion,<sup>97</sup> undue influence,<sup>98</sup> misunderstanding or mistake,<sup>99</sup> or made contrary to the express directions and wishes of the client and constitutes a surrender of the client's substantial rights,<sup>1</sup> or was rendered inequitable by the development of a new situation.<sup>2</sup>

**C. APPLICATION FOR RELIEF.**—Aggrieved persons seeking relief from stipulations must, unless there is mutual consent<sup>3</sup> of all the

Wash.—First Nat. Life Assur. Soc. v. Farquhar, 75 Wash. 667, 135 Pac. 619.

[a] **Fraudulently procured stipulation**, set aside. Harjo v. Black, 49 Okla. 566, 153 Pac. 1137.

**Where injurious to the rights of an incompetent party**, see *supra*, II, B, 3. 90. Koepf v. Ruppert, 29 Idaho 223, 158 Pac. 319.

91. Porter v. Holt, 73 Tex. 447, 11 S. W. 494; Commonwealth Bonding & Cas. Ins. Co. v. Beavers (Tex. Civ. App.), 186 S. W. 859.

92. Porter v. Holt, 73 Tex. 447, 11 S. W. 494; Commonwealth Bonding & Cas. Ins. Co. v. Beavers (Tex. Civ. App.), 186 S. W. 859.

93. Dubue v. Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401.

94. Ark.—Webster v. Goolsby, 130 Ark. 141, 197 S. W. 286. Colo.—Gibson v. Foster, 24 Colo. App. 252, 133 Pac. 144. N. Y.—Morris v. Press Pub. Co., 98 App. Div. 143, 90 N. Y. Supp. 673, 15 N. Y. Ann. Cas. 343.

[a] **Grounds which would warrant rescission of a contract will**, in general, justify the court in relieving from a stipulation. Gibson v. Foster, 24 Colo. App. 252, 133 Pac. 144.

95. Morris v. Press Pub. Co., 98 App. Div. 143, 90 N. Y. Supp. 673, 15 N. Y. Ann. Cas. 343; Ludeman v. Third Ave. R. Co., 72 App. Div. 26, 76 N. Y. Supp. 128.

96. Idaho.—Koepf v. Ruppert, 29 Idaho 223, 158 Pac. 319. Kan.—Southern Kansas R. Co. v. Pavey, 57 Kan.

521, 46 Pac. 969. Mass.—Powell v. Turner, 139 Mass. 97, 28 N. E. 453. Minn.—Wells v. Penfield, 70 Minn. 66, 72 N. W. 816. N. Y.—Kley v. Healey, 149 N. Y. 346, 44 N. E. 150. N. D. Patterson Land Co. v. Lynn, 27 N. D. 391, 147 N. W. 256.

97. Saleski v. Boyd, 32 Ark. 74; Seaver v. Moore, 1 Hun (N. Y.) 305.

98. Hill v. Hermans, 59 N. Y. 396.

99. Colo.—Gibson v. Foster, 24 Colo. App. 252, 133 Pac. 144. Minn. Schaefer v. Schoenborn, 94 Minn. 490, 103 N. W. 501. Wis.—Illinois Steel Co. v. Warras, 141 Wis. 119, 123 N. W. 656.

[a] **Mistake Not Mutual**.—Wells v. American Express Co., 49 Wis. 224, 5 N. W. 333.

1. Lyman v. Kaul, 275 Ill. 11, 113 N. E. 944.

[a] **Thus where the attorney waives a jury** contrary to the wishes of the client, the court may set aside such waiver. Lyman v. Kaul, 275 Ill. 11, 113 N. E. 944.

2. Brown v. Cohn, 88 Wis. 627, 60 N. W. 826; Morris v. Press Pub. Co., 98 App. Div. 143, 90 N. Y. Supp. 673, 15 N. Y. Ann. Cas. 343.

3. U. S.—Aurrecoechea v. Bangs, 110 U. S. 217, 3 Sup. Ct. 639, 28 L. ed. 125; Muller v. Downs, 94 U. S. 277, 24 L. ed. 76. Ga.—Harris v. McArthur, 90 Ga. 216, 15 S. E. 758; Johnson v. Wright, 19 Ga. 509. Me.—Hutchings v. Buck, 32 Me. 277. N. C.—State v. McLean, 121 N. C. 589, 28 S. E. 140, 42 L. R. A. 721; Stevenson v. Felton,

parties to its withdrawal, make proper application to the court to have it set aside and annulled.<sup>4</sup>

**VIII. CONCLUSIVENESS AND OPERATION.**—A. PERSONS BOUND.—1. Parties and Their Attorneys.—Unless the stipulation is regularly withdrawn or set aside,<sup>5</sup> it remains binding upon counsel and client,<sup>6</sup> and all the parties thereto have the right to assume

99 N. C. 58, 5 S. E. 399. Pa.—Crumley v. Lutz, 196 Pa. 559, 46 Atl. 901. S. C.—Brown v. Peckman, 55 S. C. 555, 33 S. E. 732.

[a] One party as against his adversary's objection has no right to ignore or withdraw his stipulation. U. S. Muller v. Dows, 94 U. S. 277, 24 L. ed. 76. Ala.—Prestwood v. Watson, 111 Ala. 604, 20 So. 600. Ind.—Hays v. Hynds, 28 Ind. 531.

4. Webster v. Goolsby, 130 Ark. 141, 197 S. W. 286.

[a] Application by Motion.—Ia. Ft. Dodge Lumber Co. v. Rogosch, 175 Iowa 475, 157 N. W. 189. Minn. Schaefer v. Schoenborn, 94 Minn. 490, 103 N. W. 501. N. Y.—Ettlinger v. Kruger, 147 N. Y. Supp. 37. Okla. Harjo v. Black, 49 Okla. 566, 153 Pac. 1137.

[b] But upon notice to the other party a party may, according to some cases, withdraw his stipulation where the conditions would justify the court in setting the agreement aside and where no prejudice follows. Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 Sup. Ct. 693, 46 L. ed. 963; Wallace v. Matthews, 39 Ga. 617, 99 Am. Dec. 473.

5. See *supra*, VI.

6. U. S.—Brooklyn M. & M. Co. v. Miller, 227 U. S. 194, 33 Sup. Ct. 251, 57 L. ed. 478; Pensacola State Bank v. Melton, 210 Fed. 57. Ark.—Webster v. Goolsby, 130 Ark. 141, 197 S. W. 286. Colo.—Gibson v. Foster, 24 Colo. App. 252, 133 Pac. 144. Ga. Worsham v. Ligon, 147 Ga. 39, 92 S. E. 756; Atlanta, S. M. & L. R. Co. v. Bradley, 141 Ga. 740, 81 S. E. 1104. Ill.—Baker v. Pierce, 197 Ill. App. 158; Eaton v. Western Life Indemnity Co., 185 Ill. App. 217; Gilbert v. Croshaw, 178 Ill. App. 10. Ind.—Traveler's Protective Assn. v. Smith (Ind.), 101 N. E. 817. Ia.—Ft. Dodge, D. M. & S. R. Co. v. Burns, 177 Iowa 51, 158 N. W. 582; Dwight v. City of Des Moines, 174 Iowa 178, 156 N. W. 336. La.—Succession of Lefort, 139 La. 51,

71 So. 215, Ann. Cas. 1917E, 769. Minn.—Olson v. Moulster, 137 Minn. 96, 162 N. W. 1068. Mo.—Laclede Land & Imp. Co. v. Epright, 265 Mo. 210, 177 S. W. 386; Schawacker v. McLaughlin, 139 Mo. 333, 40 S. W. 935; *In re McManus' Estate* (Mo. App.), 199 S. W. 422; Stone v. St. Louis Union Trust Co., 183 Mo. App. 261, 166 S. W. 1091. Mont.—Bush v. Baker, 46 Mont. 535, 129 Pac. 550; Morin v. Wells, 30 Mont. 76, 75 Pac. 688. Neb.—Holmes v. State, 82 Neb. 406, 118 N. W. 99. N. J.—Decker v. George W. Smith & Co., 88 N. J. L. 630, 96 Atl. 915. N. Y.—Dubuc v. Lazell, Dalley & Co., 182 N. Y. 482, 75 N. E. 401; William Randall & Sons v. Garfield W. Mills, 178 App. Div. 196, 165 N. Y. Supp. 125; *In re Cushman*, 177 App. Div. 127, 163 N. Y. Supp. 712; Rotberg v. Hebron, 157 N. Y. Supp. 788; *In re Fred*, 151 N. Y. Supp. 276. Okla.—Lewis v. Allen, 42 Okla. 584, 142 Pac. 384. Ore.—Hutcheon v. West Coast Life Ins. Co., 67 Ore. 12, 135 Pac. 179. Pa.—Manufacturers' Natural Gas Co. v. Birmingham & Brownsville Macadamized Turnpike Road Co., 243 Pa. 458, 90 Atl. 134. Tex.—Houston Oil Co. v. Wm. M. Rice Institute (Tex. Civ. App.), 194 S. W. 413; Commonwealth Bonding & Casualty Ins. Co. v. Beavers (Tex. Civ. App.), 186 S. W. 559. Vt.—United States v. U. S. F. & G. Co., 83 Vt. 278, 75 Atl. 280; Clark v. Tudhope, 80 Vt. 246, 95 Atl. 489. Wash.—Connor v. Seattle, 82 Wash. 296, 144 Pac. 52. W. Va.—McCoy v. McCoy, 74 W. Va. 64, 81 S. E. 562, Ann. Cas. 1916C, 367. Wis. Calahan v. Moll, 160 Wis. 523, 152 N. W. 179, L. R. A. 1916A, 744; Illinois Steel Co. v. Warras, 141 Wis. 119, 123 N. W. 656.

Necessity of consent of client, see *supra*, II, B, 2.

Substituted counsel bound by a stipulation of his predecessor, see *supra*, II, B, 1.

[a] Jurisdiction to hear a motion when conferred by stipulation, cannot



that its terms will not be questioned,<sup>7</sup> or the right to its use be resisted.<sup>8</sup> The court, moreover, is justified in charging the jury in accordance with a stipulation.<sup>9</sup>

**Intervenors.**—Upon the principal that intervenors take the case as they find it,<sup>10</sup> they have, when properly made parties to the suit, been concluded by stipulations entered into before their intervention.<sup>11</sup>

**2. Strangers.**—One not a party to the proceeding nor to the stipulation is not concluded thereby.<sup>12</sup>

**3. Conclusiveness on Court.**—It is the duty of the court to enforce and effectuate a valid stipulation<sup>13</sup> in conformity to its agreed

be questioned by the parties after it has been exercised. *Lobe v. Bartaschawich*, 37 N. D. 572, 164 N. W. 276.

[b] **Failure to file briefs** not ground for dismissal of appeal where the filing of briefs is waived by stipulation. *Adams v. State*, 81 Tex. Crim. 114, 193 S. W. 1067.

[c] **Theory of Case.**—Where defendants submitted the case to the jury as one in trover instead of in replevin, and the jury returns its verdict on that theory, they are estopped from questioning the propriety of the form of verdict so returned. *Olson v. Moulster*, 137 Minn. 96, 162 N. W. 1068.

[d] **Recitals in a document will bind** the party who stipulates to admit the document in evidence. *Crews v. Powers* (Tex. Civ. App.), 184 S. W. 363.

**Limiting Issues.**—*Brown v. Aitken*, 90 Vt. 569, 99 Atl. 265.

[e] **A deposition cannot be read in evidence** contrary to a stipulation to the effect that it should not be so read. *Stevens v. Illinois Cent. R. Co.*, 157 Ky. 561, 163 S. W. 747.

[f] **Where use of evidence taken in another action** is authorized by stipulation, the party cannot object to such evidence being incorporated in the motion for new trial. *McCann v. McCann*, 20 Cal. App. 564, 129 Pac. 966.

**7.** *Webster v. Goolsby*, 130 Ark. 141, 197 S. W. 286.

**8.** *Webster v. Goolsby*, 130 Ark. 141, 197 S. W. 286.

**9.** *Decker v. George W. Smith & Co.*, 88 N. J. L. 630, 95 Atl. 915; *Calahan v. Moll*, 160 Wis. 523, 152 N. W. 179 L. R. A. 1916A, 744.

**10.** See 14 STANDARD PROC. 330.

**11.** *Worsham v. Ligon*, 147 Ga. 39, 92 S. E. 756.

**12.** *U. S.—Central Trust Co. v. Wor-*

*cester Cycle Co.*, 128 Fed. 483. **Ala.** *Heirs of Holman v. Bank of Norfolk*, 12 Ala. 369. **Ariz.**—*Allen v. State*, 14 Ariz. 458, 130 Pac. 1114, 44 L. R. A. (N. S.) 468. **Cal.**—*Wilkins v. Stidger*, 22 Cal. 231, 83 Am. Dec. 64. **Ind.** *Weaver v. Ferguson* (Ind. App.), 117 N. E. 659. **Tex.**—*Grant v. Hill* (Tex. Civ. App.), 30 S. W. 952. **W. Va.** *Western Lunatic Asylum v. Miller*, 29 W. Va. 326, 1 S. E. 740, 6 Am. St. Rep. 644. **Wash.**—*Yakima County v. Olson*, 94 Wash. 579, 162 Pac. 987; *Port of Seattle v. Yesler Estate*, 83 Wash. 166, 145 Pac. 209.

**13.** *U. S.*—*Grant v. National Bank*, 232 Fed. 201. **Ark.**—*Webster v. Goolsby*, 130 Ark. 141, 197 S. W. 286. **Colo.** *Gibson v. Foster*, 24 Colo. App. 252, 133 Pac. 144. **Ga.**—*Atlanta, S. M. & L. R. Co. v. Bradley*, 141 Ga. 740, 81 S. E. 1104; *Kelly v. Cunard*, 21 Ga. App. 119, 94 S. E. 80. **Ill.**—*People v. Spring Lake Drainage & Levee Dist.*, 253 Ill. 479, 97 N. E. 1042. **Me.**—*In re Robinson*, 116 Me. 125, 100 Atl. 373. **Mich.**—*Brown v. Spiegel*, 155 Mich. 138, 120 N. W. 579. **Mont.**—*Spaulding v. Stone*, 46 Mont. 483, 129 Pac. 327. **N. Y.**—*People v. New York Cent. & H. R. R. Co.*, 213 N. Y. 136, 107 N. E. 55; *William Randall & Sons v. Garfield W. Mills*, 178 App. Div. 196, 165 N. Y. Supp. 125.

**Stipulations not binding on court**, see *supra*, IV, A.

[a] **Where the action is tried by a referee** pursuant to stipulation, the court cannot review the referee's findings. *Grant v. National Bank*, 232 Fed. 201.

[b] **Although the stipulation "was perhaps foolish"** the court will nevertheless enforce it where the parties do not seek to be relieved therefrom. Thus the court will enforce a stipulation of the defendant's attorney that "if they

terms,<sup>14</sup> particularly where the other party has in good faith relied upon it;<sup>15</sup> and though the court may on request of the parties amend the agreement,<sup>16</sup> it cannot modify, alter or change it in any material detail against their objection.<sup>17</sup> The court need not enforce an oral stipulation where a writing is necessary nor one which has not been entered or filed as required by law unless the stipulation in either case is admitted or has been acted upon,<sup>18</sup> nor need it give effect to a stipulation which is indefinite in character,<sup>19</sup> or one which is merely the expression of a legal conclusion,<sup>20</sup> or one which is not properly the subject of stipulation.<sup>21</sup>

**Appellate Courts.**—An appellate court should not disregard stipulations made at the trial and which would be binding on the trial court,<sup>22</sup> and on the other hand a stipulation which the trial judge might refuse to enforce would not conclude the appellate judge.<sup>23</sup>

**B. OPERATION AND EFFECT.**—No order of court is necessary to vitalize stipulations; they operate *proprio vigore*.<sup>24</sup> Where the exist-

find 100 douche pans in the place, I am willing to have judgment entered against my client for the full amount.'"  
*Broome-Clinton Co. v. Woltzer*, 144 N. Y. Supp. 768.

[c] **Reversal for Failure To Enforce.**—Refusal to allow proof of damages under a stipulation permitting defendant to amend his answer to set up a claim for damages caused by plaintiff's levy of attachment in the same suit, held reversible error. *Brown v. Spiegel*, 155 Mich. 138, 120 N. W. 579.

14. **Colo.**—*Gibson v. Foster*, 24 Colo. App. 252, 133 Pac. 144. **Me.**—*In re Robinson*, 116 Me. 125, 100 Atl. 373. **N. Y.**—*William Randall & Sons v. Garfield W. Mills*, 178 App. Div. 196, 165 N. Y. Supp. 125; *Burkard v. Stephan Bldg. & Const. Co.*, 160 App. Div. 50, 144 N. Y. Supp. 775.

[a] **Stipulation that judgment be entered during the term or in vacation as of the term, is not complied with where the judgment is entered pursuant to order at a subsequent term.** *In re Robinson*, 116 Me. 125, 100 Atl. 373.

15. *Brown v. Spiegel*, 155 Mich. 138, 120 N. W. 579.

16. See *supra*, V.

17. *William Randall & Sons v. Garfield W. Mills*, 178 App. Div. 196, 165 N. Y. Supp. 125.

18. See *supra*, III, B and D.

19. *Bailey v. Montgomery*, 177 App. Div. 777, 165 N. Y. Supp. 159.

20. *Jensen v. Northwestern Underwriters' Assn.*, 35 N. D. 223, 159 N. W. 611.

21. **Ala.**—*Kidd v. McMillan*, 21 Ala. 325. **Cal.**—*Powelson v. Lockwood*, 82 Cal. 613, 23 Pac. 143. **Ga.**—*Ford v. Holmes*, 61 Ga. 419. **Ill.**—*People v. Spring Lake Drainage & Levee Dist.*, 253 Ill. 479, 97 N. E. 1042. **Mass.**—*Masonic Bldg. Assn. v. Brownell*, 164 Mass. 306, 41 N. E. 306. **Mich.**—*Rousseau v. Brotherhood of American Yeomen*, 177 Mich. 568, 143 N. W. 626. **Tex.**—*Needham v. Cooney* (Tex. Civ. App.), 173 S. W. 979. **Wis.**—*State v. McArthur*, 23 Wis. 427.

See *supra*, IV, A.

[a] **Stipulation waiving exceptions to court's charge to jury.** *Needham v. Cooney* (Tex. Civ. App.), 173 S. W. 979.

22. **Ala.**—*Smith v. Tennessee Coal, Iron & R. Co.*, 192 Ala. 129, 68 So. 865. **S. D.**—*Gruba v. Chapman*, 36 S. D. 119, 153 N. W. 929. **Tex.**—*Houston Oil Co. v. Wm. M. Rice Institute* (Tex. Civ. App.), 194 S. W. 413.

[a] **Where no relief from stipulation asked in trial court the appellate court will not disregard it, although it "was perhaps foolish."** *Broome-Clinton Co. v. Woltzer*, 144 N. Y. Supp. 768.

23. *Jensen v. Northwestern Underwriters' Assn.*, 35 N. D. 223, 159 N. W. 611.

[a] **Stipulation Expressing Legal Conclusion.**—*Jensen v. Northwestern Underwriters' Assn.*, 35 N. D. 223, 159 N. W. 611.

24. *Hansford v. Stone-Ordean-Wells Co.*, 201 Fed. 185.

[a] **Stipulation Extending Time To**

ence or truth of certain facts in issue are stipulated to<sup>25</sup> no proof of such facts is necessary<sup>26</sup> or proper,<sup>27</sup> and no findings with respect to facts thus settled are required.<sup>28</sup> A stipulation confining the trial to certain issues<sup>29</sup> operates to exclude all other issues.<sup>30</sup> An agreement to waive objections to pleadings<sup>31</sup> authorizes the court to try all material matters alleged in the pleading.<sup>32</sup>

**IX. PROCEEDINGS TO ENFORCE.**—Actions. —For breach of a stipulation made upon consideration an action for damages will lie against the party in default,<sup>33</sup> and in a proper case a suit for specific

Plead. — *Hansford v. Stone-Ordean-Wells Co.*, 201 Fed. 185.

[b] **Stipulation Not a Judgment.**—Parties to a suit in equity agreed to settle it and dismiss the proceeding. The agreement was drawn up in writing and signed. A decree was entered dismissing the bill "as per the following stipulation now filed herein" and the instrument followed. The court construed the instrument, aside from the order of dismissal, as being neither a decree nor a consent decree, but merely an agreement entered into for the purpose of terminating the pending litigation. It did not, therefore, have the force and effect of a prior adjudication. *People v. Spring Lake Drainage & Levee Dist.*, 253 Ill. 479, 97 N. E. 1042.

25. See *supra*, IV, B, 4, A.

26. **U. S.**—*Connell Bros. Co. v. H. Diederichsen & Co.*, 213 Fed. 737, 130 C. C. A. 251. **Ala.**—*Ballard v. Bank of Roanoke*, 187 Ala. 335, 65 So. 356. **Ark.**—*Planters' Fire Ins. Co. v. Crockett*, 115 Ark. 606, 170 S. W. 1012. **Cal.** *People v. Nolan*, 34 Cal. App. 545, 167 Pac. 642. **Ill.**—*Mid-City Trust & Savings Bank v. National Surety Co.*, 202 Ill. App. 6. **Ind.**—*Traveler's Protective Assn. v. Smith*, 101 N. E. 817. **Me.** *Thompson v. Bowes*, 115 Me. 6, 97 Atl. 1. **Mont.**—*Spaulding v. Stone*, 46 Mont. 483, 129 Pac. 327. **Ore.**—*Hutcheon v. West Coast Life Ins. Co.*, 67 Ore. 12, 135 Pac. 179. **Tex.**—*Commonwealth Bonding & Casualty Ins. Co. v. Harper*, (Tex. Civ. App.), 180 S. W. 1156; *Campbell v. Gibbs* (Tex. Civ. App.), 161 S. W. 430.

[a] **Legal Conclusions.**—A stipulation that facts pleaded are true does not bind the party as to legal conclusions. *Day v. Old Colony Trust Co.*, 228 Mass. 225, 117 N. E. 252.

27. *Webster v. Goolsby*, 130 Ark. 141, 197 S. W. 286.

[a] "It would be, and is, an anomalous situation to have litigants stipulate as to what the facts are for the purpose of a trial, and then to admit evidence contradicting the recital of such stipulation." *Webster v. Goolsby*, 130 Ark. 141, 197 S. W. 286, 287.

28. *Alderson v. Cutting*, 163 Cal. 503, 126 Pac. 157, Ann. Cas. 1914A, 1; *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364.

See generally the title "Findings and Conclusions."

29. See *supra*, IV, B, 1.

30. **Cal.**—*Taylor v. Morris*, 163 Cal. 717, 127 Pac. 66. **Ga.**—*Evans v. Thompson*, 143 Ga. 61, 84 S. E. 128. **Ill.**—*Curtis v. Donnelly*, 273 Ill. 79, 112 N. E. 293. **Tex.**—*Houston Oil Co. v. Wing* (Tex. Civ. App.), 194 S. W. 221.

[a] **Binding on Appeal.**—*Houston Oil Co. v. Wm. M. Rice Institute* (Tex. Civ. App.), 194 S. W. 413.

[b] Such limitations amount to binding waivers of all issues not included. *Brown v. Aitken*, 90 Vt. 569, 99 Atl. 265.

[c] A stipulation that no question of interstate commerce involved, held not to preclude proof by the employee that he was engaged in interstate commerce where such proof offered to rebut a defense. *Wagner v. Chicago & A. R. Co.*, 265 Ill. 245, 106 N. E. 809, Ann. Cas. 1916A, 778.

[d] On motion for new trial the sufficiency of evidence to support issues eliminated by stipulation, cannot be considered. *Conwell v. Varain*, 20 Cal. App. 521, 130 Pac. 23.

31. See *supra*, IV, B, 3.

32. *Radford v. First Nat. Bank*, 71 Ore. 84, 142 Pac. 362.

33. *Rothberg v. Hebron*, 157 N. Y. Supp. 788.



performance will lie,<sup>34</sup> or a mandatory injunction will issue to compel a stipulating party to perform certain acts in compliance with the agreement.<sup>35</sup>

**Motion.**—A binding stipulation relative to some step in the cause may be summarily enforced by motion,<sup>36</sup> and the order upon such motion should substantially conform to the agreement made by the parties,<sup>37</sup> and be specific enough to fully guard and protect the rights of the parties under their agreement.<sup>38</sup>

**X. USE OF STIPULATION.**—In the absence of limitations in the stipulation as to its use, the presumption is that it is intended for use at any stage of the litigation.<sup>39</sup> Thus a stipulation made in a justice court, and the use of which is not limited to that court, may be used on appeal therefrom.<sup>40</sup> But if the stipulation, by its terms, shows plainly that it was limited to the trial at which it was given, it cannot be used at a subsequent trial.<sup>41</sup>

34. *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125.

[a] **Stipulation to abide the result of another suit, specifically enforced.** *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125.

[b] **Adequacy of Legal Remedy.**—An action for damages for the breach of a stipulation that an action at law which has passed to judgment shall abide the final decision of another action is not as practical and efficient to attain the ends of justice as a suit in equity for specific performance of the contract where the final decision of the other action requires a reversal of the judgment. *Brown v. Arnold*, 131 Fed. 723, 67 C. C. A. 125.

35. *Atlanta, S. M. & L. R. Co. v. Bradley*, 141 Ga. 740, 81 S. E. 1104.

[a] **A mandatory injunction compelling a railroad company to remove its tracks in compliance with a stipulation, held proper.** *Atlanta, S. M. & L. R. Co. v. Bradley*, 141 Ga. 740, 81 S. E. 1104.

36. *Mangler v. Maryland Cas. Co.*, 201 Ill. App. 560; *William Randall & Sons v. Garfield W. Mills*, 178 App. Div. 196, 165 N. Y. Supp. 125; *Potter v.*

*Rossiter*, 109 App. Div. 737, 96 N. Y. Supp. 177.

[a] **Motion for order permitting taking of samples in accordance with a stipulation.** *William Randall & Sons v. Garfield W. Mills*, 178 App. Div. 196, 165 N. Y. Supp. 125.

37. *William Randall & Sons v. Garfield W. Mills*, 178 App. Div. 196, 165 N. Y. Supp. 125.

38. *William Randall & Sons v. Garfield W. Mills*, 178 App. Div. 196, 165 N. Y. Supp. 125.

[a] **Where plaintiff's failure to take depositions was induced by a written stipulation, the court will enforce it, though it was not filed as required by statute.** *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529.

39. *Webster v. Goolsby*, 130 Ark. 141, 197 S. W. 286.

40. *Webster v. Goolsby*, 130 Ark. 141, 197 S. W. 286.

41. *Goodman v. New York Rvs. Co.*, 88 Misc. 95, 150 N. Y. Supp. 702.

[a] **Stipulation as to amount of damages held not binding at subsequent trial.** *Goodman v. New York Rvs. Co.*, 88 Misc. 95, 150 N. Y. Supp. 702.

# STOCK AND STOCKHOLDERS

By the Editorial Staff.

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## CROSS-REFERENCES:

Corporations;                      Subscriptions;  
 Set-Off, Counterclaim and    Winding Up Corporations.  
 Recoupment;

Garnishment of stock and unpaid subscriptions, see 10 STANDARD PROC. 433.

For forms, see 9 STANDARD PROC. 280, 1174.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

# I. STOCK SUBSCRIPTIONS.—A. REMEDIES OF CORPORATION.

1. **Actions To Enforce.**—a. *In General.*—An action at law may be maintained to enforce a subscription to the capital stock of a corporation.<sup>1</sup> The fact that a corporation has a lien on its stock,<sup>2</sup> or that it has, under a statute, the right to forfeit the stock for non-payment of the agreed price,<sup>3</sup> does not affect the right to maintain an action upon the subscription. Unless the terms and conditions of payment of the subscription are fixed by the subscription agreement,<sup>4</sup> the making of a call in accordance with existing statutory or charter provisions is a condition precedent to the maintenance of the action.<sup>5</sup> A demand for payment need not be made after notice of a call has been given,<sup>6</sup> nor when payment is due on or before a specified date.<sup>7</sup> A tender of a certificate of stock need not be made the subscriber,<sup>8</sup> unless the delivery of a certificate is by the agreement expressly made a concurrent act with final payment of the subscription.<sup>9</sup> When the subscription is payable in installments, an action may be maintained on each installment as it falls due,<sup>10</sup> or the total amount may be recovered after all installments have matured.<sup>11</sup> Causes of action against different subscribers, involving similar issues, may in the discretion of the court, be consolidated for trial.<sup>12</sup>

1. See 5 STANDARD PROC. 688.

[a] **The Right of Action Is Purely Legal.**—*Brookline Canning & Packing Co. v. Evans*, 163 Mo. App. 564, 146 S. W. 828.

[b] Existing corporation and one to be formed distinguished, see *Bole v. Fulton*, 233 Pa. 609, 82 Atl. 947.

2. *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

**Enforcement of lien of the corporation**, see *infra*, II, H.

3. See 5 STANDARD PROC. 688.

[a] A forfeiture of the stock is not a condition precedent to maintenance of the action. *Nashua Sav. Bank v. Anglo-American Land, M. & A. Co.*, 189 U. S. 221, 23 Sup. Ct. 517, 47 L. ed. 782.

**Enforcing forfeiture for failure to pay subscription**, see *infra*, I, A, 2.

4. *Los Angeles Athletic Club v. Spire*, 166 Cal. 173, 135 Pac. 298; *Imperial Land & Stock Co. v. Oster*, 34 Cal. App. 776, 168 Pac. 1159.

5. See 5 STANDARD PROC. 587. And see *Los Angeles Athletic Club v. Spire*, 166 Cal. 173, 135 Pac. 298.

[a] Where the action is instituted by a stockholder because of the failure of the directors to act, "the suit in itself is equivalent to a notice of call, and a court of equity has power to make the call on a proper showing." *Bergman v. Evans*, 92 Wash. 158, 158 Pac. 961.

6. Cal.—*Imperial Land & Stock Co. v. Oster*, 34 Cal. App. 776, 168 Pac. 1159.

Ga.—*Winter v. Muscogee R. Co.*, 11 Ga. 438. Ind.—*Beckner v. Riverside & B. G. Tpk. Co.*, 65 Ind. 468.

7. *Mountain Timber Co. v. Case*, 65 Ore. 417, 133 Pac. 92.

8. Cal.—*California Southern Hotel Co. v. Callender*, 94 Cal. 120, 29 Pac. 859, 28 Am. St. Rep. 99.

Ind.—*Drover v. Evans*, 59 Ind. 454; *New Albany & S. R. Co. v. McCormick*, 10 Ind. 499, 71 Am. Dec. 337. Minn.—*Columbia Electric Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244. Utah.—*Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577.

And see *Sanders v. Barnaby*, 173 App. Div. 244, 159 N. Y. Supp. 579.

9. U. S.—*In re Hall*, 206 Fed. 850. Minn.—*Walter A. Wood Harvester Co. v. Jefferson*, 57 Minn. 456, 59 N. W. 532. Ore.—*Astoria & S. C. R. Co. v. Hill*, 20 Ore. 177, 25 Pac. 379.

10. See *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577.

11. *Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577.

[a] After all the installments have matured the corporation cannot split its cause of action and maintain separate actions upon each installment. *Walter A. Wood Harvester Co. v. Jefferson*, 57 Minn. 456, 59 N. W. 532.

12. *Columbia-Knickerbocker Trust*



b. *Parties*.—The corporation may maintain the action,<sup>13</sup> even though it is not named in the subscription agreement,<sup>14</sup> or was not organized at the time the subscription was made.<sup>15</sup> Where the corporation refuses to sue, a stockholder who has paid for his stock in full may institute the action in its behalf.<sup>16</sup> A receiver of the corporation may also maintain the action,<sup>17</sup> though a receiver will not be appointed for a solvent corporation merely to collect unpaid subscriptions.<sup>18</sup> Unless it is otherwise provided by statute,<sup>19</sup> the action cannot be maintained against several stockholders jointly,<sup>20</sup> though when the corporation is insolvent and the suit is in equity by a creditor or by a receiver, for the benefit of creditors, different stockholders may be joined as defendants.<sup>21</sup>

c. *Pleadings*.—(I.) *Complaint*.—The complaint must allege the making of the subscription by defendant,<sup>22</sup> the organization of the cor-

Co. v. Abbot, 247 Fed. 833, 160 C. C. A. 55.

Joining several subscribers as defendants in one action, see *infra*, I, A, 1, b.

13. Edinboro Academy v. Robinson, 37 Pa. 210, 78 Am. Dec. 421.

14. Cal.—Horseshoe Pier Amusement Co. v. Sibley, 157 Cal. 442, 108 Pac. 308, as the real party in interest it is entitled to sue. Mo.—De Giverville Land Co. v. Thompson, 190 Mo. App. 682, 176 S. W. 409. N. J.—But see Johnson v. Tennessee Oil, etc. Co., 74 N. J. Eq. 32, 69 Atl. 788.

[a] Where the subscription is given to a person as trustee he, as well as the corporation may enforce it. Horse-shoe Pier A. Co. v. Sibley, 157 Cal. 442, 108 Pac. 308.

15. Ky.—Stone v. Monticello Const. Co., 135 Ky. 659, 117 S. W. 369, 40 L. R. A. (N. S.) 978. Neb.—Nebraska Chicory Co. v. Lednický, 79 Neb. 587, 113 N. W. 245. N. J.—Delaware & A. R. Co. v. Irick, 23 N. J. L. 321.

16. Bergman v. Evans, 92 Wash. 158, 158 Pac. 961, Ann. Cas. 1918C, 848; Bergman Clay Mfg. Co. v. Bergman, 73 Wash. 144, 131 Pac. 485. And see Hartnett v. St. Louis Min. & M. Co., 51 Mont. 395, 153 Pac. 437.

[a] *Basis of the Right*.—"A subscriber to the capital stock of a corporation is, in virtue of his promise, a debtor, and the same principle that sustains the right of a stockholder to bring an action for the benefit of the corporation will sustain the suit of a stockholder to compel the payment of unpaid subscriptions." Bergman Clay Mfg. Co. v. Bergman, 73 Wash. 144, 143, 131 Pac. 485.

Stockholders' suits generally, see *infra*, III, and 5 STANDARD PROC. 697.

17. Ala.—Hundley v. Hewitt, 195 Ala. 647, 71 So. 419. N. Y.—Myers v. Sturgis, 123 App. Div. 470, 108 N. Y. Supp. 528, *affirmed*, 197 N. Y. 526, 90 N. E. 1162. Wis.—Lathrop v. Knapp, 27 Wis. 214.

And see *infra*, IV, C.

18. Hartnett v. St. Louis, M. & M. Co., 51 Mont. 395, 153 Pac. 437; Bergman Clay Mfg. Co. v. Bergman, 73 Wash. 144, 131 Pac. 485.

19. Pittsburgh Wholesale Grocery Co. v. Rearich, 67 Pa. Super. 490.

20. Chicago Bldg. & Mfg. Co. v. Browning, 19 Pa. Super. 355. See Hartnett v. St. Louis M. & M. Co., 51 Mont. 395, 153 Pac. 437.

Consolidation for trial, of several actions, see *supra*, I, A, 1, a.

21. See *infra*, IV, A, 7, b. And see Brown v. Allebach, 156 Fed. 697.

22. Minn.—Walter A. Wood Harvester Co. v. Robbins, 56 Minn. 48, 57 N. W. 317. N. Y.—Buffalo & N. Y. C. R. Co. v. Dudley, 14 N. Y. 336. S. C. Cheraw & C. R. Co. v. White, 14 S. C. 51. Va.—And see Stuart v. Valley R. Co., 32 Gratt. (73 Va.) 146.

[a] An express promise to pay need not be alleged as the law implies a promise to pay from an agreement to take the stock. Buffalo & N. Y. C. R. Co. v. Dudley, 14 N. Y. 336. And see San Joaquin L. & W. Co. v. Beecher, 101 Cal. 70, 35 Pac. 349. A contrary rule obtains in some states. See 5 STANDARD PROC. 687, note 95.

[b] *Ownership of the stock at the date a call was made payable* need not be alleged. American Alkali Co. v. Campbell, 113 Fed. 398.

poration,<sup>23</sup> and its right to issue capital stock and accept subscriptions thereto.<sup>24</sup> The performance of any conditions precedent to defendant's liability must be alleged.<sup>25</sup> In some states, the fact that there has been subscribed the percentage of capital stock required by statute to be subscribed before the corporation is entitled to make a call,<sup>26</sup> or that payment of the required percentage of the subscribed capital stock has been made,<sup>27</sup> is regarded as a condition precedent to maintenance of the action and must be alleged; but, in other states, failure to obtain the required amount of subscriptions,<sup>28</sup> or to receive the required payments upon the capital stock,<sup>29</sup> is considered to be matter of defense. If the subscription sued for is due only upon a call,<sup>30</sup> the making<sup>31</sup> of the

23. *Banty v. Buckles*, 68 Ind. 49; *Shick v. Citizens Enterprise Co.*, 15 Ind. App. 329, 44 N. E. 48, 57 Am. St. Rep. 230.

[a] **General allegations of incorporation** are sufficient. Ala.—*Planters' & M. I. P. Co. v. Webb*, 144 Ala. 666, 39 So. 562; *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344. Ky.—*Henderson & N. R. Co. v. Leavell*, 16 B. Mon. 358. N. Y.—*Kohlmetz v. Calkins*, 16 App. Div. 518, 44 N. Y. Supp. 1031. See also 5 STANDARD PROC. 643.

[b] **The articles of incorporation** need not be set out. *American Alkali Co. v. Campbell*, 113 Fed. 398. But see *Herron v. Vance*, 17 Ind. 595; *Pedicaris v. Trenton City Bridge Co.*, 29 N. J. L. 367.

[c] **When the subscription is to stock of an existing corporation**, facts showing a legal corporate organization need not be alleged. *Shick v. Citizens Enterprise Co.*, 15 Ind. App. 329, 44 N. E. 48, 57 Am. St. Rep. 230.

**Pleading incorporation generally**, see 5 STANDARD PROC. 640.

24. *Minneapolis Harvester Works v. Libby*, 24 Minn. 327. And see *Duluth Club v. MacDonald*, 74 Minn. 254, 76 N. W. 1128, 73 Am. St. Rep. 344.

25. Ga.—*Dotson v. Savannah Pure Food Co.*, 140 Ga. 161, 78 S. E. 801. Ky.—*Henderson & N. R. Co. v. Leavell*, 16 B. Mon. 358. Tex.—*Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

See generally 11 STANDARD PROC. 998, et seq.

[a] **When a subscription is conditional upon subscriptions by other persons to a stated amount**, the fact that the required amount has been subscribed must be pleaded. *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 44 N. E. 48, 57 Am. St. Rep.

230 (an allegation that such subscriptions were made in good faith by solvent persons, is not required); *Knottsville Roller Mill Co. v. Mattingly*, 18 Ky. L. Rep. 246, 35 S. W. 1114.

26. *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *York Park Bldg. Assn. v. Barnes*, 39 Neb. 834, 58 N. W. 440, a general allegation that the required amount has been subscribed is sufficient.

27. *Peninsular Ry. Co. v. Duncan*, 28 Mich. 130 (avermnt by way of recital held sufficient); *La Cresse Brown Harvester Co. v. Goddard*, 114 Wis. 610, 91 N. W. 225; *Anvil M. Co. v. Sherman*, 74 Wis. 226, 42 N. W. 226, 4 L. R. A. 232.

[a] **An averment that a corporation is duly organized** has been held sufficient. *Milwaukee Brick & Cement Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838. And see *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415.

28. Ga.—*Dotson v. Savannah Pure Food Co.*, 140 Ga. 161, 78 S. E. 801. Ky.—*Lail v. Mt. Sterling Coal Road Co.*, 13 Bush 32. But see *Fry's Exr. v. Lexington & B. S. R. R. Co.*, 2 Metc. 314. N. Y.—*Myers v. Sturgis*, 123 App. Div. 470, 108 N. Y. Supp. 528, *affirmed*, 197 N. Y. 526, 90 N. E. 1162.

29. See *Jeffery v. Selwyn*, 220 N. Y. 77, 115 N. E. 275.

30. See *supra*, I, A, 1, a.

31. Cal.—*Bell Development Co. v. Marshall*, 35 Cal. App. 324, 169 Pac. 717. Ind.—*Banty v. Buckles*, 68 Ind. 49. Minn.—*Wood Harvester Co. v. Robbins*, 56 Minn. 48, 57 N. W. 317. Ohio.—*Mansfield, C. & L. M. R. Co. v. Hall*, 26 Ohio St. 310. Wis.—*La Cresse Brown Harvester Co. v. Storey*, 114 Wis. 614, 91 N. W. 1127; *South Mil-*

call, the giving of notice thereof,<sup>32</sup> and the expiration of the time limited therein for payment,<sup>33</sup> must be alleged. An agreement to pay the call need not be averred.<sup>34</sup> A tender of a certificate of stock, or readiness and willingness to deliver the stock, need not be alleged,<sup>35</sup> unless the delivery of a certificate is expressly made a condition to payment of the subscription, or its final instalment.<sup>36</sup>

(II.) **Answer.** — The answer must plead any matter of affirmative defense which is relied upon by the defendant. Thus the defense that the corporation was never legally organized,<sup>37</sup> that the entire,<sup>38</sup> or required amount of the capital stock had not been subscribed,<sup>39</sup> that calls were illegally made,<sup>40</sup> that a liability once existing has been extinguished or released,<sup>41</sup> or fraud in obtaining the subscription,<sup>42</sup> should be specially pleaded.

(III.) **Set-Off and Counterclaim.** — A debt due the defendant from the corporation may be pleaded as a set-off or counterclaim,<sup>43</sup> though where the corporation is insolvent and the action is brought by a receiver,<sup>44</sup>

*waukee Co. v. Murphy*, 112 Wis. 614, 88 N. W. 583, 58 L. R. A. 82.

[a] **An averment that the call was "duly made"** (*Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48, 57 N. W. 317; *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. 358), in accordance with the provisions of the statute and by laws (*Atlantic Mut. F. Ins. Co. v. Young*, 38 N. H. 451, 75 Am. Dec. 200; *La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610, 91 N. W. 225; *Germania Iron Min. Co. v. King*, 94 Wis. 439, 69 N. W. 181, 36 L. R. A. 51) is sufficient.

32. **Ark.**—*Mississippi, O. & R. R. Co. v. Gaster*, 22 Ark. 361. **Ill.**—*Tomlin v. Tonica & P. R. Co.*, 23 Ill. 429. **Wash.**—*Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089. **Wis.**—*South Milwaukee Co. v. Murphy*, 112 Wis. 614, 88 N. W. 583, 58 L. R. A. 82.

[a] **A general allegation of notice is sufficient.** **Ala.**—*Carlisle v. Cahawba & M. R. Co.*, 4 Ala. 70. **Minn.**—*Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48, 57 N. W. 317. **Wis.**—*La Crosse Brown Harvester Co. v. Goddard*, 114 Wis. 610, 91 N. W. 225. *Compare Pennsylvania & Ohio Canal Co. v. Webb*, 9 Ohio 136.

33. *Bethel & H. Toll-Bridge Co. v. Bean*, 58 Me. 89.

34. *American Alkali Co. v. Campbell*, 113 Fed. 398.

35. **Minn.**—*Marson v. Deither*, 49 Minn. 423, 52 N. W. 38. **Tex.**—*McCord v. Southwestern Sundries Co.* (*Tex. Civ. App.*), 158 S. W. 226. **Utah.**

*Utah Hotel Co. v. Madsen*, 43 Utah 285, 134 Pac. 577.

**Tender as a condition precedent to maintenance of the action, see *supra*, I, A, 1, a.**

36. *Walter A. Wood Harvester Co. v. Jefferson*, 57 Minn. 456, 59 N. W. 532. And see *Clark v. Continental Imp. Co.*, 57 Ind. 135.

37. *Columbia Elec. Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244.

38. *McFarland v. West Side Imp. Assn.*, 56 Neb. 277, 76 N. W. 584.

39. See *supra*, I, A, 1, c, (1).

40. *Inter-Mountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20; *Bank of China, Japan & the Straits v. Morse*, 44 App. Div. 435, 61 N. Y. Supp. 268, call for an illegal purpose.

41. *Atlantic Trust Co. v. Osgood*, 116 Fed. 1019; *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 88 N. W. 583, 58 L. R. A. 82, by a transfer of the stock.

42. **Cal.**—*Marysville Elec. L. & P. Co. v. Johnson* 93 Cal. 538, 29 Pac. 126, 27 Am. St. Rep. 215. **Ga.**—*Dotson v. Savannah Pure Food Co.*, 140 Ga. 161, 78 S. E. 801. **Ill.**—*Cole v. Joliet Opera House Co.*, 79 Ill. 96, a general allegation of fraud is insufficient.

**Fraud as a defense, see *infra*, II, G, 3, and the title "Fraud and Deceit."**

43. *Bausman v. Denny*, 73 Fed. 69; *Boulton Carbon Co. v. Mills*, 78 Iowa 460, 43 N. W. 290, 5 L. R. A. 649.

44. *Vaughan-Robertson Drug Co. v. Grimes-Mills Drug Co.*, 173 N. C. 502, 92 S. E. 376.



or a creditor,<sup>45</sup> the rule is otherwise. Damages to the subscriber from fraud inducing the subscription may be pleaded in recoupment.<sup>46</sup>

**2. Forfeiture of Stock.**—A right in the corporation to sell and forfeit the stock of a subscriber who is in default under his subscription contract depends entirely upon the existence of a statute or provision in the charter or by-laws of the corporation,<sup>47</sup> or upon the prior consent of the subscriber having been given to a forfeiture, under such circumstances.<sup>48</sup> The remedy by forfeiture is cumulative to the right of the corporation to maintain an action upon the contract of subscription,<sup>49</sup> and, under some statutes, forfeiture proceedings which have been instituted may be abandoned, under specified conditions and an action commenced to recover the amount due.<sup>50</sup> Proceedings to effect a forfeiture of stock must strictly comply with the forms and requirements of the statute or bylaws.<sup>51</sup> After a forfeiture and sale of stock, made in good faith, an action cannot in most jurisdictions be maintained against the subscriber to recover the balance due from him under his subscription,<sup>52</sup> although such a proceeding is permitted in some states.<sup>53</sup> The subscriber's relief against a forfeiture is treated elsewhere in this article.<sup>54</sup>

**B. RIGHTS AND REMEDIES OF SUBSCRIBER.**—**1. In General.**—If the right of a subscriber who has paid for stock, is denied by the corporation, the value of the stock may be recovered in an action at law,<sup>55</sup> or a stock certificate will be required to be issued by the corporation.<sup>56</sup> A subscriber to stock in a corporation is entitled to receive stock of

45. See *infra*, IV, A, 8, b.

46. *Owens v. Boyd Land Co.*, 95 Va. 560, 28 S. E. 950.

47. *Ore.*—*Budd v. Multnomah St. Ry. Co.*, 15 Ore. 413, 15 Pac. 659, 3 Am. St. Rep. 413. *Tenn.*—*Cartwright v. Dickinson*, 88 Tenn. 476, 12 S. W. 1030, 17 Am. St. Rep. 910, 7 L. R. A. 706. *Wash.*—*Mitchell v. Blue Star Min. Co.*, 98 Wash. 191, 167 Pac. 130.

[a] Mere failure to pay a subscription does not work a forfeiture. *Anthony v. Hillsboro Gold Min. Co.*, 58 Ore. 258, 113 Pac. 442, 114 Pac. 95.

[b] In Washington there can be no forfeiture of stock under the statute, unless the by-laws of the corporation prescribe the manner of its sale. *Clise Inv. Co. v. Washington Sav. Bank*, 18 Wash. 8, 50 Pac. 575.

48. *Jensen v. Northwestern Underwriters Assn.*, 35 N. D. 223, 159 N. W. 611.

49. See 5 STANDARD PROC. 688.

50. *Stockton C. H. & Agr. Works v. Houser*, 109 Cal. 1, 41 Pac. 809; *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *National Paraffine Oil Co. v. Chappellet*, 4 Cal. App. 505, 88 Pac. 506.

51. *Cal.*—*Cheney v. Canfield*, 158 Cal. 342, 111 Pac. 92, 32 L. R. A. (N. S.) 16; *Raisch v. Missouri, K. & T. Oil Co.*, 7 Cal. App. 667, 95 Pac. 662. *Idaho.*—*Corcoran v. Sonora Min. & M. Co.*, 8 Idaho 651, 71 Pac. 127. *Kan.*—*Crissey v. Cook*, 67 Kan. 20, 72 Pac. 541. *N. Y.*—*Matter of New York & W. Town Site Co.*, 145 App. Div. 623, 130 N. Y. Supp. 414. *N. D.*—*Jensen v. Northwestern Underwriters' Assn.*, 35 N. D. 223, 159 N. W. 611. *Tex.*—*Nicholson-Watson Shoe & Clothing Co. v. Urquhart*, 32 Tex. Civ. App. 527, 75 S. W. 45. *Utah.*—*Schwab v. Frisco Mining & M. Co.*, 21 Utah 258, 60 Pac. 940.

52. *Mandel v. Swan Land & Cattle Co.*, 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313; *Germantown Pass. Ry. Co. v. Fitler*, 60 Pa. 124, 100 Am. Dec. 546.

53. See 2 Fletcher Cyc. Corporations, §665.

54. See *infra*, I, B, 3.

55. *Wyman v. American Powder Co.*, 8 Cush. (Mass.) 163.

56. See *infra*, II, A, 1.

that particular corporation,<sup>57</sup> and original stock, rather than issued stock,<sup>58</sup> and common stock rather than preferred stock,<sup>59</sup> and cannot be required to accept stock other than that specifically subscribed for. If his money is wrongfully diverted, he may maintain an action for money had and received.<sup>60</sup> Specific performance of the contract will sometimes be awarded.<sup>61</sup> A subscription which would operate as a fraud upon other subscribers will not be enforced.<sup>62</sup> Mandamus proceedings cannot be maintained to allow a subscription to stock of a corporation to be made.<sup>63</sup> Where the officers of a corporation fail to collect subscriptions, an action in its name may be maintained by subscribers who have paid for their stock,<sup>64</sup> or possibly mandamus proceedings could be maintained by the stockholders against the directors to compel them to make the collection.<sup>65</sup>

**2. Relief From Fraud in Obtaining Subscription.**—The remedies generally available to a person who has been induced by fraud to enter into a contract, may be invoked by a subscriber for stock under such circumstances.<sup>66</sup> Thus the subscriber may withdraw from the contract and effectuate a rescission of it by his voluntary act, without taking legal proceedings,<sup>67</sup> and he may then maintain an action to recover the amount he has paid,<sup>68</sup> or he may maintain a suit in equity to have a cancellation and rescission declared,<sup>69</sup> and to recover the amount

57. *Ariz.*—People's Nat. Bank v. Taylor, 17 *Ariz.* 215, 149 *Pac.* 763. *Cal.*—Gray v. Ellis, 164 *Cal.* 481, 129 *Pac.* 791. *Tenn.*—Powell's Valley Ry. Co. v. Knoxville, 98 *Tenn.* 1, 37 *S. W.* 883.

58. *Gray v. Ellis*, 164 *Cal.* 481, 129 *Pac.* 791; *Powell's Valley Ry. Co. v. Knoxville*, 98 *Tenn.* 1, 37 *S. W.* 883. And see *Brainerd v. Kydd*, 26 *Cal. App.* 655, 148 *Pac.* 221.

59. *Powell's Valley Ry. Co. v. Knoxville*, 98 *Tenn.* 1, 37 *S. W.* 883.

60. *Gray v. Ellis*, 164 *Cal.* 481, 129 *Pac.* 791.

61. *Selover v. Isle Harbor Land Co.*, 91 *Minn.* 451, 98 *N. W.* 344. But see *Kennedy v. Thompson*, 97 *App. Div.* 296, 89 *N. Y. Supp.* 963.

Specific performance of contracts for the purchase and sale of corporate stock, see *infra*, II, G, 1.

62. *Ennis v. New World Life Ins. Co.*, 97 *Wash.* 122, 165 *Pac.* 1091, a subscription apparently absolute but in fact a mere option.

63. *American Asylum v. Phoenix Bank*, 4 *Conn.* 172, 10 *Am. Dec.* 112.

64. See *supra*, I, A, 1, b.

65. See *Hays v. Lycoming Fire Ins. Co.*, 98 *Pa.* 184. And see *infra*, IV, A, 3.

66. See 10 *STANDARD PROC.* 33, and the title "Fraud and Deceit."

[a] "Contracts to take stock in a corporation stand upon the same footing as all other conventional obligations. If induced by fraud, they create no obligation, and the injured party has a right to have them abrogated. The rule is universal, whatever fraud creates justice will destroy." *Vreeland v. New Jersey Stone Co.*, 29 *N. J. Eq.* 188, 190. And see *Raich v. Lindebek*, 36 *N. D.* 133, 161 *N. W.* 1026.

67. *Ind.*—*Wm. B. Joyce & Co. v. Eifert*, 56 *Ind. App.* 190, 105 *N. E.* 59. *Okla.*—*Gast v. King*, 27 *Okla.* 554, 112 *Pac.* 997. *Tex.*—*Bohn v. Burton-Lingo Co. (Tex. Civ. App.)*, 175 *S. W.* 173.

[a] No action to have his name stricken from the books need be taken by the subscriber. *Johns v. Coffee*, 74 *Wash.* 189, 133 *Pac.* 4. And see *Savage v. Bartlett*, 78 *Md.* 561, 28 *Atl.* 414.

68. *Cal.*—*Dox v. R. E. Lomax Co.*, 29 *Cal. App.* 718, 156 *Pac.* 874. *Ga.*—*Granger's Ins. Co. v. Turner*, 61 *Ga.* 561. *Ill.*—*Taylor v. Currey*, 192 *Ill. App.* 502, *assumpsit*. *Mich.*—*Sherman v. American Stove Co.*, 85 *Mich.* 169, 48 *N. W.* 537. *Mo.*—*Ramsey v. Thompson Mfg. Co.*, 116 *Mo.* 313, 22 *S. W.* 719.

69. *U. S.*—*Tyler v. Savage*, 143 *U. S.* 79, 12 *Sup. Ct.* 340, 36 *L. ed.* 82.

paid by him,<sup>70</sup> or to cancel notes executed in payment.<sup>71</sup> The subscriber may, however, if he prefers to do so, ratify the contract, and maintain an action for the damages he received.<sup>72</sup> Such an action may be brought

**Ala.**—Wiseola Co. v. Moore, 187 Ala. 163, 65 So. 398; Southern States Fire & Cas. & I. Co. v. Tanner, 180 Ala. 30, 60 So. 81. **Cal.**—Browne v. San Gabriel River Rock Co., 22 Cal. App. 682, 136 Pac. 542, 544; People v. California Safe Deposit & Trust Co., 19 Cal. App. 414, 126 Pac. 516, 520. **Ga.** Georgia Portland Cement & S. Co. v. Jackson, 143 Ga. 84, 84 S. E. 461. **Ia.** Hinkley v. Sac Oil & Pipe Line Co., 132 Iowa 396, 107 N. W. 629, 119 Am. St. Rep. 564. **Ky.**—Central Life Ins. Co. v. Taylor, 164 Ky. 844, 176 S. W. 373. **Mass.**—Ginn v. Almy, 212 Mass. 486, 99 N. E. 276. **Mich.**—Hamilton v. American Hulled Bean Co., 156 Mich. 609, 121 N. W. 731. **Minn.**—Drake v. Fairmont Drain Tile & Brick Co., 129 Minn. 145, 151 N. W. 914. **N. Y.** Bosley v. National Mach. Co., 123 N. Y. 550, 25 N. E. 990. **Okla.**—Gast v. King, 27 Okla. 554, 112 Pac. 997. **Tex.** Com. Bonding & Casualty Ins. Co. v. Meeks (Tex. Civ. App.), 187 S. W. 681; Com. Bonding & Casualty Ins. Co. v. Cator (Tex. Civ. App.), 175 S. W. 1074. **W. Va.**—Cox v. National Coal & Oil Inv. Co., 61 W. Va. 291, 56 S. E. 494.

Suit to rescind, see generally the title "Rescission and Cancellation."

70. **U. S.**—National Leather Co. v. Roberts, 221 Fed. 922, 137 C. C. A. 492; Barends v. Gates, 89 Fed. 783, 32 C. C. A. 337. **Ala.**—King v. Livingston Mfg. Co., 192 Ala. 269, 68 So. 897. **Cal.**—Brown v. National Elec. Works, 168 Cal. 336, 143 Pac. 606. **Ga.**—Empire Life Ins. Co. v. Brown, 145 Ga. 818, 89 S. E. 1085. **Ind.**—Wm. B. Joyce & Co. v. Eifert, 56 Ind. App. 190, 105 N. E. 59. **Ia.**—Fish v. White, 180 Iowa 1176, 162 N. W. 753 (even though the corporation is solvent); Farnsworth v. Muscatine Produce & Pure Ice Co., 161 Iowa 170, 141 N. W. 940. **Ky.**—Reid v. Owensboro Sav. Bank & Trust Co., 141 Ky. 444, 132 S. W. 1026. **N. Y.**—Mack v. Latta, 178 N. Y. 525, 71 N. E. 97, 67 L. R. A. 126. **Tex.**—Davis v. Burns (Tex. Civ. App.), 173 S. W. 476. **Utah.** Campbell v. Zion Co-Op. Home Building, etc. Co., 46 Utah 1, 148 Pac. 401.

[a] **Parties.**—Subscribers who have

been subjected to the same fraud may join in the action. Hamilton v. American Hulled Bean Co., 156 Mich. 609, 121 N. W. 731; Sherman v. American Stove Co., 85 Mich. 169, 48 N. W. 537; Bosher v. Richmond & H. Land Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. Rep. 879.

[b] The agents or officers of the corporation, by whom the representations were made, may be joined as defendants. **Ala.**—King v. Livingston Mfg. Co., 192 Ala. 269, 68 So. 897. **N. J.**—Vreeland v. New Jersey Stone Co., 29 N. J. Eq. 188, 651. **N. Y.** Lehman-Charley v. Bartlett, 135 App. Div. 674, 120 N. Y. Supp. 501. **Tex.** Com. Bonding & Cas. Ins. Co. v. Meeks (Tex. Civ. App.), 187 S. W. 681.

[c] **Complaint.**—(1) The facts constituting the alleged fraud must be specifically set out. Bartol v. Walton & Whann Co., 92 Fed. 13. (2) The particulars in which the representations made were false must be alleged. Central Life Ins. Co. v. Taylor, 164 Ky. 844, 176 S. W. 373. (3) The nature and extent of the injury suffered by plaintiff should be set forth. Central Life Ins. Co. v. Taylor, 164 Ky. 844, 176 S. W. 373; Ritzwoller v. Lurie, 176 App. Div. 100, 162 N. Y. Supp. 475. Compare Stern v. Kirby Lumber Co., 134 Fed. 509. (4) It will be sufficient, however, if from the facts alleged it appears that injury necessarily resulted. Com. Bonding & Casualty Ins. Co. v. Bomar (Tex. Civ. App.), 169 S. W. 1060. (5) Facts showing that there has been no laches or waiver of the fraud, should be alleged. Central Life Ins. Co. v. Taylor, 164 Ky. 844, 176 S. W. 373. But see the title "Laches."

[d] Whether a subscriber acted with sufficient promptness in rescinding, is a question of fact. People v. California Safe Deposit & Trust Co., 19 Cal. App. 414, 126 Pac. 516, 520.

71. Southern Ins. Co. v. Milligan, 154 Ky. 216, 157 S. W. 37; Peerless Fire Ins. Co. v. Reveire (Tex. Civ. App.), 188 S. W. 254.

72. Miller v. Barber, 66 N. Y. 558; Paddock v. Fletcher, 42 Vt. 389.



against the corporation,<sup>73</sup> or the officers or agents who made the misrepresentations,<sup>74</sup> or they may both be joined in one action.<sup>75</sup> He may also set up the misrepresentations as a defense to an action to recover the amount of his subscription,<sup>76</sup> or an action upon a note given by him in payment of his subscription;<sup>77</sup> or he may plead the damages by way of recoupment.<sup>78</sup>

**3. Relief Against Forfeiture.**—Equity will not relieve against a forfeiture regularly made.<sup>79</sup> But a threatened, illegal, forfeiture will be enjoined.<sup>80</sup> Where the forfeiture has been declared but is illegal, the subscriber may elect to treat his contract as rescinded and maintain an action to recover the money he has paid,<sup>81</sup> or may maintain a suit in equity to set aside the forfeiture and sale,<sup>82</sup> or, in some states, man-

73. *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290; *Jordan v. Annex Corporation*, 109 Va. 625, 64 S. E. 1050, 17 Ann. Cas. 267.

74. *Huntress v. Blodgett*, 206 Mass. 318, 92 N. E. 427; *Getchell v. Dusenbury*, 145 Mich. 197, 108 N. W. 723.

[a] The corporation is not a necessary party to the action. *Austin v. Murdock*, 127 N. C. 454, 37 S. E. 478.

75. *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290. And see *Chatfield v. Sintz-Wallin Co.*, 182 Mich. 689, 148 N. W. 797.

76. **U. S.**—*Columbia Knickerbocker Trust Co. v. Abbot*, 247 Fed. 833, 160 C. C. A. 55; *American Alkali Co. v. Salom*, 131 Fed. 46, 65 C. C. A. 284. **Cal.**—*Vulcan Fire Ins. Co. v. Jorgensen*, 33 Cal. App. 763, 166 Pac. 835; *Tidewater Southern R. Co. v. Harvey*, 32 Cal. App. 253, 162 Pac. 664. **Colo.** *Zang v. Adams*, 23 Colo. 408, 48 Pac. 509, 58 Am. St. Rep. 249. **Ga.**—*Huson Ice & Coal Co. v. Thornton*, 143 Ga. 297, 84 S. E. 969. **Ia.**—*State Bank of Indiana v. Cook*, 125 Iowa 111, 100 N. W. 72. **Md.**—*Fear v. Bartlett*, 81 Md. 435, 32 Atl. 322, 33 L. R. A. 721. **Miss.**—*Water Valley Mfg. Co. v. Seaman*, 53 Miss. 655. **Nev.**—*Foulks Accelerating Air Motor Co. v. Thies*, 26 Nev. 158, 65 Pac. 373, 99 Am. St. Rep. 684. **Ohio.**—*Armstrong v. Karshner*, 47 Ohio St. 276, 24 N. E. 897. **Tex.**—*Hall v. Grayson County Nat. Bank*, 36 Tex. Civ. App. 317, 81 S. W. 762. **Va.**—*West End Real Est. Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900. **Wash.**—*Johns v. Coffee*, 74 Wash. 189, 133 Pac. 4. **W. Va.**—*West End Real*

*Est. Co. v. Nash*, 51 W. Va. 341, 41 S. E. 182.

77. *People's Nat. Bank v. Taylor*, 17 Ariz. 215, 149 Pac. 763; *Turner v. Grobe*, 24 Tex. Civ. App. 554, 59 S. W. 583.

78. See *supra*, I, A, 1, c, (III).

79. *Weeks v. Silver Islet Consol. Min. & L. Co.*, 23 Jones & S. 1, 8 N. Y. St. 110; *Germantown Passenger Ry. Co. v. Fittler*, 60 Pa. 124, 100 Am. Dec. 546. See *Gorman v. Guardian Sav. Bank*, 4 Mo. App. 180, and *supra*, I, A, 2.

80. **Cal.**—*Green v. Abietine Medical Co.*, 96 Cal. 322, 31 Pac. 100; *Humphrey v. Buena Vista Water Co.*, 2 Cal. App. 540, 84 Pac. 296. **Idaho.**—*Mantle v. Jack Waite Min. Co.*, 24 Idaho 613, 135 Pac. 854, 136 Pac. 1130. **N. Y.** *Schuetz v. German-Am. Real Estate Co.*, 21 App. Div. 163, 47 N. Y. Supp. 500.

81. *Wood v. Universal Adding Mach. Co.*, 166 Ill. App. 346.

82. **U. S.**—*Wilson v. Colorado Min. Co.*, 227 Fed. 721, 142 C. C. A. 245. **Cal.**—*Herbert Craft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143; *Raisch v. M. K. & T. Oil Co.*, 7 Cal. App. 667, 95 Pac. 662. **N. J.**—*New York & Eastern Tel. & Tel. Co. v. Great Eastern Tel. Co.*, 74 N. J. Eq. 221, 69 Atl. 528. **Utah.**—*Schwab v. Frisco M. & M. Co.*, 21 Utah 258, 60 Pac. 940. **Wash.**—*Falk v. Schmitz Alaska, etc. Min. Co.*, 44 Wash. 612, 87 Pac. 927.

[a] The value of the stock or the fact and extent of injury, need not be alleged. *Raisch v. M. K. & T. Oil Co.*, 7 Cal. App. 667, 95 Pac. 662.

Right of action by pledgee, see *infra*, II, F, 1.

damus proceedings, to compel the issue of stock to him,<sup>83</sup> or an action to recover the stock from the purchaser at the sale,<sup>84</sup> or he may treat the wrongful acts of the corporation as a conversion and seek to recover the damages he has sustained.<sup>85</sup>

## II. CORPORATE STOCK. — A. ISSUANCE OF CERTIFICATES.<sup>86</sup>

1. **In General.** — In many states mandamus may be employed to compel a corporation to issue a stock certificate to the person entitled thereto,<sup>87</sup> though in a few states this remedy is not available.<sup>88</sup> In the latter states the remedy open to the owner of the stock is a suit in equity for specific performance of the express or implied contract of the corporation to issue the certificate.<sup>89</sup> The owner may also, at his

83. *Wilson v. Duplin Tel. Co.*, 139 N. C. 395, 52 S. E. 62.

84. *Shannon v. Tooker*, 167 Cal. 484, 140 Pac. 10.

[a] A tender of the sum for which (1) the stock was sold and any subsequent assessments and interest, is a condition precedent to maintenance of the action. *Shannon v. Tooker*, 167 Cal. 484, 140 Pac. 10; *Campbell v. Santa Maria Oil & Gas Co.*, 153 Cal. 282, 95 Pac. 39. (2) The tender should be made to the purchaser and not to the corporation. *Stephens v. Lemoore Canal & Irr. Co.*, 22 Cal. App. 579, 135 Pac. 707.

85. **U. S.**—*Wilson v. Colorado Min. Co.*, 227 Fed. 721, 142 C. C. A. 245. **Cal.**—*Herbert Craft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143. **Minn.**—*Carpenter v. American Bldg. & L. Assn.*, 54 Minn. 403, 56 N. W. 95, 40 Am. St. Rep. 345. **N. C.**—*Wilson v. Duplin Tel. Co.*, 139 N. C. 395, 52 S. E. 62. **Ore.**—*Budd v. Multnomah St. R. Co.*, 15 Ore. 413, 15 Pac. 659, 3 Am. St. Rep. 169. **Tex.**—*Nicholson-Watson Shoe & Clothing Co. v. Urquhart*, 32 Tex. Civ. App. 527, 75 S. W. 45.

86. **Compelling transfer on the books of the corporation**, see *infra*, II, E.

87. **U. S.**—*In re Ballou*, 215 Fed. 810. **La.**—*State v. New Orleans Gas Light Co.*, 25 La. Ann. 413. **Me.**—*Dennett v. Acme Mfg. Co.*, 106 Me. 476, 76 Atl. 922. **S. C.**—*State v. Cheraw & C. R. Co.*, 16 S. C. 524.

[a] **Alternative relief by an award of damages** (1) will be granted if for any reason the issuance of the certificate is impossible. *Snyder v. Charleston & S. Bridge Co.*, 65 W. Va. 1, 63 S. E. 616, 131 Am. St. Rep. 947.

(2) As to the form of a judgment in the alternative see *Consolidated Min. & P. Co. v. Huff*, 62 Kan. 405, 63 Pac. 442.

88. *State ex rel. Gleeson v. Jumbo Extension Min. Co.*, 30 Nev. 192, 94 Pac. 74, 133 Am. St. Rep. 715, 16 Ann. Cas. 896; *State v. Carpenter*, 51 Ohio St. 83, 37 N. E. 261, 46 Am. St. Rep. 556.

89. **U. S.**—*Citizens' Sav. & Tr. Co. v. Illinois Cent. R. Co.*, 182 Fed. 607, 105 C. C. A. 145; *Citizens' Sav. & L. Assn. v. Belleville & S. I. R. Co.*, 117 Fed. 109, 54 C. C. A. 495. **Ala.**—*Birmingham Nat. Bank v. Roden*, 97 Ala. 404, 11 So. 883. **Cal.**—*Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981; *Noble v. Learned*, 153 Cal. 245, 94 Pac. 1047. **Colo.**—*Mountain Water Works Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501. **Ga.**—*Blaisdell v. Bohr*, 68 Ga. 56. **Ill.**—*Davenport v. Plano Implement Co.*, 70 Ill. App. 161. **Kan.**—*Consolidated Min. & P. Co. v. Huff*, 62 Kan. 405, 63 Pac. 442. **Minn.**—*Selover v. Isle Harbor Land Co.*, 100 Minn. 253, 111 N. W. 155. **N. H.**—*Westminster Nat. Bank v. New England Elec. Works*, 73 N. H. 465, 62 Atl. 971, 111 Am. St. Rep. 637, 3 L. R. A. (N. S.) 551. **Ohio.**—*Iron R. Co. v. Fink*, 41 Ohio St. 321, 52 Am. Rep. 84. **Utah.**—*Coray v. Perry Irrigation Co.*, 166 Pac. 672. **Wash.**—*Lacaff v. Dutch Miller Min. & S. Co.*, 31 Wash. 566, 72 Pac. 112. **W. Va.**—*Applegate v. Wellsburg Banking & Trust Co.*, 68 W. Va. 477, 69 S. E. 901.

[a] **Inability on the part of the corporation to issue the stock** is a matter of defense and need not be negated by the complaint. *Applegate v. Wellsburg Banking & Trust Co.*, 68 W. Va. 477, 69 S. E. 901.

election, maintain, an action in contract for damages for failure to issue a certificate,<sup>90</sup> or, if he has legal title to the stock, may sue in tort for a conversion,<sup>91</sup> and an action for damages is the only remedy available where the corporation has already issued all of the stock authorized by law.<sup>92</sup> Refusal to issue a certificate is also ground for a rescission of a contract of subscription,<sup>93</sup> if made before the insolvency of the corporation.<sup>94</sup>

**2. When Original Certificate Is Lost.**—The procedure to obtain the issuance of new certificates of stock, in place of certificates which have been lost, is in many states, now regulated by statutes.<sup>95</sup> Mandamus proceedings may be maintained in some states.<sup>96</sup> In the absence of a statute providing a remedy and regulating the procedure, a court of equity will take jurisdiction of the matter.<sup>97</sup> The action may be maintained against a foreign corporation.<sup>98</sup>

**B. CANCELLATION OF CERTIFICATES.**—Certificates of stock may be canceled by the corporation,<sup>99</sup> or by a court of equity in an action<sup>1</sup>

90. *Ariz.*—Salt River Canal Co. v. Hickey, 4 *Ariz.* 240, 36 *Pac.* 171. *Md.* Baltimore City Passenger Ry. Co. v. Sewell, 35 *Md.* 238, 6 *Am. Rep.* 402. *Minn.*—Milnor v. Home Sav. & Loan Assn., 64 *Minn.* 500, 67 *N. W.* 346. *N. H.*—Swazey v. Choate Mfg. Co., 48 *N. H.* 200. *Ore.*—Watkins v. Record Photographing Abstract Co., 76 *Ore.* 421, 149 *Pac.* 478.

91. *Teeple v. Hawkeye Gold Dredging Co.*, 137 *Iowa* 206, 114 *N. W.* 906; *State v. Carpenter*, 51 *Ohio St.* 83, 37 *N. E.* 261, 46 *Am. St. Rep.* 556.

92. *Dupoyster v. First Nat. Bank*, 29 *Ky. L. Rep.* 1153, 96 *S. W.* 830; *New York & N. H. R. Co. v. Schuyler*, 34 *N. Y.* 30.

93. *Potts v. Wallace*, 32 *Fed.* 272; *Cotter v. Butte & R. V. Smelting Co.*, 31 *Mont.* 129, 77 *Pac.* 509.

94. See *Butler v. Eaton*, 141 *U. S.* 240, 11 *Sup. Ct.* 985, 35 *L. ed.* 713.

95. See the statutes and *Travers v. North Carolina R. Co.*, 133 *N. C.* 322, 45 *S. E.* 651; *Hendon v. North Carolina R. Co.*, 127 *N. C.* 110, 37 *S. E.* 155; *La Belle Iron Works v. Quarter Sav. Bank*, 74 *W. Va.* 569, 82 *S. E.* 614.

[a] **An order to show cause** why a new certificate should not be issued may be obtained in some states. *Matter of Coats*, 75 *App. Div.* 469, 78 *N. Y. Supp.* 425; *Matter of Speir*, 69 *App. Div.* 149, 74 *N. Y. Supp.* 555.

96. *State v. New Orleans Cotton Exchange*, 114 *La.* 324, 38 *So.* 204; *State v. Southern Mineral & Land Imp. Co.*, 108 *La.* 24, 32 *So.* 174.

97. *Kinnan v. Forty-Second St. M.*

& *St. N. A. R. Co.*, 140 *N. Y.* 183, 35 *N. E.* 498; *Yeaman v. Galveston City Co.*, 106 *Tex.* 389, 167 *S. W.* 710, *Ann. Cas.* 1917E, 191.

98. *Guilford v. Western Union Tel. Co.*, 59 *Minn.* 332, 61 *N. W.* 324, 50 *Am. St. Rep.* 407, visitatorial power or interference with the internal affairs of a foreign corporation is not involved.

99. See *Coffin v. Struthers*, 169 *Iowa* 313, 151 *N. W.* 400.

1. See cases cited *infra*, this section.

[a] **Parties.**—All the holders of the stock tainted with the illegality may be joined as defendants. *New York & N. H. R. Co. v. Schuyler*, 17 *N. Y.* 592, 7 *Abb. Pr.* 41, 34 *N. Y.* 30.

[b] **The complaint** (1) must show that the corporation is one which had a right and power to issue capital stock. *Reno Oil Co. v. Culver*, 60 *App. Div.* 129, 69 *N. Y. Supp.* 969. (2) A complaint based upon the fraudulent issue of stock for property of no value, must allege that the property was known or believed to be valueless at the time of the transaction. *Kimbell v. Chicago Hydraulic Press Brick Co.*, 119 *Fed.* 102, 55 *C. C. A.* 162.

[c] **A counterclaim** that plaintiff, a stockholder held property in trust for the corporation but denied its right thereto, cannot be pleaded. *Brahm v. M. C. Gehl Co.*, 132 *Wis.* 674, 112 *N. W.* 1097.

[d] **An offer to return any consideration received** (1) must be made (*Jones v. Green*, 129 *Mich.* 203, 88 *N. W.* 1047, 95 *Am. St. Rep.* 433; *Vine-land Grape Juice Co. v. Chandler*, 80



maintained for that purpose, by the corporation,<sup>2</sup> or its stockholders, if the directors wrongfully refuse to institute the action,<sup>3</sup> where the stock was issued illegally,<sup>4</sup> fraudulently,<sup>5</sup> or without consideration,<sup>6</sup> or where the consideration has failed.<sup>7</sup>

C. UNAUTHORIZED ISSUANCE OF STOCK.—1. Prevention.—An injunction will issue upon the application of minority stockholders to prevent the unauthorized or illegal issuance of the stock by a corporation.<sup>8</sup>

2. Relief After Issuance.—The corporation or a stockholder may obtain the cancellation of stock certificates which have been fraudulently or unauthorizedly issued.<sup>9</sup> Criminal liability is also sometimes imposed for the wrongful issue of corporate stock.<sup>10</sup>

D. ASSESSMENTS UPON FULLY PAID STOCK.—When an assessment upon paid-up stock is authorized by statute,<sup>11</sup> the proceedings to re-

N. J. Eq. 437, 85 Atl. 213, Ann. Cas. 1914A, 679), though (2) where the action is instituted by a stockholder, this is not always required. *Trask v. Chase*, 107 Me. 137, 77 Atl. 698.

[e] All action by the board of directors which authorized the issue of the stock, cannot be enjoined pending the trial, though any specific wrongful act may be prevented. *Moore v. Moore Mica Paint Co.*, 150 App. Div. 792, 135 N. Y. Supp. 210.

2. *Cuba Colony Co. v. Kirby*, 149 Mich. 453, 112 N. W. 1133; *Whitfield v. Nonpareil Consol. Copper Co.*, 67 Wash. 286, 123 Pac. 1078, 41 L. R. A. (N. S.) 187.

3. Cal.—*James v. P. B. Steifer Min. Co.*, 35 Cal. App. 778, 171 Pac. 117. Ill.—*Stebbins v. Perry*, 167 Ill. 567, 47 N. E. 1048. Neb.—*Haskell v. Read*, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007. N. H.—*Kimball v. New England Roller Grate Co.*, 69 N. H. 485, 45 Atl. 253. N. J.—*Stephany v. Marsden*, 75 N. J. Eq. 90, 71 Atl. 598. Wis.—*Brahm v. M. C. Gehl Co.*, 132 Wis. 674, 112 N. W. 1097.

[a] Portion of Stock.—A stockholder cannot be relieved in equity from the burden of ownership of a part of his stock which he claims was illegally issued, where he cannot point out the specific stock which is illegal but asks for cancellation of a stated proportion of the stock owned by him. *Church v. Citizens' Street R. Co.*, 78 Fed. 526.

[b] Preferred stockholders may attack an issue of common stock. *Scully v. Automobile Finance Co. (Del. Ch.)*, 101 Atl. 908.

4. *Ellis v. Penn Beef Co.*, 9 Del. Ch.

213, 80 Atl. 666; *B. & C. Electrical Const. Co. v. Owen*, 176 App. Div. 399, 163 N. Y. Supp. 31. See also cases in preceding notes.

5. *Crow v. Florence Ice & Coal Co.*, 143 Ala. 541, 39 So. 401.

6. Cal.—*James v. P. B. Steifer Min. Co.*, 35 Cal. App. 778, 171 Pac. 117. N. H.—*Kimball v. New England Roller Grate Co.*, 69 N. H. 485, 45 Atl. 253. N. J.—*Stephany v. Marsden*, 75 N. J. Eq. 90, 71 Atl. 598.

7. *Coffin v. Struthers*, 169 Iowa 313, 151 N. W. 400; *Hillside Cemetery Assn. v. Holmes*, 97 Minn. 261, 105 N. W. 905.

8. Ala.—*Fitzpatrick v. Dispatch Pub. Co.*, 83 Ala. 604, 2 So. 727. N. J. *Donald v. American Smelting & Ref. Co.*, 62 N. J. Eq. 729, 48 Atl. 771, 1116. Tex.—*Southwestern Portland Cement Co. v. Latta (Tex. Civ. App.)*, 193 S. W. 1115.

[a] Where the principal place of business of a foreign corporation is within the state, the courts of the state have jurisdiction to enjoin an illegal issuance of stock. *Kraft v. Grif-fon Co.*, 82 App. Div. 29, 81 N. Y. Supp. 438.

[b] An authorized increase in capital stock of a corporation cannot be cancelled because it is proposed to issue such stock for an illegal purpose. *Southwestern Portland Cement Co. v. Latta (Tex. Civ. App.)*, 193 S. W. 1115.

9. See *supra*, II, B.

10. See the statutes. And see *Ford v. Kalamazoo Circuit Judge*, 192 Mich. 337, 158 N. W. 841.

11. See note 22 L. R. A. (N. S.) 1013.

cover the assessment, are in general, similar to proceedings to collect calls upon a subscription contract.<sup>12</sup> An assessment, regularly made in accordance with the statutory, or charter provisions and the requirements of the corporation bylaws, in some states creates a debt, which may be enforced by an action at law,<sup>13</sup> or by proceedings, in accordance with the statute, for the forfeiture and sale of the stock.<sup>14</sup> But in other states an assessment upon fully paid stock cannot be collected by action, unless this right is given by the charter, the corporation being limited to proceedings to forfeit the stock.<sup>15</sup> Several stockholders cannot be joined in one action to collect an assessment.<sup>16</sup> An unauthorized or illegal assessment will be enjoined.<sup>17</sup>

**E. TRANSFER. — 1. Enforcing Transfer.** — A transfer of stock upon the books of the corporation may be enforced by a shareholder,<sup>18</sup> by a suit in equity,<sup>19</sup> for specific performance of the corporation's ex-

12. See *supra*, I, A, 1.

13. *Imperial Land & Stock Co. v. Oster*, 34 Cal. App. 776, 168 Pac. 1159; *Bottle Mining & Mill. Co. v. Kern*, 9 Cal. App. 527, 99 Pac. 994.

[a] The action may be instituted prior to the day fixed for the sale of the stock, where the right to proceed by sale has been waived. *Imperial Land & Stock Co. v. Oster*, 34 Cal. App. 776, 168 Pac. 1159.

[b] The amount of stock owned by defendant must be set forth in the complaint. *Hartnett v. St. Louis Min. & M. Co.*, 51 Mont. 395, 153 Pac. 437.

[c] An attachment or garnishment may be based upon an unpaid assessment, since this is a contract liability. *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244.

14. *Imperial Land & Stock Co. v. Oster*, 34 Cal. App. 776, 168 Pac. 1159.

Forfeiture of stock, generally, see *supra*, I, A, 2.

15. *Dotson v. Hoggan*, 44 Utah 295, 140 Pac. 128; *Gary v. York Min. Co.*, 9 Utah 464, 35 Pac. 494.

[a] **Nature of the Liability.** — "The levy of an assessment under the statute of this state against stock fully paid up is a proceeding in rem by which the stock may be sold; but no personal liability attaches to the stockholder for any deficiency arising from the sale. *Wall v. Basin Min. Co.*, 16 Idaho 313, 101 Pac. 733, 22 L. R. A. (N. S.) 1013.

16. *Hartnett v. St. Louis M. & M. Co.*, 51 Mont. 395, 153 Pac. 437.

17. *Moore v. New Jersey Lighterage Co.*, 25 Jones & S. 1, 6 N. Y. Supp. 192, 23 N. Y. St. 213; *First Nat. Bank v.*

*Multnomah State Bank*, 87 Ore. 423, 170 Pac. 534. And see note, 45 L. R. A. 653.

18. See *infra*, this note and section.

[a] A foreign executor or his transferee is entitled to maintain proceedings to enforce a transfer. *London, P. & A. Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663; *Way v. International Portland Cement Co.*, 100 Wash. 182, 170 Pac. 553.

19. **U. S.** — *Webster v. Upton*, 91 U. S. 65, 23 L. ed. 384; *Mechanics' Bank v. Seton*, 1 Pet. 299, 7 L. ed. 152; *Jessup v. Chicago & N. W. Ry. Co.*, 188 Fed. 931. **Ala.** — *Wetumpka Bridge Co. v. Kidd*, 124 Ala. 242, 27 So. 431, action by execution purchaser. **Cal.** — *Spangenberg v. Western Heavy Hdw. & Iron Co.*, 166 Cal. 284, 135 Pac. 1127. **Ill.** — *Lemon v. Lemon*, 192 Ill. App. 361. **Mo.** — *Whiting v. Enterprise Land & Sheep Co.*, 265 Mo. 374, 177 S. W. 589; *Senn v. Union P. & Mercantile Co.*, 115 Mo. App. 685, 92 S. W. 507. **Mont.** — *Fitzpatrick v. O'Neill*, 43 Mont. 552, 118 Pac. 273, Ann. Cas. 1912C, 296. **Neb.** — *Everitt v. Farmers & Mer. Bank*, 82 Neb. 191, 117 N. W. 401, 20 L. R. A. (N. S.) 996. **N. J.** — *Farrell v. Passaic Water Co.*, 82 N. J. Eq. 97, 88 Atl. 627, registration of a corporate bond. **N. Y.** — *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315; *Orvis v. Howe*, 183 App. Div. 1, 170 N. Y. Supp. 264; *Powers v. Universal Film Mfg. Co.*, 162 App. Div. 806, 148 N. Y. Supp. 114. **Okla.** — *Litchfield v. Henson Oil Co.*, 157 Pac. 137. **Ore.** — *Davidson v. Almeda Mines Co.*, 66 Ore. 412, 134 Pac. 782, 48 L. R. A.

press or implied contract to make a transfer,<sup>20</sup> or on the theory that the plaintiff is the equitable owner of the stock and seeks by the transfer to consummate a legal title,<sup>21</sup> or by mandamus proceedings,<sup>22</sup>

(N. S.) 847. **Va.**—Fleckheimer v. National Exchange Bank, 79 Va. 80.

[a] **Conditions Precedent.**—Redress from the directors of the corporation must be sought before the action can be maintained. Chapin v. Citizens' Tel. Co., 196 Mich. 331, 162 N. W. 908.

[b] **Parties.**—(1) Both the secretary and the treasurer are proper parties to the bill. Morris v. Hussong Dyeing Mach. Co., 81 N. J. Eq. 256, 86 Atl. 1026. (2) The assignor of plaintiff is also a proper defendant. Thornton v. Martin, 116 Ga. 115, 42 S. E. 348; Morris v. Hussong Dyeing Mach. Co., 81 N. J. Eq. 256, 86 Atl. 1026. (3) An executor need not make the state a party although the latter is entitled to an inheritance tax upon the property. Jessup v. Chicago & N. W. Ry. Co., 188 Fed. 931. (4) And he is also a necessary party where a dispute arises as to the nature and extent of the pledgee's rights to a transfer. Tom Boy G. M. Co. v. Green, 11 Colo. App. 447, 53 Pac. 845. (5) If the action is by a pledgee and the statute of limitations has apparently run against the debt secured, the pledgor or his legal representatives are necessary parties to the action. Wadlinger v. First Nat. Bank, 209 Pa. 197, 58 Atl. 359. (6) The purchaser at a pledgee's sale need not join the executors of the deceased pledgor, where the legatees are made parties to the suit. Warrior Coal & Coke Co. v. National Bank (Ala.), 53 So. 997.

[c] **Joinder of Actions.**—(1) With an action to compel the transfer of stock may be joined an action against the officer refusing to make it, for his willful and malicious misconduct in the same connection (Orvis v. Howe, 183 App. Div. 1, 170 N. Y. Supp. 264), or (2) an action to restrain the former owner from transferring the stock. Thornton v. Martin, 116 Ga. 115, 42 S. E. 348.

[d] **On foreclosure of a mortgage on stock** the court may order a transfer on the books of the corporation. Thompson v. Grace, 91 Ark. 52, 120 S. W. 397.

[e] **A decree ordering a transfer**

operates of its own effect, to pass the title. Carriage Nat. Bank v. Poole, 160 Mo. App. 133, 141 S. W. 729.

20. Westminster Bank v. New England Elec. Works, 73 N. H. 465, 62 Atl. 971, 111 Am. St. Rep. 637, 3 L. R. A. (N. S.) 551.

[a] **Damages Not Adequate.**—"To deny him relief by specific performance, upon the ground that he could recover damages at law, would be, in effect, to compel him to sell what he already owns at such a price as a jury might think it was worth." Westminster Nat. Bank v. New England Elec. Works, 73 N. H. 465, 480, 62 Atl. 971.

21. Lockward v. Evans, 88 N. J. Eq. 530, 102 Atl. 19; Morris v. Hussong Dyeing Mach. Co., 81 N. J. Eq. 256, 86 Atl. 1026; Reilly v. Absecon Land Co., 75 N. J. Eq. 71, 71 Atl. 248.

22. **U. S.**—*In re* Ballou, 215 Fed. 810; Hair v. Burnell, 106 Fed. 280. **Ill.** Carus v. Matthiessen, 196 Ill. App. 445; Smith v. Automatic Photographic Co., 118 Ill. App. 649. **Ind.**—Burnsville Turnpike Co. v. State, 119 Ind. 382, 20 N. E. 421, 3 L. R. A. 265. **Ia.** Funck v. Farmers' Elev. Co., 142 Iowa 621, 121 N. W. 53, 24 L. R. A. (N. S.) 108; Dooley v. Gladiator Con. Gold M. & M. Co., 134 Iowa 468, 109 N. W. 864, 13 Ann. Cas. 297. **La.**—State v. Bank of Baton Rouge, 125 La. 138, 51 So. 95, 136 Am. St. Rep. 332; State v. Consumers' Brewing Co., 115 La. 782, 40 So. 45. **Me.**—Dennett v. Acme Mfg. Co., 106 Me. 476, 76 Atl. 922. **Pa.**—Deal v. Erie Coal & Coke Co., 244 Pa. 622, 90 Atl. 915, purchaser at pledgee's sale. **R. I.**—Rowe v. Border City Garnetting Co., 40 R. I. 394, 101 Atl. 223. **S. D.**—Amidon v. Florence Farmers Elev. Co., 28 S. D. 24, 132 N. W. 166. **Tenn.**—Memphis Appeal Pub. Co. v. Pike, 9 Heisk. 697. **Tex.** Milner v. Brewer-Monaghan Mercantile Co. (Tex. Civ. App.), 188 S. W. 49, the petition must show what the by-laws provide with reference to transfers.

[a] **Compliance with by-law requirements**, is a condition precedent to relief. Tyng v. United Mercantile Agency, 184 Ill. App. 433; Shirley Farmers' Grain & Coal Co. v. Douglass, 130 Ill. App. 285.



though in some states mandamus cannot be maintained,<sup>23</sup> unless title was acquired at a public or execution sale.<sup>24</sup> In a few states, summary orders for a transfer may be obtained upon an order to show cause.<sup>25</sup> Where a foreign corporation maintains an office and keeps its corporate records within the state, the courts of the state have jurisdiction to compel it to make a transfer of stock upon its books.<sup>26</sup>

**2. Remedy at Law for Refusal To Transfer.**—Where a transfer of stock is upon the books of the corporation improperly refused, an action at law to recover the full value of the stock may be maintained,<sup>27</sup>

[b] An action for damages does not afford an adequate remedy. *Dennett v. Acme Mfg. Co.*, 106 Me. 476, 76 Atl. 922.

[c] The motive of petitioner in seeking a transfer is usually immaterial, but a court will not lend its aid where it appears that an illegal conspiracy is being carried into effect. *Funck v. Farmers' Elev. Co.*, 142 Iowa 621, 121 N. W. 53, 24 L. R. A. (N. S.) 108.

23. Cal.—*Spangenberg v. Western Heavy Hdw. & Iron Co.*, 166 Cal. 284, 135 Pac. 1127 ("unless some extraordinary emergency exists"); *Kimball v. Union Water Co.*, 44 Cal. 173, 13 Am. Rep. 157. Ga.—*Terrell v. Georgia R. & B. Co.*, 115 Ga. 104, 41 S. E. 262. Mont.—*Durfee v. Harper*, 22 Mont. 354, 56 Pac. 582. N. Y.—*Travis v. Knox Terpezone Co.*, 215 N. Y. 259, 109 N. E. 250, Ann. Cas. 1917A, 387, L. R. A. 1916A, 542; *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365, 32 Am. Rep. 315; *People v. Utah Gold & Copper Min. Co.*, 135 App. Div. 418, 119 N. Y. Supp. 852. Ore.—*Davidson v. Alameda Mines Co.*, 66 Ore. 412, 134 Pac. 782, 48 L. R. A. (N. S.) 847. Pa.—*Birmingham Fire Ins. Co. v. Com.*, 92 Pa. 72.

[a] The remedy by an action for damages has been (1) held to be adequate, under ordinary conditions (*Galbraith v. People's Bldg. & L. Assn.*, 43 N. J. L. 389), though (2) this may well be doubted. *Spangenberg v. Western Heavy Hdw. & Iron Co.*, 166 Cal. 284, 135 Pac. 1127.

[b] The insolvency of the corporation rendering an action for damages useless, is no ground for mandamus proceedings since the remedy in equity remains. *Davidson v. Alameda Mines Co.*, 66 Ore. 412, 134 Pac. 782, 48 L. R. A. (N. S.) 847.

[c] Where title to the stock is in question, mandamus will not lie. *Rowe v. Border City Garnetting Co.*, 40 R. I.

394, 101 Atl. 223. And see *Townes v. Nichols*, 73 Me. 515.

[d] In the federal courts, see *Jessup v. Chicago & N. W. Ry. Co.*, 188 Fed. 931, and 19 STANDARD PROC. 240, 241.

24. *Bailey v. Strohecker*, 38 Ga. 259, 95 Am. Dec. 388; *Slemmons v. Thompson*, 23 Ore. 215, 31 Pac. 514.

25. *Corn Exchange Nat. Bank v. Kaiser*, 160 Wis. 199, 151 N. W. 259 (the order does not settle the question of title); *Schwab v. Smith*, 143 Wis. 427, 128 N. W. 78, the order is based upon affidavits.

26. U. S.—*London, P. & A. Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663. N. H.—*Westminster Nat. Bank v. New England Elec. Wks.*, 73 N. H. 465, 476, 62 Atl. 971, 111 Am. St. Rep. 637, 3 L. R. A. (N. S.) 551. N. Y.—*Travis v. Knox Terpezone Co.*, 215 N. Y. 259, 109 N. E. 250, Ann. Cas. 1917A, 387, L. R. A. 1916A, 542.

And see *Com. v. Camp*, 258 Pa. 548, 102 Atl. 205. Compare *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151, 20 Atl. 1039.

[a] No interference with the internal affairs of a foreign corporation is involved, but rights of ownership in property are protected. *Travis v. Knox Terpezone Co.*, 215 N. Y. 259, 109 N. E. 250, Ann. Cas. 1917A, 387, L. R. A. 1916A, 542.

27. Ark.—*Bankers' Trust Co. v. McCloy*, 109 Ark. 160, 159 S. W. 205, 47 L. R. A. (N. S.) 333. Ia.—*Dooley v. Gladiator Con. G. M. & M. Co.*, 134 Iowa 468, 109 N. W. 864, 13 Ann. Cas. 297. La.—*Eisenhauer v. New Orleans Cotton Exchange*, 140 La. 574, 73 So. 685, action by pledgee. Ore.—*Davidson v. Alameda Mines Co.*, 66 Ore. 412, 134 Pac. 782, 48 L. R. A. (N. S.) 847.

And see *Ramage v. Gould*, 176 Cal. 746, 169 Pac. 670.

[a] Failure to apply for a writ of

or an action in trover to recover damages for its conversion.<sup>28</sup> Penalties have been created by some statutes for the wrongful refusal of corporate officers to make a transfer of stock upon the corporate books,<sup>29</sup> and an action may be maintained to recover the penalty prescribed.<sup>30</sup>

**3. Wrongful Transfer.**—A threatened, wrongful, transfer of stock upon the books of the corporation, which would occasion irreparable injury to the owner will be enjoined.<sup>31</sup> Where the transfer has actually been made without the consent or authority of the owner, the latter may compel the corporation by mandamus proceedings to recognize him as the owner and to reinstate him upon the books of the corporation.<sup>32</sup> He may also maintain a suit in equity to obtain such relief incident to his status as a stockholder as the circumstances of the particular case require,<sup>33</sup> or he may maintain an action at law based upon

mandate to compel a transfer does not affect the right to maintain an action for damages. *Eisenhauer v. New Orleans Cotton Exchange*, 140 La. 574, 75 So. 685.

[b] **Parties.**—The transferror is entitled to maintain the action. *Lockwood v. United States Steel Corporation*, 153 App. Div. 655, 138 N. Y. Supp. 725. *Contra*, *Lewis v. Bidwell Elec. Co.*, 141 Ill. App. 33.

**28. U. S.**—*London, P. & A. Bank v. Aronstein*, 117 Fed. 601, 54 C. C. A. 663. **Cal.**—*Craig v. Hesperia L. & W. Co.*, 113 Cal. 7, 45 Pac. 10, 54 Am. St. Rep. 316, 35 L. R. A. 306; *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476. **Conn.**—*Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231. **Ga.**—*Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 48 S. E. 226, 102 Am. St. Rep. 115; *Bank of Norwood v. Ray*, 21 Ga. App. 620, 94 S. E. 819; *Hilton v. Sylvania & G. R. Co.*, 8 Ga. App. 10, 68 S. E. 746. **Ill.**—*Lewis v. Bidwell Elec. Co.*, 141 Ill. App. 33. **Ia.**—*Dooley v. Gladiator Con. G. M. & M. Co.*, 134 Iowa 468, 109 N. W. 864, 13 Ann. Cas. 297. **Mass.**—*Bond v. Mount Hope I. Co.*, 99 Mass. 505, 97 Am. Dec. 49. **Minn.**—*Humphreys v. Minnesota Clay Co.*, 94 Minn. 469, 103 N. W. 338. **Neb.**—*Herrick v. Humphrey Hardware Co.*, 73 Neb. 809, 103 N. W. 685, 119 Am. St. Rep. 917. **N. J.**—*Siegel v. Riverside Box & Lbr. Co.*, 89 N. J. L. 595, 99 Atl. 407. **N. Y.**—*Travis v. Knox Terpezzone Co.*, 215 N. Y. 259, 109 N. E. 250, Ann. Cas. 1917A, 387, L. R. A. 1916A, 542. **Ore.**—*Durham v. Monumental S. M. Co.*, 9 Ore. 41. **Tex.**—*Rio Grande Cattle Co. v. Burns*, 82 Tex. 50, 17 S. W. 1043.

*Compare McLean v. Wright Med. Co.*, 96 Mich. 479, 56 N. W. 68.

[a] **Ownership of the stock by plaintiff** must be distinctly alleged. *Paine v. British-Butte Min. Co.*, 41 Mont. 28, 108 Pac. 12.

[b] **Compliance with all by-laws and regulations** of the corporation must be shown. *Kjellman v. Scandia Fish Co.*, 128 Ill. App. 544.

**29.** See the statutes.

**30.** See *infra*, this note, and the title "Penalties, Forfeitures and Fines."

[a] That the refusal to make the transfer was willful and without legal reason need not be alleged. *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343.

**31.** *Reynolds v. Touzalin Imp. Co.*, 62 Neb. 236, 87 N. W. 24; *Zeiger v. Stephenson*, 153 N. C. 528, 69 S. E. 611.

**32.** *Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143; *Citizens' Nat. Bank v. State*, 179 Ind. 621, 101 N. E. 620, 45 L. R. A. (N. S.) 1075.

**Reinstatement of stockholder or member of corporation**, see *infra*, III, A.

**33. U. S.**—*Western Union Tel. Co. v. Davenport*, 97 U. S. 369, 24 L. ed. 1047; *Geyser-Marion Gold-Min. Co. v. Stark*, 106 Fed. 553, 45 C. C. A. 467. **Cal.**—*Kraft Co. Bank v. Bank of Orland*, 133 Cal. 64, 65 Pac. 143. **Ind.**—*Vernon, G. & R. R. Co. v. Washington Civil Township*, 48 Ind. App. 309, 95 N. E. 599. **Mass.**—*Pratt v. Taunton Copper Mfg. Co.*, 123 Mass. 110, 25 Am. Rep. 37. **Mo.**—*Trimble v. Union Nat. Bank*, 71 Mo. App. 467. **N. Y.**—*Pollock v. National Bank*, 7 N. Y. 274, 57

a conversion of the stock.<sup>34</sup> If issued corporate stock has been wrongfully, negligently or unauthorizedly transferred upon the corporate books, the corporation<sup>35</sup> and the officer issuing the stock<sup>36</sup> are liable to a bona fide holder of the supposed certificates for the damages he has sustained.

**F. PLEDGES OF STOCK.—1. Remedies of Pledgee.—a. In General.**<sup>37</sup>—The pledgee of stock may maintain an action to protect his rights in the stock whenever a right of action would have existed in the pledgor had there been no pledge.<sup>38</sup> He has a right of action for

Am. Dec. 520. **Pa.**—Pennsylvania Co. v. Franklin Fire Ins. Co., 181 Pa. 40, 37 Atl. 191, 37 L. R. A. (N. S.) 788. **Tenn.**—Read v. Cumberland Tel. & Tel. Co., 93 Tenn. 482, 27 S. W. 660. **W. Va.**—Snyder v. Charleston & S. Bridge Co., 65 W. Va. 1, 63 S. E. 616, 131 Am. St. Rep. 947.

[a] **A prayer for alternative relief** by an award of damages, is not essential to the sufficiency of the complaint. Vernon, G. & R. R. Co. v. Washington Civil Township, 48 Ind. App. 309, 95 N. E. 599.

[b] **If the corporation has no new stock which it can issue** it will be required to pay to the stockholder the value of his shares. Pollock v. National Bank, 7 N. Y. 274, 57 Am. Dec. 520; Snyder v. Charlestown & S. Bridge Co., 65 W. Va. 1, 63 S. E. 616, 131 Am. St. Rep. 947.

34. **Cal.**—Cooper v. Spring Valley Water Co., 171 Cal. 158, 153 Pac. 936. **Ind.**—Vernon, G. & R. R. Co. v. Washington Civil Township, 48 Ind. App. 309, 95 N. E. 599. **La.**—Leurey v. Bank of Baton Rouge, 131 La. 30, 58 So. 1022, Ann. Cas. 1913E, 1168. **N. C.**—Baker v. Atlantic Coast Line R. Co., 173 N. C. 365, 92 S. E. 170, L. R. A. 1917E, 266; Cox v. First Nat. Bank, 119 N. C. 302, 26 S. E. 22. **Utah.**—Rasmussen v. Sevier Valley Canal Co., 40 Utah 371, 121 Pac. 741.

[a] **Averment that transfer was made "without lawful authority"** is a mere conclusion. Rasmussen v. Sevier Valley Canal Co., 40 Utah 371, 121 Pac. 741.

[b] **Both the corporation and the transferee of the stock, if the latter is not a bona fide purchaser, may be made defendants.** Rasmussen v. Sevier Valley Canal Co., 40 Utah 371, 121 Pac. 741.

[c] **A third person alleged by the corporation in its answer to be owner**

of the stock, should be made a party to the action, in order that all matters involved may be settled in one action. Rasmussen v. Sevier Valley Canal Co., 40 Utah 371, 121 Pac. 741.

35. **U. S.**—Moore v. Citizens' Nat. Bank, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. ed. 385. **Mass.**—Farrington v. South Boston R. Co., 150 Mass. 406, 23 N. E. 109, 15 Am. St. Rep. 222, 5 L. R. A. 849. **Mo.**—National Bank of Webb City v. Newell-Morse R. Co., 259 Mo. 637, 168 S. W. 699. **N. Y.**—Fifth Ave. Bank v. Forty-second St. & G. St. Ferry R. Co., 137 N. Y. 231, 33 N. E. 378, 33 Am. St. Rep. 712, 19 L. R. A. 331. **Wis.**—First Ave. Land Co. v. Parker, 111 Wis. 1, 86 N. W. 604, 87 Am. St. Rep. 841.

[a] **"The ground on which a corporation is held liable to a bona fide purchaser for value of false certificates of its stock issued under its seal, signed by the proper officers and apparently genuine, is that the certificates are statements by the corporation of facts which it is its duty to know, and which cannot well be known to the purchaser."** Allen v. South Boston R. Co., 150 Mass. 200, 22 N. E. 917, 15 Am. St. Rep. 185, 5 L. R. A. 716.

36. **Windram v. French**, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750.

[a] **The officer may be sued separately or joined in an action against the corporation.** Bruff v. Mali, 36 N. Y. 200, 34 How. Pr. 338.

37. See generally, the title "Pledges."

38. **Cal.**—Kraft Co. Bank v. Bank of Orland, 133 Cal. 64, 65 Pac. 143, action for relief from illegal assessment and sale. **Colo.**—Farmers' Pawnee Canal Co. v. Henderson, 46 Colo. 37, 102 Pac. 1063, to restrain enforcement of illegal assessment. **Ore.**—First Nat. Bank v. Multnomah State Bank, 87 Ore. 423, 170 Pac. 534, suit to enjoin



a conversion of the stock by a third person,<sup>39</sup> or to recover dividends improperly paid to the pledgor.<sup>40</sup> He may also prevent any wrongful or illegal disposition of the corporate property which will impair the value of the stock.<sup>41</sup>

b. *Enforcing the Pledge.*—The pledgee may maintain an action upon the debt secured if he so desires,<sup>42</sup> and doing so does not affect the existence of the pledge,<sup>43</sup> unless an attachment or execution is levied upon the stock.<sup>44</sup> After default in payment of the debt secured a sale of the stock pledged may be made under the common law,<sup>45</sup> or under the statutes,<sup>46</sup> or by virtue of a power of sale in the pledge,<sup>47</sup>

sale of stock for an illegal assessment may be maintained.

39. *Florida Nat. Bank v. Merchants' & Farmers' Bank*, 227 Fed. 714, the amount of the debt secured must be alleged in the complaint as it determines the measure of damages.

40. *Hunt v. Laconia & L. Street Ry.*, 68 N. H. 561, 39 Atl. 437.

41. *Ga.*—*Andrews Co. v. National Bank*, 129 Ga. 53, 58 S. E. 633, 121 Am. St. Rep. 186. *Minn.*—*Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261. *Tex.* *Enterprise Trading Co. v. Bank of Crowell* (Tex. Civ. App.), 167 S. W. 296, removal of corporate assets from its domicile. *Wash.*—*Kneeland Inv. Co. v. Berendes*, 81 Wash. 372, 142 Pac. 869, action to cancel a corporate mortgage.

[a] *An attempt to obtain relief through the action of the corporation, need not be made by the pledgee.* *Kneeland Inv. Co. v. Berendes*, 81 Wash. 372, 142 Pac. 869.

[b] *Parties.*—The corporation, its stockholders, and all parties to the alleged wrongful act, may be joined in the action. *Andrews Co. v. National Bank*, 129 Ga. 53, 58 S. E. 633, 121 Am. St. Rep. 186.

[c] *An unregistered pledgee cannot set aside a sale of corporate property consented to by all of the stockholders including the pledgor, although it was lacking in certain formalities.* *Elyea v. Lehigh Salt Min. Co.*, 169 N. Y. 29, 61 N. E. 992.

42. *Ehrlich v. Ewald*, 66 Cal. 97, 4 Pac. 1062; *Sonoma Valley Bank v. Hill*, 59 Cal. 107; *Stover v. Flack*, 41 Barb. (N. Y.) 162.

[a] *A statute requiring a debt secured by mortgage to be collected by foreclosure proceedings, does not apply to a pledge.* *Ehrlich v. Ewald*, 66 Cal. 97, 4 Pac. 1062.

[b] *The judgment need not contain a provision that the stock shall be surrendered on satisfaction.* *French v. McCarthy*, 125 Cal. 508, 58 Pac. 154.

[c] *After a finding of the amount due on a note and entry of an order of sale in a foreclosure suit an independent action on the debt cannot be further prosecuted.* *Brigel v. Creed*, 65 Ohio St. 40, 60 N. E. 991.

43. *French v. McCarthy*, 125 Cal. 508, 58 Pac. 154.

[a] *The Stock May Be Retained Until the Judgment Is Satisfied.* *French v. McCarthy*, 125 Cal. 508, 58 Pac. 154.

44. *Ark.*—*Clafin Co. v. Bretzfelder*, 69 Ark. 271, 62 S. W. 905. But see, *Hudson v. Bank of Pine Bluff*, 75 Ark. 493, 87 S. W. 1177. *Ia.*—*Citizens' Bank v. Dows*, 68 Iowa 460, 27 N. W. 459. *Mont.*—*Parberry v. Woodson Sheep Co.*, 18 Mont. 317, 45 Pac. 278.

45. *Mass.*—*Merchants' Nat. Bank v. Thompson*, 133 Mass. 482. *N. Y.* *Stearns v. Marsh*, 4 Denio 227, 47 Am. Dec. 248. *Tex.*—*King & Co. v. Texas Banking & Ins. Co.*, 58 Tex. 669. *Vt.* *White River Sav. Bank v. Capital Sav. Bank & Tr. Co.*, 77 Vt. 123, 59 Atl. 197, 107 Am. St. Rep. 754.

46. See the statutes and *McAulay v. Moody*, 128 Cal. 202, 60 Pac. 778.

[a] *Where a controversy arises between the pledgor and the corporation as to the right of the former to receive payment of a dividend, the pledgee need not await the determination of the litigation before selling the pledged stock.* *McAulay v. Moody*, 128 Cal. 202, 60 Pac. 778.

[b] *A Statutory Method Is Not Exclusive.*—*Taft v. Church*, 162 Mass. 527, 39 N. E. 283.

47. *Conn.*—*Stevens v. Hurlbut Bank*, 31 Conn. 146. *Ga.*—*Thornton v. Martin*, 116 Ga. 115, 42 S. E. 348. *Mo.*—*Hagan*

or a suit in equity for the foreclosure of the pledge and the sale of the property may be maintained.<sup>48</sup> An agreement for forfeiture of the stock pledged if payment of the debt is not made on a specified date, will not be enforced,<sup>49</sup> nor can a pledgor's rights be cut off by a mere notice to pay the debt by a certain time.<sup>50</sup>

**2. Remedies of Pledgor.**—An action for conversion may be maintained by the pledgor of stock against the pledgee, for any wrongful or unauthorized dealing with it by the latter,<sup>51</sup> or for a failure to re-

*v. Continental Nat. Bank*, 182 Mo. 319, 81 S. W. 171.

[a] **The pledgor cannot compel a sale** to be made immediately after a default on the debt. *Franklin Sav. Inst. v. Pretorius*, 6 Mo. App. 470.

[b] **Place.**—(1) The sale need not be made in the county in which a railroad, the stock of which is pledged, is situated. *Thornton v. Martin*, 116 Ga. 115, 42 S. E. 348. (2) If the place for making the sale is specified the sale must be conducted there. *Dykens v. Allen*, 7 Hill (N. Y.) 497, 42 Am. Dec. 87.

48. *Ala.*—*Jones v. Dimmick*, 178 Ala. 296, 59 So. 623. *Me.*—*Boynton v. Payrow*, 67 Me. 587. *Vt.*—*White River Sav. Bank v. Capital Sav. Bank & Tr. Co.*, 77 Vt. 123, 59 Atl. 197, 107 Am. St. Rep. 754.

[a] **A statutory remedy is merely cumulative.** *Jones v. Dimmick*, 178 Ala. 296, 59 So. 623.

[b] **A lien on real property for security of the same debt will not be required to be first enforced.** *Weiscope v. Newman*, 24 Ky. L. Rep. 36, 65 S. W. 808.

[c] **Venue.**—The action is transitory and should be brought in the county in which the defendant resides. *State v. Superior Court*, 13 Wash. 607, 43 Pac. 887, 46 Pac. 342.

[d] **A cause of action upon the note secured by the pledge cannot be joined with a cause of action for foreclosure of the pledge unless both causes of action affect all the parties.** *Plankinton v. Hildebrand*, 89 Wis. 209, 61 N. W. 839.

[e] **Parties.**—The assignee of the pledgor, where the assignment is known to the pledgee, is a necessary party to the foreclosure action. *Brown v. Hotel Assn.*, 63 Neb. 181, 88 N. W. 175.

[f] **A receiver for the property of the pledgor is also a necessary party.** *Denny v. Cole*, 22 Wash. 372, 61 Pac. 38, 79 Am. St. Rep. 940.

[g] **Any person claiming an interest in the property may be made a party.** *Plankinton v. Hildebrand*, 89 Wis. 209, 61 N. W. 839.

[h] **A jury trial cannot be had.** *Brigel v. Creed*, 65 Ohio St. 40, 60 N. E. 991.

[i] **A deficiency judgment may be rendered.** *Commercial Nat. Bank v. Grant*, 73 Neb. 435, 103 N. W. 68. *Compare Plankinton v. Hildebrand*, 89 Wis. 209, 61 N. W. 839.

[j] **Different stocks pledged may be ordered sold in one parcel where this seems desirable.** *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87.

[k] **Possession of the Certificate After Judgment.**—After a judgment of foreclosure ordering a sale of the stock, the pledgees' claim is merged in the judgment and he is not entitled to possession of the certificate of stock, the clerk of the court should retain possession of the certificate until a redemption is made by the pledgor. *American Bonding Co. v. Loeb*, 50 Wash. 104, 96 Pac. 692, 126 Am. St. Rep. 891.

49. *Smith v. Becker*, 192 Mo. App. 597, 184 S. W. 943.

[a] **A clause that if payment is not made by a specified date the pledgor "agrees to forfeit all his right, title and interest to the same" does not constitute a sale.** "A contract which is a pledge in the beginning continues a pledge until the debt is paid or the right of redemption is foreclosed. The right of redemption is a part of the contract of pledge and the parties cannot therein make any valid agreement that there shall be no redemption after default." *Smith v. Becker*, 192 Mo. App. 597, 604, 184 S. W. 943.

50. *Groeltz v. Cole*, 128 Iowa 340, 103 N. W. 977.

51. *Ky.*—*Kentucky Title Sav. Bank & Trust Co. v. McClarty*, 174 Ky. 171, 191 S. W. 892. *Mich.*—*Feige v. Burt*, 118 Mich. 243, 77 N. W. 928, 74 Am.

deliver the stock when there has been full compliance by the pledgor with the terms of the pledge.<sup>52</sup> Where the transferee of stock claims ownership, an action may be maintained by the transferor to have the transfer declared to be a pledge and not a sale and for recovery of the stock.<sup>53</sup> While the general rule is said to be that an action in equity can not be maintained to redeem property pledged for a debt,<sup>54</sup> some authorities deny the existence of the rule.<sup>55</sup> And, in any event, where special grounds appear which would make the remedy at law inadequate,<sup>56</sup> as where there has been a transfer of the stock on the books of the corporation,<sup>57</sup> where it is of a special and peculiar value to the pledgor,<sup>58</sup> or where an accounting is necessary to determine the rights of the parties,<sup>59</sup> resort may be had to a court of equity.<sup>60</sup>

G. SALES. — 1. **Specific Performance of Contract To Sell Stock.** The general rule that contracts of purchase and sale of personal property will not be specifically enforced in equity, the remedy at law for

St. Rep. 390. **Mo.**—Schaaf *v.* Fries, 90 Mo. App. 111. **Ore.**—Morgan *v.* Johns, 84 Ore. 557, 165 Pac. 369.

[a] **A sale without notice constitutes a conversion.** Feige *v.* Burt, 118 Mich. 243, 77 N. W. 928, 74 Am. St. Rep. 390; Furber *v.* National Metal Co., 118 App. Div. 263, 103 N. Y. Supp. 490.

[b] **A tender of the debt or demand of return of the stock need not be made before instituting suit for conversion by a sale of the stock without notice.** Feige *v.* Burt, 118 Mich. 243, 77 N. W. 928, 74 Am. St. Rep. 390. Compare Schaaf *v.* Fries, 90 Mo. App. 111.

[c] **A recoupment of the amount of the debt may be made by the pledgee who is sued for conversion in selling stock without notice.** Feige *v.* Burt, 118 Mich. 243, 77 N. W. 928, 74 Am. St. Rep. 390.

52. See *infra*, this note.

[a] **The assignee of the pledgor may maintain the action.** McKee *v.* Bernheim, 130 App. Div. 424, 114 N. Y. Supp. 1080.

53. Golden *v.* Fischer, 27 Cal. App. 271, 149 Pac. 797 (such an action is not one of claim and delivery); Smith *v.* Becker, 192 Mo. App. 597, 184 S. W. 943.

[a] **Action for Conversion as Election.**—Institution of an action for conversion which is dismissed before trial is not a conclusive election which will prevent maintenance of an action to recover the stock itself. Smith *v.* Becker, 192 Mo. App. 597, 184 S. W. 943.

54. Hagan *v.* Continental Nat. Bank,

182 Mo. 319, 81 S. W. 171; Treadwell *v.* Clark, 190 N. Y. 51, 82 N. E. 505.

55. Colburn *v.* Riley, 11 Colo. App. 184, 52 Pac. 684. See Le Febure *v.* Lord (Iowa), 167 N. W. 651.

56. Hagan *v.* Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171.

57. Bryson *v.* Rayner, 25 Md. 424, 90 Am. Dec. 69; Hagan *v.* Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171.

58. Hagan *v.* Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171.

59. **Ala.**—Adams *v.* Adams, 73 So. 984. **Mo.**—Hagan *v.* Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171. **N. H.** White Mountain Railroad *v.* Bay State Iron Co., 50 N. H. 57.

60. See cases in preceding notes.

[a] **Judgment.**—(1) Where it appears that the defendant has possession of the stock, the judgment may be for its delivery and need not be in the alternative for delivery or payment of its value. Colburn *v.* Riley, 11 Colo. App. 184, 52 Pac. 684. (2) Payment of the debt may be required as a condition to granting relief. Love *v.* Park, 95 Neb. 729, 146 N. W. 941. (3) Where the pledgee's sale of the property was made unfairly, and he cannot redeliver the property, he will be required to account for the amount received by him at the sale, less the amount of the debt secured. Hagan *v.* Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171.

[b] Where a stock dividend has been received by the pledgee, the pledgor cannot on redemption treat the issue of the dividend to the pledgee as a conversion, but will be allowed to



the recovery of damages for breach of the contract being considered an adequate remedy, applies to contracts for the purchase and sale of corporate stock, having a market value and which may be readily bought and sold.<sup>61</sup> There is a marked tendency upon the part of the courts, however, to liberally apply the exception to this general rule, that specific performance will be awarded where unusual circumstances exist by virtue of which the stock has a peculiar value to the purchaser and it would be inequitable to relegate him to an action for damages.<sup>62</sup> Thus the contract has been specifically enforced where the stock is not for sale in the general market,<sup>63</sup> where the stock has no certain, ascer-

redem the stock with its increment. *Whitney v. Whitney Bros. Co.*, 152 Wis. 453, 140 N. W. 35.

61. **U. S.**—*Eckley v. Daniel*, 193 Fed. 279; *Bernier v. Griscom-Spencer Co.*, 169 Fed. 889. **Cal.**—See *Bacon v. Grosse*, 165 Cal. 481, 132 Pac. 1027. **Fla.** *Graham v. Herlong*, 50 Fla. 521, 39 So. 111. **Ill.**—*Cohn v. Mitchell*, 115 Ill. 124, 3 N. E. 420; *Cazier v. Mohr*, 197 Ill. App. 550. **Md.**—*Ryan v. McLane*, 91 Md. 175, 46 Atl. 340, 80 Am. St. Rep. 438, 50 L. R. A. 501. **Mich.**—*Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329. **Minn.**—*Moulton v. Warren Mfg. Co.*, 81 Minn. 259, 83 N. W. 1082. **N. H.**—*Eckstein v. Downing*, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404. **N. J.**—*Kimball v. Morton*, 5 N. J. Eq. 26, 53 Am. Dec. 621. **N. Y.**—*Harle v. Brenning*, 131 App. Div. 742, 116 N. Y. Supp. 51; *Gilbert v. Bunnell*, 92 App. Div. 284, 86 N. Y. Supp. 1123. **Pa.** *Corser v. Hale*, 149 Pa. 274, 24 Atl. 285. **Wis.**—*Avery v. Ryan*, 74 Wis. 591, 43 N. W. 317.

[a] **Government stocks and bonds** are particularly within the general rule. *Eckstein v. Downing*, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404. And see *Frue v. Houghton*, 6 Colo. 318, bonds of a municipal corporation.

62. **U. S.**—*Henry L. Doherty & Co. v. Rice*, 186 Fed. 204. **Ill.**—*Ames v. Witbeck*, 179 Ill. 458, 53 N. E. 969. **Minn.**—*Northern Trust Co. v. Markell*, 61 Minn. 271, 63 N. W. 735. **Mo.** *Baumhoff v. St. Louis & K. R. Co.*, 205 Mo. 248, 104 S. W. 5, 120 Am. St. Rep. 745; *Dennison v. Keasby*, 200 Mo. 408, 98 S. W. 546. **N. Y.**—*Waddle v. Cabana*, 220 N. Y. 18, 114 N. E. 1054; *Butler v. Wright*, 186 N. Y. 259, 78 N. E. 1002. **N. C.**—*Meisenheimer v. Alexander*, 162 N. C. 226, 78 S. E. 161. **Pa.** *Eichbaum v. Sample*, 213 Pa. 216, 62 Atl. 837. **W. Va.**—*Hogg v. McGuffin*,

67 W. Va. 456, 68 S. E. 41, 31 L. R. A. (N. S.) 491.

[a] **Attitude of the Courts.**—"In administering the remedy current authority regards the jurisdiction as flexible, depending largely upon the facts of each individual case, and not bound by hard and fast rules; a reasonable discretion being allowed in awarding relief, and in determining the right thereto the situation involved should be considered from a practical rather than a theoretical, view point." First *Nat. Bank v. Corporation Securities Co.*, 128 Minn. 341, 150 N. W. 1084.

[b] **A large discretion is exercised** by the courts in such actions. *Clowes v. Miller*, 74 Conn. 287, 50 Atl. 728; *McLaughlin v. Leonhardt*, 113 Md. 261, 77 Atl. 647.

63. **Cal.**—*Krouse v. Woodward*, 110 Cal. 638, 42 Pac. 1084. **Ill.**—*Hills v. McMunn*, 232 Ill. 488, 83 N. E. 963; *Cazier v. Mohr*, 197 Ill. App. 550. **Ia.** See *Schmidt v. Pritchard*, 135 Iowa 240, 112 N. W. 801. **Mass.**—*Adams v. Messinger*, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679. **Mich.**—*Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329. **Mo.**—*Dennison v. Keasby*, 200 Mo. 408, 98 S. W. 546. **N. J.**—*Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371. **Ore.**—*Deitz v. Stephenson*, 51 Ore. 596, 95 Pac. 803. **Pa.**—*Northern Central R. Co. v. Walworth*, 193 Pa. 207, 44 Atl. 253, 74 Am. St. Rep. 683. **W. Va.** *Morgan v. Bartlett*, 75 W. Va. 293, 83 S. E. 1001, action by the seller.

[a] **Where the corporation is a close corporation** or its stock is owned principally by one person, specific performance will be granted. **U. S.**—*Newton v. Woolley*, 105 Fed. 541. **Ill.**—*Kimmel v. Gray*, 196 Ill. App. 406. **Mich.**—*Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329. **N. J.**—*Safford v. Barber*, 74 N. J. Eq. 352, 70 Atl. 371. **N. Y.**

tainable value,<sup>64</sup> as where the stock was stock of a mining corporation, whose property was undeveloped and of no certain value,<sup>65</sup> where a conveyance of land was also involved in the transaction,<sup>66</sup> where the stock is incident or appurtenant to other property which is sold,<sup>67</sup> where the contract is for the sale of all the stock of the corporation,<sup>68</sup> where the contract is one involving the reorganization of a defunct corporation,<sup>69</sup> where control of the corporation for legitimate purposes was the reason for the purchase of the stock,<sup>70</sup> where the right to a transfer is based upon a provision of the charter or bylaws of the cor-

Waddle v. Cabana, 220 N. Y. 18, 114 N. E. 1054.

[a] Where stock has been pledged, specific performance of the contract to return the stock may be enforced. Krouse v. Woodward, 110 Cal. 638, 42 Pac. 1084.

64. Cal.—Krouse v. Woodward, 110 Cal. 638, 42 Pac. 1084. Del.—United States Fire Apparatus Co. v. G. W. Baker Mach. Co., 10 Del. Ch. 421, 95 Atl. 294, 97 Atl. 613. Ill.—Kimmel v. Gray, 196 Ill. App. 406. Minn.—First Nat. Bank v. Corporation Securities Co., 128 Minn. 341, 150 N. W. 1084. Mo.—Whiting v. Enterprise Land & Sheep Co., 265 Mo. 374, 177 S. W. 589; Baumhoff v. St. Louis & Kirkwood R. Co., 205 Mo. 248, 104 S. W. 5, 120 Am. St. Rep. 745. N. J.—Safford v. Barber, 74 N. J. Eq. 352, 70 Atl. 371. N. Y. Waddle v. Cabana, 220 N. Y. 18, 114 N. E. 1054; Rau v. Seidenberg, 53 Misc. 386, 104 N. Y. Supp. 798, where the organization of the corporation had recently been completed. Pa.—Eichbaum v. Sample, 213 Pa. 216, 62 Atl. 837; Rumsey v. New York & Penn. Ry. Co., 203 Pa. 579, 53 Atl. 495.

65. Gilfallan v. Gilfallan, 168 Cal. 23, 141 Pac. 623, Ann. Cas. 1915D, 784; Wait v. Kern River Min. etc. Co., 157 Cal. 16, 106 Pac. 98; Turley v. Thomas, 31 Nev. 181, 101 Pac. 568, 135 Am. St. Rep. 667.

[a] Basis of the Rule.—“In the peculiar condition of business and mining operations in this state, where numerous mining and other corporations are in existence whose stock is often of fluctuating and uncertain value, and where certain kinds of stocks have a peculiar value to those acquainted with their affairs, where the market value of stocks, if any they have, is often difficult to substantiate by competent evidence, and where the risk of the personal responsibility of individuals

and corporations is so great, courts should be liberal in extending the full, adequate, and complete relief afforded by a decree of specific performance.” Treasurer v. Commercial etc. Co., 23 Cal. 390, quoted with approval. Gilfallan v. Gilfallan, 168 Cal. 23, 141 Pac. 623.

66. U. S.—Perin v. Megibben, 53 Fed. 86, 3 C. C. A. 443. Mass.—Leach v. Fobes, 11 Gray 506, 71 Am. Dec. 732. But see, Jones v. Newhall, 115 Mass. 244, 15 Am. Rep. 97. W. Va.—Lathrop v. Columbia Collieries Co., 70 W. Va. 58, 73 S. E. 299.

67. Riverside Land Co. v. Jarvis, 174 Cal. 316, 163 Pac. 54 (water stock attached to land); Fleishman v. Woods, 135 Cal. 256, 67 Pac. 276.

68. Moloney v. Cressler, 236 Fed. 636, 149 C. C. A. 632.

69. Millen v. Potter, 190 Mich. 262, 157 N. W. 101.

70. U. S.—Henry L. Doherty & Co. v. Rice, 186 Fed. 204. Cal.—Sherwood v. Wallin, 1 Cal. App. 532, 82 Pac. 566. Del.—United States Fire Apparatus Co. v. G. W. Baker Mach. Co., 10 Del. Ch. 421, 95 Atl. 294, where the ultimate object was control of a patent owned by the corporation. Mo.—Wood v. Kansas City Home Tel. Co., 223 Mo. 537, 123 S. W. 6; O'Neill v. Webb, 75 Mo. App. 1. Pa.—Sherman v. Herr, 220 Pa. 420, 69 Atl. 899; Rumsey v. New York & P. R. Co., 203 Pa. 579, 53 Atl. 495. Contra, Rigg v. Reading & S. W. St. Ry. Co., 191 Pa. 298, 43 Atl. 212; Foll's Appeal, 91 Pa. 434, 36 Am. Rep. 671.

[a] Unless under the circumstances it is not equitable to grant specific performance. Clowes v. Miller, 74 Conn. 287, 50 Atl. 728; McLaughlin v. Leonhardt, 113 Md. 261, 77 Atl. 647; Ryan v. McLane, 91 Md. 175, 46 Atl. 340, 80 Am. St. Rep. 438, 50 L. R. A. 501, quasi public corporation.

poration,<sup>71</sup> where a prior right to purchase the stock had been granted the plaintiff,<sup>72</sup> and where the seller is insolvent.<sup>73</sup> A contract with the corporation by which it agrees to issue its stock for services performed or property sold or upon any other adequate consideration is subject to the general principles already stated.<sup>74</sup> Where the stock is held by defendant in trust for the plaintiff, a transfer to him will be required to be made, irrespective of the existence of any peculiar value attaching to the stock.<sup>75</sup>

Specific performance in this class of cases follows the general rule, that a contract to be specifically enforced must be certain,<sup>76</sup> fair,<sup>77</sup> and the consideration adequate.<sup>78</sup>

**Mutuality.** — While ordinarily a contract which may be specifically enforced at the suit of the vendee may likewise be specifically enforced at the suit of the vendor, upon the doctrine of mutuality of remedies,<sup>79</sup> this rule has been held inapplicable to contracts for the purchase of personal property, such as corporate stocks, where the vendor is entitled only to a recovery of money or of property having an easily ascertainable money value,<sup>80</sup> though there are also authorities upholding

71. *Riverside Land Co. v. Jarvis*, 174 Cal. 316, 163 Pac. 54.

72. *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; *Eichbaum v. Sample*, 213 Pa. 216, 62 Atl. 837.

73. *Ames v. Witbeck*, 179 Ill. 458, 53 N. E. 969; *Avery v. Ryan*, 74 Wis. 591, 43 N. W. 317.

74. *Ames v. Witbeck*, 179 Ill. 458, 53 N. E. 969; *Kennedy v. Thompson*, 97 App. Div. 296, 89 N. Y. Supp. 963, refusing specific performance where there was no showing that the stock had a special value to plaintiff.

[a] Where no stock had ever been issued or sold, specific performance was decreed. *Selover v. Isle Harbor Land Co.*, 91 Minn. 451, 98 N. W. 344.

[b] **Services.**—(1) The purchaser cannot enforce the contract where the consideration for the transfer was the future rendition of personal services by the purchaser to the seller. *Deitz v. Stephenson*, 51 Ore. 596, 95 Pac. 803. (2) After the services contracted for have been rendered specific performance will be awarded. *Turley v. Thomas*, 31 Nev. 181, 101 Pac. 568, 135 Am. St. Rep. 667.

75. *U. S.*—*Krohn v. Williamson*, 62 Fed. 869, *affirmed*, 66 Fed. 655, 13 C. C. A. 668. *Cal.*—*Bacon v. Grosse*, 165 Cal. 481, 132 Pac. 1027. *N. Y.*—*Johnson v. Brooks*, 93 N. Y. 337. *Pa.*—*Dietrich v. Tyson*, 4 Phila. 352.

[a] A contract between two persons to severally purchase certain stock from others and divide it equally between themselves, will be specifically enforced where the stock is not easily procurable in the market. *Sherman v. Herr*, 220 Pa. 420, 69 Atl. 899.

76. *Ala.*—*Stay v. Tennile*, 159 Ala. 514, 49 So. 238. *Cal.*—*Gilfallan v. Gilfallan*, 168 Cal. 23, 141 Pac. 623, Ann. Cas. 1915D, 784. *Del.*—*Diamond State Iron Co. v. Todd*, 6 Del. Ch. 163, 14 Atl. 27, 8 Houst. 372. *Ill.*—*Kimmel v. Gray*, 196 Ill. App. 406. *Mo.*—*Butler v. Murphy*, 106 Mo. App. 287, 80 S. W. 337. *Nev.*—*Oliver v. Little*, 31 Nev. 476, 103 Pac. 240. *N. J.*—*Sheehan v. Humphreys*, 81 N. J. Eq. 416, 83 Atl. 189. *Wash.*—*Huston v. Harrington*, 58 Wash. 51, 107 Pac. 874.

77. *Wait v. Kern River Min. etc. Co.*, 157 Cal. 16, 106 Pac. 98.

78. *Cal.*—*Wait v. Kern River Min. etc. Co.*, 157 Cal. 16, 106 Pac. 98. *Mich.*—*Johnston v. Frederick Stearns & Co.*, 160 Mich. 247, 125 N. W. 29. *Wis.*—*Hibbert v. Mackinnon*, 79 Wis. 673, 49 N. W. 21.

79. 2 Pom. Eq. Rem., §747.

80. *Del.*—*United States Fire Apparatus Co. v. G. W. Baker Mach. Co.*, 10 Del. Ch. 421, 95 Atl. 294, 97 Atl. 613. *Mass.*—*Jones v. Newhall*, 115 Mass. 244, 15 Am. Rep. 97. *N. H.*—*Eckstein v. Downing*, 64 N. H. 248, 9 Atl. 626, 10 Am. St. Rep. 404.



the principle of mutuality in such cases.<sup>81</sup>

**Procedure.** — The corporation is not a necessary party to the action,<sup>82</sup> unless, perhaps, some action by it is sought.<sup>83</sup> As elsewhere shown<sup>84</sup> process may be served by publication where the court has jurisdiction of the res and of the persons necessary to the enforcement of the decree.<sup>85</sup> The complaint must allege the facts from which appears the peculiar value of the stock to plaintiff and the necessity for a resort to equity.<sup>86</sup> Where specific performance is refused, the court may, if the facts alleged justify it, retain jurisdiction and award an accounting between the parties,<sup>87</sup> or fix and award the damages to which he is entitled.<sup>88</sup>

**2. Remedies for Breach of Contract.** — The remedies available to the purchaser or seller of other classes of personal property may be employed in the case of the breach of a contract involving corporation stock.<sup>89</sup> Thus an action may be maintained by the seller to recover the purchase price,<sup>90</sup> or damages for the breach,<sup>91</sup> or to cancel and

81. **Ill.**—*Hills v. McMunn*, 232 Ill. 488, 83 N. E. 963. **Mich.**—*Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329. **N. C.**—*Austin v. Gillaspie*, 54 N. C. 261. **W. Va.**—*Morgan v. Bartlett*, 75 W. Va. 293, 83 S. E. 1001; *Bumgardner v. Leavitt*, 35 W. Va. 194, 13 S. E. 67, 12 L. R. A. 776. But see *Hissam v. Parrish*, 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892.

82. *Williamson v. Krohn* 66 Fed. 655, 13 C. C. A. 668; *Sayward v. Houghton*, 82 Cal. 628, 23 Pac. 120; *Sherwood v. Wallin*, 1 Cal. App. 532, 82 Pac. 566.

83. See *Wait v. Kern River Min. etc. Co.*, 157 Cal. 16, 106 Pac. 98.

84. See the title "**Service of Process and Papers.**" See also 17 **STANDARD PROC.** 683, 688.

85. See *infra*, this note.

[a] **Proceeding in Rem.**—An Arizona corporation was organized solely for the purpose of doing business in California where all its property and business was located. It held in its treasury certain unissued stock in trust for its promoter with whom plaintiff had a contract entitling him to a certain number of such shares. In an action against the promoter and the corporation to compel enforcement of the contract and compel issuance of the stock, it was held that service might be had on the promoter, who had absconded, by publication; that under the circumstances the situs of the stock might be deemed to California, and that therefore, the stock or "res" being within the jurisdiction, the action

for its delivery was in a sense one in rem. *Wait v. Kern River Min. etc. Co.*, 157 Cal. 16, 106 Pac. 98. Compare *Hamil v. Flowers*, 133 Ga. 216, 65 S. E. 961.

86. **U. S.**—*Eckley v. Daniel*, 193 Fed. 279. **Fla.**—*Graham v. Herlong*, 50 Fla. 521, 39 So. 111. **Minn.**—*Northern Trust Co. v. Markell*, 61 Minn. 271, 63 N. W. 735. **N. Y.**—*Kennedy v. Thompson*, 97 App. Div. 296, 89 N. Y. Supp. 963; *Bateman v. Straus*, 86 App. Div. 540, 83 N. Y. Supp. 785.

[a] Where it appears that the corporation is a close, family affair, "it will not be presumed that the stock can be procured on the market, or has a market value." *Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329.

87. *A. D. Smith & Sons v. Securities Co. (Ala.)*, 73 So. 892; *Eastman v. Reid*, 101 Ala. 320, 13 So. 46, the option should be given the defendant to perform the contract.

88. *Wonson v. Fenno*, 129 Mass. 405.

89. See generally the title, "**Sales,**" and see 11 **STANDARD PROC.** 931.

90. *Conger v. Lee*, 174 Iowa 423, 157 N. W. 240; *Phelps-Stokes Estates v. Nixon*, 222 N. Y. 93, 118 N. E. 241.

[a] A tender or delivery of the stock must be pleaded. *Nicholls v. Reid*, 109 Cal. 630, 42 Pac. 298; *Bartlett v. Scott*, 55 Neb. 477, 75 N. W. 1102.

[b] An allegation of the consideration for the contract is unnecessary. *Cuthill v. Peabody*, 19 Cal. App. 304, 125 Pac. 926.

91. See *infra*, this note.

rescind the sale.<sup>92</sup>

The purchaser may maintain an action to recover damages suffered by him.<sup>93</sup> An action to recover damages for a breach of warranty,<sup>94</sup> or on an indemnity contract,<sup>95</sup> or an agreement by the seller to repurchase the stock on demand,<sup>96</sup> may also be maintained.

**3. Remedies for Fraud in Inducing Sale.**<sup>97</sup> — Where a sale of corporate stock has been induced by fraud, the remedies generally available in the case of fraud and deceit are open to the defrauded party.<sup>98</sup>

[a] An agreement by plaintiff to sell the stock must appear (1) from the complaint. *Eustice v. Meytrott*, 100 Ark. 510, 140 S. W. 590. (2) It need not, however, be expressly alleged. *First Nat. Bank v. Corporation Securities Co.*, 120 Minn. 105, 139 N. W. 296. See *Hardin v. Case*, 134 Ga. 813, 68 S. E. 648.

92. See the titles "Sales;" "Rescission and Cancellation."

[a] The undisclosed principal for whom the purchase was made, is not a necessary party to the action. *Poole v. Camden*, 79 W. Va. 310, 92 S. E. 454, L. R. A. 1917E, 988.

[b] Where a part of the stock has been transferred the judgment may order any deficiency made up from other similar shares of stock owned by the defendant or there may be judgment for their value. *Poole v. Camden*, 79 W. Va. 310, 92 S. E. 454, L. R. A. 1917E, 988.

93. See *infra*, this note.

[a] Upon the breach of an executory contract the form of action must be special and not general assumpsit. *Thomas v. Mott*, 78 W. Va. 113, 88 S. E. 651.

[b] Where property is conveyed to a corporation by the plaintiff on the promise of stockholders to transfer certain stock to him, an action for damages may be maintained against the stockholders on their refusal to perform. *Uhl v. Gayley*, 181 App. Div. 802, 169 N. Y. Supp. 191.

[c] If the contract is entire, and the purchaser has made partial payment, he cannot on a breach by the seller maintain an action to recover the proportion of the stock he has paid for. *Reid v. Caldwell*, 110 Ga. 481, 35 S. E. 684.

94. Ark.—*Cornish v. Friedman*, 94 Ark. 282, 126 S. W. 1079. S. C.—*Iler v. Jennings*, 87 S. C. 87, 68 S. E. 1041, distinguishing between an action on a warranty and one for fraud. Wash.

*Pacific Power & Light Co. v. White*, 96 Wash. 18, 164 Pac. 602, Ann. Cas. 1918B, 125.

[a] Parties.—Although a sale of stock is made by all the stockholders, if only a portion of them executed the warranty they are the only necessary parties to an action upon it. *Pacific Power & Light Co. v. White*, 96 Wash. 18, 164 Pac. 602, Ann. Cas. 1918B, 125.

95. *Eva v. Andersen*, 166 Cal. 420, 137 Pac. 16.

[a] Form of complaint in action by purchaser upon a contract of indemnity against a liability for the debts of the corporation, see *Eva v. Andersen*, 166 Cal. 420, 137 Pac. 16.

96. Ala.—*Sibley v. Barclay*, 14 Ala. App. 422, 70 So. 201. Ill.—*Kincaid v. Overshiner*, 171 Ill. App. 37. Ia. *Doughty v. Law*, 178 Iowa 840, 160 N. W. 226. Minn.—*Matson v. Bauman*, 139 Minn. 296, 166 N. W. 343; *Lyons v. Snider*, 136 Minn. 252, 161 N. W. 532.

[a] Allegations of fraud inducing the execution of the contract of sale, are irrelevant. *Shea v. Kiely*, 167 N. Y. Supp. 570.

[b] Excusing Tender.—An allegation that certificates of stock were never delivered to the plaintiff is relevant, as showing why a tender by plaintiff was not made. *Shea v. Kiely*, 167 N. Y. Supp. 570.

[c] Option in Purchaser to Rescind. Where there is a conditional sale with an option in the purchaser to revoke or rescind the contract, in an action to recover under the agreement the amount due, it is unnecessary to allege facts sustaining an action for damages for a breach of a contract of sale or a suit for specific performance. *Lyons v. Snider*, 136 Minn. 252, 161 N. W. 532.

97. Fraud in obtaining a subscription to stock, see *supra*, I, B, 2.

98. See 10 STANDARD PROC. 33.

[a] Actions against officers of the

Thus, the purchaser may affirm the contract and bring an action for damages sustained,<sup>99</sup> or he may rescind and maintain an action to have the sale set aside and recover the purchase price,<sup>1</sup> or property conveyed in exchange for the stock,<sup>2</sup> or cancel notes given in payment,<sup>3</sup> or he may waive the tort and sue in assumpsit, for money had and received.<sup>4</sup> The fraud may also be pleaded as a defense in an action by the seller to recover the purchase price.<sup>5</sup>

The seller in case of fraud by the purchaser, may seek to recover the damages he has suffered,<sup>6</sup> or he may seek a rescission of the contract,<sup>7</sup> or he may rescind the sale and plead the fraud as a defense in an action by the purchaser for damages.<sup>8</sup> He cannot however maintain an action of trover.<sup>9</sup> Persons who have been injured by identical mis-

corporation, see *Boulden v. Stilwell*, 100 Md. 543, 60 Atl. 609, 1 L. R. A. (N. S.) 258.

99. **Ia.**—*Burke v. Berry*, 131 N. W. 753. **Ky.**—*Ligon v. Minton*, 125 S. W. 304. **N. Y.**—*Kountze v. Kennedy*, 147 N. Y. 124, 41 N. E. 414, 49 Am. St. Rep. 651, 29 L. R. A. 360; *Vail v. Reynolds*, 118 N. Y. 297, 23 N. E. 301. **Ore.**—*Van de Wiele v. Garbade*, 60 Ore. 585, 120 Pac. 752, the action is at law.

[a] Knowledge that the seller knew that his representations were false must be averred. *Cantwell v. Harding*, 249 Ill. 354, 94 N. E. 488.

[b] An allegation that one defendant was a director of the corporation, is insufficient to charge or connect him with the fraud of another defendant. *Bartlett v. Blei*, 133 N. Y. Supp. 475.

[c] The cause of action does not abate on the death of the seller. *Bullowa v. Gladding*, 40 R. I. 147, 100 Atl. 249, L. R. A. 1917D, 832. See generally the title "Survival."

1. **Ark.**—*Hunt v. Davis*, 98 Ark. 44, 135 S. W. 458. **Cal.**—*Sheer v. Hoyt*, 13 Cal. App. 662, 110 Pac. 477. **Ill.**—*Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074. **Ky.**—*Ligon v. Minton*, 125 S. W. 304. **N. Y.**—*Vail v. Reynolds*, 118 N. Y. 297, 23 N. E. 301. **Utah.**—*Hancock v. Luke*, 46 Utah 26, 148 Pac. 452; *Morrison v. Snow*, 26 Utah 247, 72 Pac. 924. **Wash.**—*Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 1000. **Wis.**—*Schwab v. Esbenshade*, 151 Wis. 513, 139 N. W. 420.

[a] Return of Consideration.—The party rescinding must return or offer to return anything of value received by him, and the complaint must show that this was done; an averment of willingness to do so is insufficient. *Fairchild*

*v. Western Securities Corp.*, 176 Cal. 742, 169 Pac. 363; *Vail v. Reynolds*, 118 N. Y. 297, 23 N. E. 301.

[b] Rescission cannot be made after an action for deceit has been instituted. *Hanrahan v. National Bldg. L. & P. Assn.*, 66 N. J. L. 80, 48 Atl. 517.

2. *Moore v. Carrick*, 26 Colo. App. 97, 140 Pac. 485.

3. *Head v. Oglesby*, 175 Ky. 613, 194 S. W. 793.

4. *Arnold v. Dodson*, 272 Ill. 377, 112 N. E. 70.

[a] A demand for the money paid constitutes an election to rely upon the promise implied by law. *Arnold v. Dodson*, 272 Ill. 377, 112 N. E. 70.

[b] The complaint should allege (1) the facts constituting the tort. *Arnold v. Dodson*, 272 Ill. 377, 112 N. E. 70. (2) A waiver of the tort need not be expressly alleged. *Arnold v. Dodson*, 272 Ill. 377, 112 N. E. 70.

5. *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056; *Rumsey v. Shaw*, 212 Pa. 576, 61 Atl. 1109. But see *McMillan v. Batten*, 52 Ore. 218, 96 Pac. 675.

6. See generally 10 STANDARD PROC. 33.

7. **U. S.**—*Sullivan v. Pierce*, 125 Fed. 104, 60 C. C. A. 148. **Neb.**—*Barber v. Martin*, 67 Neb. 445, 93 N. W. 722. **Tex.**—*Continental Trust Co. v. Cowart* (Tex. Civ. App.), 173 S. W. 588.

[a] Damages may be prayed for in case a rescission is found to be inequitable. *Campbell v. Rushing* (Tex. Civ. App.), 141 S. W. 133.

8. *Dawson v. Flinton*, 195 Mo. App. 75, 190 S. W. 972.

9. *Newman v. Mercantile Trust Co.*, 189 Mo. 423, 88 S. W. 6.



representations may under some circumstances join in an action for relief.<sup>10</sup>

4. **Enjoining Sales of Stock.** — The holder or person in possession of certificates of stock may be enjoined from transferring them, at the suit of a person claiming an interest in them, the equitable remedy being regarded as more beneficial and complete than any the law can afford,<sup>11</sup> though by some authorities an action for damages is considered to be an adequate remedy.<sup>12</sup> Violation of a valid contract regulating the time or manner in which stock shall be sold may also be enjoined.<sup>13</sup>

H. **LIEN OF THE CORPORATION.** — The lien of a corporation upon its stock may be enforced in the manner in which liens generally are enforced.<sup>14</sup> Thus, where it is an equitable lien it may be foreclosed by a suit in equity.<sup>15</sup> It may also be enforced in some states by an attach-

10. *Hamilton v. American Hulled Bean Co.*, 143 Mich. 277, 106 N. W. 731; *Sherman v. American Stove Co.*, 85 Mich. 169, 48 N. W. 537, where the statements were made to partners. See 10 STANDARD PROC. 46.

[a] "It should make no difference in principle whether the representations are made to the prospective shareholders at the same time when they are gathered together or to them separately at different times, provided the representations are identical, the interests and subject-matter are identical, and the relief sought is identical." *Hamilton v. American Hulled Bean Co.*, 143 Mich. 277, 285, 106 N. W. 731

[b] If a sale is made by two stockholders acting in unison, through false representations made to one of them, but intended to influence both of them; they may join as plaintiffs in an action for relief. *Bradley v. Bradley*, 165 N. Y. 183, 58 N. E. 887.

11. U. S.—*Osborn v. United States Bank*, 9 Wheat. 738, 845, 6 L. ed. 204. N. Y.—*Rau v. Seidenberg*, 53 Misc. 386, 104 N. Y. Supp. 798, where the holder appeared to be insolvent. N. C.—*Currie v. Jones*, 138 N. C. 189, 50 S. E. 560, the rules applicable to ordinary chattels do not apply. Tex.—*Davis v. San Antonio & G. S. Ry. Co.*, 92 Tex. 642, 51 S. W. 324.

12. *Sisson v. Bassett*, 134 App. Div. 53, 118 N. Y. Supp. 664.

13. *Brown v. Bracking*, 11 Idaho 678, 83 Pac. 950, contract of promoters that treasury stock should be sold prior to individual stock.

14. See 18 STANDARD PROC. 987, and *United States & Canada Land Co. v.*

*Sullivan*, 113 Minn. 27, 128 N. W. 1112, Ann. Cas. 1912A, 51.

15. U. S.—*United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. 947, 114 C. C. A. 583. Ala.—*Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 So. 228. Ark.—*McIlroy Bkg. Co. v. Dickson*, 66 Ark. 327, 50 S. W. 868. Cal.—*Mechanics' Bldg. & L. Assn. v. King*, 83 Cal. 440, 23 Pac. 376. Ky.—*German Nat. Bank v. Kentucky Trust Co.*, 19 Ky. L. Rep. 361, 40 S. W. 458. Md.—*Reese v. Bank of Commerce*, 14 Md. 271, 74 Am. Dec. 536. Minn.—*United States & Canada Land Co. v. Sullivan*, 113 Minn. 27, 128 N. W. 1112, Ann. Cas. 1912A, 51. Wis.—*H. W. Wright Lumber Co. v. Hixon*, 105 Wis. 153, 80 N. W. 1110.

[a] A statutory method of enforcement does not exclude the right of a court of equity to foreclose the lien. *Wynn v. Talapoosa County Bank*, 168 Ala. 469, 53 So. 228; *United States & Canada Land Co. v. Sullivan*, 113 Minn. 27, 128 N. W. 1112, Ann. Cas. 1912A, 51.

[b] Where the statute creating the lien contains no provision for its enforcement, it may be foreclosed in equity. *United States & Canada Land Co. v. Sullivan*, 113 Minn. 27, 128 N. W. 1112, Ann. Cas. 1912A, 51.

[c] The complaint must describe the debt secured with certainty. *Wynn v. Talapoosa County Bank*, 168 Ala. 469, 53 So. 228.

[d] Where the lien is regarded as a legal lien, it can not be foreclosed in equity unless other grounds of equitable jurisdiction exist. *Aldine Mfg. Co. v. Phillips*, 118 Mich. 162, 76 N. W.

ment of the shares,<sup>16</sup> or a sale of the stock upon notice.<sup>17</sup> The existence of the lien may be pleaded as a defense to an action brought to compel a transfer of the stock on the books of the corporation.<sup>18</sup> The lien may be waived and an action maintained on the debt.<sup>19</sup>

### III. RIGHTS AND REMEDIES OF STOCKHOLDERS. — A.

**RIGHT TO PARTICIPATE IN CORPORATE AFFAIRS.** — A member or stockholder of a corporation who has been improperly removed or disenfranchised,<sup>20</sup> or who is being excluded from receiving the benefits afforded by the corporation,<sup>21</sup> may enforce his rights in the corporation by a proceeding in mandamus,<sup>22</sup> though rights in an unincorporated

371, 74 Am. St. Rep. 380, 42 L. R. A. 531.

[e] **A lien to secure an unadjudicated claim for damages** cannot be enforced in equity, since the main purpose of an action to enforce it would be the awarding of damages. *United Cigarette Mach. Co. v. Winston Mach. Co.*, 194 Fed. 947, 114 C. C. A. 583.

16. *Owens v. Atlanta Trust & Banking Co.*, 119 Ga. 924, 47 S. E. 215; *Sabin v. Bank of Woodstock*, 21 Vt. 353.

17. *Elliott v. Sibley*, 101 Ala. 344, 13 So. 500.

18. *Cal.*—*Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476. *Ga.* *People's Bank v. Exchange Bank*, 116 Ga. 820, 43 S. E. 269, 94 Am. St. Rep.

144. *Kan.*—*Faulkner v. Bank of Topeka*, 77 Kan. 385, 94 Pac. 153. *Mich.* *Moore v. Royal Oak Lumber & Supply Co.*, 171 Mich. 400, 137 N. W. 270. *Tex.* *Minler v. Brewer-Monaghan Mer. Co.* (Tex. Civ. App.), 188 S. W. 49. *Va.* *Bohmer v. City Bank*, 77 Va. 445.

19. *Lankershim Ranch Land & Water Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134; *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

[a] **Mortgage Statute.**—A statute providing that the sole method of enforcing a mortgage shall be by foreclosure does not apply to the lien. *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029. See generally the title "Mortgages."

20. *Cal.*—*Miller v. Imperial Water Co.*, No. 8, 156 Cal. 27, 103 Pac. 227, 24 L. R. A. (N. S.) 372; *Otto v. Journeymen Tailors' Protective & Ben. Union*, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156. *Ga.*—*United Bros. v. Williams*, 126 Ga. 19, 54 S. E. 907, 115 Am. St. Rep. 64. *Ill.*—*People ex rel. McPherson v. Western Life Indemnity Co.*, 181 Ill. App. 116. *Mass.*—See *Longyear v. Hardman*, 219 Mass. 405,

106 N. E. 1012, Ann. Cas. 1916D, 1200. *Mich.*—*Meurer v. Detroit Musicians' Ben. & P. Assn.*, 95 Mich. 451, 54 N. W. 954. *Mo.*—*State v. Adams*, 44 Mo. 570. *N. J.*—*Sibley v. Board of Management*, 40 N. J. L. 295. *N. Y.*—*People ex rel. everell v. Musical Mutual Protective Union*, 118 N. Y. 101, 23 N. E. 129. *Ohio.*—*State v. Lipa*, 28 Ohio St. 665. *Pa.*—*Evans v. Philadelphia Club*, 50 Pa. 107. *R. I.*—*Lavalle v. Societe St. Jean Baptiste*, 17 R. I. 680, 24 Atl. 467, 16 L. R. A. 392. *Wis.* *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760.

[a] **A member expelled without a hearing or notice** may resort to mandamus proceedings. *Lysaght v. St. Louis Operative Stonemason's Assn.*, 55 Mo. App. 538; *De Lacy v. Neuse River Nav. Co.*, 8 N. C. 274, 9 Am. Dec. 636.

[b] **A member who has recovered damages for his exclusion from membership** cannot maintain mandamus. *State v. Lipa*, 28 Ohio St. 665.

**Compelling reissue of stock** which has been wrongfully transferred on the books of the corporation, see *supra*, II, E, 4.

21. *McNair v. Imperial Water Co.* No. 1, 156 Cal. 31, 103 Pac. 229.

[a] **A member of a mutual irrigating company** is entitled to enforce his right to receive water from the corporation by mandamus. *McNair v. Imperial Water Co.* No. 1, 156 Cal. 31, 103 Pac. 229.

22. See preceding notes.

[a] **Basis of the Right.**—"It is one of the well-recognized offices of the remedy by mandamus, to enforce the plain rights of stockholders or members of corporations in the absence of any other adequate remedy." *Miller v. Imperial Water Co.* No. 8, 156 Cal. 27, 103 Pac. 227.

[b] **Reinstatement to membership**

association will not usually be protected or enforced by mandamus.<sup>23</sup>

Ordinarily equity will refuse to take jurisdiction over such matters,<sup>24</sup> though equitable relief has sometimes been granted.<sup>25</sup>

**B. INSPECTION OF CORPORATE BOOKS AND PROPERTY. — 1. Equitable Remedies.** — The remedy by injunction, while open to a stockholder in some jurisdictions, to compel the allowance of his right to inspect corporate records,<sup>26</sup> is usually held to be inadequate to afford the desired relief,<sup>27</sup> mandamus being the more appropriate and more favored remedy.<sup>28</sup> But a domestic corporation may be required by injunction, to keep its books and records in the state and accessible for purposes of inspection.<sup>29</sup> Where an inspection of corporate records becomes desirable and necessary in the course of pending judicial proceedings, it will of course be ordered,<sup>30</sup> and an inspection will also be permitted where a bill seeks both equitable relief and discovery.<sup>31</sup> Refusal of the right to inspect corporate records constitutes no ground for the appointment of a receiver.<sup>32</sup>

**2. Mandamus.** — a. *Right to the Remedy.* — Mandamus is the remedy most commonly available to a stockholder to enforce his right to inspect corporate books and records<sup>33</sup> as well as corporate prop-

erty in a foreign corporation will not ordinarily be ordered. See *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151, 20 Atl. 1039; *Smith v. Mutual Life Ins. Co.*, 14 Allen (Mass.) 336.

**23. Ky.**—*Wallace v. Grand Lodge*, 32 Ky. L. Rep. 1013, 107 S. W. 724. **N. J.**—*Frank v. National Alliance*, 89 N. J. L. 380, 99 Atl. 134, trade union. **N. Y.**—*Weidenfeld v. Keppler*, 84 App. Div. 235, 82 N. Y. Supp. 634, member of stock exchange.

*Contra*, *Otto v. Journeymen Tailors' Protective & Ben. Union*, 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156; *People ex rel. Bartlett v. Medical Society*, 32 N. Y. 187.

**24.** *Sturges v. Board of Trade*, 86 Ill. 441; *Gregg v. Massachusetts Medical Soc.*, 111 Mass. 185, 15 Am. Rep. 24.

**25. U. S.**—*Hall v. Supreme Lodge*, 24 Fed. 450. **N. J.**—*Altmann v. Benz*, 27 N. J. Eq. 331. **S. C.**—*Smith v. Smith*, 3 Desaus. Eq. 557.

**26. Ky.**—*Murray v. Walker*, 156 Ky. 536, 161 S. W. 512, Ann. Cas. 1915C, 363. **Mass.**—*Powelson v. Tennessee Eastern Elec. Co.*, 220 Mass. 380, 107 N. E. 997, Ann. Cas. 1917D, 102, under an express statute. **Ohio.**—*Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 56 N. E. 1033, 78 Am. St. Rep. 707, 48 L. R. A. 732.

**27. Ill.**—*Heitkamp v. American Pigment & Chemical Co.*, 158 Ill. App. 587. **Ia.**—*Boardman v. Marshalltown Gro-*

*cery Co.*, 105 Iowa 445, 75 N. W. 343. **Tenn.**—*Brown v. Crystal Ice Co.*, 122 Tenn. 239, 122 S. W. 84, 19 Ann. Cas. 308. **Wyo.**—*Wyoming Coal Min. Co. v. State*, 15 Wyo. 97, 87 Pac. 337, 984, 123 Am. St. Rep. 1014.

**28.** See *infra*, III, B, 2 and *Fuller v. Alexander Hollander & Co.*, 61 N. J. Eq. 648, 47 Atl. 646, 88 Am. St. Rep. 456.

**29.** *Baillie v. Columbia Gold Min. Co.*, 86 Ore. 1, 166 Pac. 965, 167 Pac. 1167.

**30. U. S.**—*Ranger v. Champion Cotton-Press Co.*, 51 Fed. 61. **N. J.**—*Fuller v. Alexander Hollander & Co.*, 61 N. J. Eq. 648, 47 Atl. 646, 88 Am. St. Rep. 456. **S. D.**—*McGeary v. Brown*, 23 S. D. 573, 122 N. W. 605, in a receivership proceeding.

**31.** See *Fuller v. Alexander Hollander & Co.*, 61 N. J. Eq. 648, 47 Atl. 646, 88 Am. St. Rep. 456.

**32.** *Smith v. Birmingham Disinfectant Co. (Ala.)*, 56 So. 721; *Original Vienna Bakery C. & N. Co. v. Heissler*, 50 Ill. App. 406.

**33. U. S.**—*Guthrie v. Harkness*, 199 U. S. 148, 26 Sup. Ct. 4, 50 L. ed. 130, 4 Ann. Cas. 433; *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. 280. **Ala.**—*Winter v. Baldwin*, 89 Ala. 483, 7 So. 734. **Cal.**—*Johnson v. Langdon*, 135 Cal. 624, 67 Pac. 1050, 87 Am. St. Rep. 156; *Webster v. Bartlett Estate Co.*, 35 Cal. App. 283, 169 Pac. 702; *Poor v.*



erty.<sup>34</sup> The writ may be employed whether the right is based upon common law,<sup>35</sup> statute,<sup>36</sup> or the charter or by-laws of the corporation.<sup>37</sup> The remedy by injunction,<sup>38</sup> or an action for damages,<sup>39</sup> is usually held to be inadequate and not to deprive the stockholder of his

Yarnell, 28 Cal. App. 714, 153 Pac. 976. **Del.**—Swift *v.* State, 7 Houst. 338, 6 Atl. 856, 32 Atl. 143, 40 Am. St. Rep. 127. **Fla.**—Merchants Broom Co. *v.* Butler, 70 Fla. 397, 70 So. 383. **Ill.** Coquard *v.* National Linseed Oil Co., 171 Ill. 480, 49 N. E. 563; Stone *v.* Kellogg, 165 Ill. 192, 46 N. E. 222, 56 Am. St. Rep. 240; People *ex rel.* Bajohr *v.* Weber Co., 159 Ill. App. 588; Heitkamp *v.* American Pigment & Chem. Co., 158 Ill. App. 587. **Ia.**—Boardman *v.* Marshalltown Grocery Co., 105 Iowa 445, 75 N. W. 343. **La.**—State *v.* New Orleans Gaslight Co., 49 La. Ann. 1556, 22 So. 815; Cockburn *v.* Union Bank, 13 La. Ann. 289. **Me.**—White *v.* Manter, 109 Me. 408, 84 Atl. 890, 42 L. R. A. (N. S.) 332. **Md.**—Wight *v.* Heublein, 111 Md. 649, 75 Atl. 507; Weiheymayer *v.* Bitner, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446. **Mass.**—Klotz *v.* Pan-American Match Co., 221 Mass. 38, 108 N. E. 764, Ann. Cas. 1917D, 895; Andrews *v.* Mines Corporation, 205 Mass. 121, 91 N. E. 122, 137 Am. St. Rep. 428. **Mich.**—Leach *v.* Davy, 199 Mich. 378, 165 N. W. 927 (inspection by a director); Woodworth *v.* Old Second Nat. Bank, 154 Mich. 459, 117 N. W. 893, 118 N. W. 581. **Minn.**—State *v.* Displayograph Co., 135 Minn. 479, 160 N. W. 486. **Mo.**—State *ex rel.* Watkins *v.* Donnell Mfg. Co., 129 Mo. App. 206, 107 S. W. 1112. **N. H.**—Hub Construction Co. *v.* New England Breeders' Club, 74 N. H. 282, 67 Atl. 574. **N. J.**—Fuller *v.* Alexander Hollander & Co., 61 N. J. Eq. 648, 47 Atl. 646, 88 Am. St. Rep. 456; Trimble *v.* American Sugar Refining Co., 61 N. J. Eq. 340, 48 Atl. 912. **N. Y.**—*In re* Steinway, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461; *In re* Wygant, 101 Miss. 509, 167 N. Y. Supp. 369. **Ore.**—Davidson *v.* Alameda Mines Co., 66 Ore. 412, 134 Pac. 782, 48 L. R. A. (N. S.) 847. **Pa.**—Rochester *v.* Indiana County Gas Co., 246 Pa. 571, 92 Atl. 717; Kuhbach *v.* Irving Cut Glass Co., 220 Pa. 427, 69 Atl. 981, 28 L. R. A. (N. S.) 185; Neubert *v.* Armstrong Water Co., 211 Pa. 582, 61 Atl. 123. **R. I.**—Lyon *v.* American Screw Co., 16 R. I. 472, 17 Atl. 61. **Tenn.**—Brown *v.* Crystal Ice Co., 122 Tenn. 239, 122 S.

W. 84, 19 Ann. Cas. 308. **Utah.**—Kimball *v.* Dern, 39 Utah 181, 116 Pac. 28, Ann. Cas. 1913E, 166, 35 L. R. A. (N. S.) 134; State *ex rel.* Brandl *v.* Silver King Consol. Min. Co., 37 Utah 62, 106 Pac. 520. **Wash.**—State *v.* Pacific Brewing & M. Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208. **Wis.**—State *v.* Thompson's Malted Food Co., 160 Wis. 671, 152 N. W. 458.

[a] Even if a corporation has ceased doing active business, the right to an inspection will be enforced. Eldred *v.* Elliott, 161 Mich. 262, 126 N. W. 219. And see Chable *v.* Nicaragua Canal Const. Co., 59 Fed. 846.

[b] Pendency of a bill in equity brought by the same stockholder, to dissolve the corporation and wind up its affairs, will not bar the proceedings. State *ex rel.* Watkins *v.* Donnell Mfg. Co., 129 Mo. App. 206, 107 S. W. 1112.

[c] The making of a demand for the right to inspect the records and its refusal is a condition precedent to maintenance of the proceedings. Pfirman *v.* Success Min. Co., 30 Idaho 468, 166 Pac. 216; Mathews *v.* McClaughry, 83 Ill. App. 224.

34. Hobbs *v.* Tom Reed Gold Min. Co., 164 Cal. 497, 129 Pac. 781, 43 L. R. A. (N. S.) 1112, inspection of a mine permitted. And see Kinard *v.* Ward, 21 Cal. App. 85, 130 Pac. 1196.

35. **Del.**—State *v.* Swift, 7 Houst. 137, 30 Atl. 781. **Mo.**—State *v.* St. Louis & S. F. R. Co., 29 Mo. App. 301. **N. Y.**—People *ex rel.* Muir *v.* Throop, 12 Wend. 183.

36. Weiheymayer *v.* Bitner, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446; State *ex rel.* Watkins *v.* Donnell Mfg. Co., 129 Mo. App. 206, 107 S. W. 1112.

37. Lyon *v.* American Screw Co., 16 R. I. 472, 17 Atl. 61; Wyoming Coal Min. Co. *v.* State, 15 Wyo. 97, 87 Pac. 337, 984, 123 Am. St. Rep. 1014.

38. See *supra*, III, B, 1, and Wyoming Coal Min. Co. *v.* State, 15 Wyo. 97, 87 Pac. 337, 984, 123 Am. St. Rep. 1014.

39. See *infra*, III, B, 3, and Weiheymayer *v.* Bitner, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446.

right to a writ of mandate. In at least one state, however, because of special statutory provisions, mandamus proceedings cannot be maintained.<sup>40</sup> A domestic corporation which keeps its books without the state will be compelled by mandamus to bring them within the state for inspection.<sup>41</sup> If the records of a foreign corporation are kept within the state, mandamus proceedings to obtain an inspection of them may be maintained,<sup>42</sup> but such a corporation cannot be compelled by mandamus to bring its books within the state for this purpose if they are regularly kept elsewhere.<sup>43</sup> But directors of a foreign corporation, who reside and act within the state may be compelled by mandamus to order the corporate agents in another state to permit an inspection of corporate property there located.<sup>44</sup> A right of inspection conferred by a statute of the state of incorporation, will be enforced outside that state.<sup>45</sup>

A state court has jurisdiction to compel a national bank to allow an inspection of its books.<sup>46</sup> Federal courts have no original jurisdiction in mandamus proceedings but can issue the writ as ancillary to an existing jurisdiction.<sup>47</sup>

40. *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 56 N. E. 1033, 78 Am. St. Rep. 707, 48 L. R. A. 732.

41. *Crown Coal & Tow Co. v. Thomas*, 60 Ill. App. 234; *Hodgens v. United Copper Co.* (N. J. L.), 67 Atl. 756.

42. *Ala.*—*Nettles v. McConnell*, 151 Ala. 538, 43 So. 838. *Del.*—*Swift v. State*, 7 Houst. 338, 6 Atl. 856, 32 Atl. 143, 40 Am. St. Rep. 127. *Mass.*—*Andrews v. Mines Corporation*, 205 Mass. 121, 91 N. E. 122, 137 Am. St. Rep. 428, interference with the internal affairs of a foreign corporation is not involved. *Mo.*—*State v. Lazarus*, 127 Mo. App. 401, 105 S. W. 780. *Pa.*—*Machen v. Machen & Mayer Elec. Mfg. Co.*, 237 Pa. 212, 85 Atl. 100, 42 L. R. A. (N. S.) 1079, Ann. Cas. 1914B, 420; *Tierney v. Indian Ridge Coal & Coke Co.*, 256 Pa. 340, 100 Atl. 814.

*Compare Mitchell v. Northern Security Oil & Transp. Co.*, 99 App. Div. 624, 91 N. Y. Supp. 1104; *In re Rappleye*, 43 App. Div. 84, 59 N. Y. Supp. 338, 6 N. Y. Ann. Cas. 365; *In re Crosby*, 28 Misc. 300, 59 N. Y. Supp. 865.

43. *Watkins v. North American Land & Timber Co.*, 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309; *Mitchell v. Northern Security Oil & Transp. Co.*, 44 Misc. 514, 90 N. Y. Supp. 60, *affirmed*, 99 App. Div. 624, 91 N. Y. Supp. 1104.

44. *Hobbs v. Tom Reed Gold Min. Co.*, 164 Cal. 497, 129 Pac. 781, 43 L. R. A. (N. S.) 1112.

[a] "The corporation holds its directors' meetings in this state, its directors reside here and the corporate business, in part at least is done here. The corporation, although organized under the laws of Arizona, is for many purposes a resident of this state. . . . Its directors, acting in this state, may make and deliver to the plaintiff an order to the persons in charge of the mine, instructing them to permit the plaintiff to enter and examine the same. In the ordinary course of business it is to be presumed that such an order would be made in this state, rather than in Arizona, since the directors and officers reside here and hold meetings here. There is, therefore, no physical or jurisdictional obstacle to prevent the issuance and execution of a writ of mandate to compel the defendants to perform such act." *Hobbs v. Tom Reed Gold Min. Co.*, 164 Cal. 497, 129 Pac. 781, 43 L. R. A. (N. S.) 1112.

45. *State ex rel. G. Elliott & Co. v. Lake Torpedo Boat Co.*, 90 Conn. 638, 98 Atl. 580, L. R. A. 1916F, 1033, even though it could be enforced by the courts of the corporate domicile.

46. *U. S.*—*Guthrie v. Harkness*, 199 U. S. 148, 26 Sup. Ct. 4, 50 L. ed. 130, 4 Ann. Cas. 433. *Mich.*—*Woodworth v. Old Second Nat. Bank*, 154 Mich. 459, 117 N. W. 893, 118 N. W. 581. *N. Y.*—*Tuttle v. Iron Nat. Bank*, 170 N. Y. 9, 62 N. E. 761.

47. See *United States v. Nashville, C. & St. L. Ry.*, 217 Fed. 254.

Separate causes of action exist for the inspection of the records of different corporations although they are all within the custody and control of the same person.<sup>48</sup>

b. *Parties*.<sup>49</sup> — As elsewhere shown,<sup>50</sup> in some jurisdictions the proceedings should be instituted in the name of the state upon the relation of the stockholder whose right of inspection has been denied;<sup>51</sup> in others, in the name of the stockholder interested.<sup>52</sup> The officer having charge of the records or property is the proper and a necessary defendant.<sup>53</sup> Joinder of the corporation while approved by some authorities,<sup>54</sup> is disapproved by others.<sup>55</sup>

c. *Pleading*.<sup>56</sup> — The petition should state the facts showing that petitioner is a stockholder, having the right to make an inspection,<sup>57</sup> that the information is necessary to protect him in his rights as a stockholder;<sup>58</sup> that it is sought for a proper purpose,<sup>59</sup> though in some

48. *Merrill v. Saffa*, 42 Colo. 195, 93 Pac. 1099. But see *In re Crosby*, 28 Misc. 300, 59 N. Y. Supp. 865.

49. *Parties in mandamus proceedings* generally, see the title "Mandamus."

50. See 19 STANDARD PROC. 246.

51. *State v. Pacific Brewing & M. Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208.

52. *Merrill v. Saffa*, 42 Colo. 195, 93 Pac. 1099; *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

[a] Only a holder of record upon the books of the corporation is entitled to the writ. *Butterfly-Terrible Gold Min. Co. v. Brind*, 41 Colo. 29, 91 Pac. 1101; *Re Reiss*, 30 Misc. 234, 62 N. Y. Supp. 145.

[b] Joinder of several stockholders is improper unless they have a common or joint interest in the litigation. *State v. German Mutual Life Ins. Co.*, 169 Mo. App. 354, 152 S. W. 618.

53. *Ala.*—*Home Guano Co. v. State*, 193 Ala. 548, 69 So. 419. *Conn.*—*State ex rel. G. Elliott & Co. v. Lake Torpedo Boat Co.*, 90 Conn. 638, 98 Atl. 580, L. R. A. 1916F, 1033. *Del.*—*Swift v. State*, 7 Houst. 338, 6 Atl. 856, 32 Atl. 143, 40 Am. St. Rep. 127. *N. Y.* *People ex rel. Muir v. Throop*, 12 Wend. 183. *Wis.*—*State v. Bergenthal*, 72 Wis. 314, 39 N. W. 566.

See 19 STANDARD PROC. 251, 254.

[a] A person who is an officer of and has the custody of papers of different corporations cannot be proceeded against in one action in his representative capacity as holder of such offices. *Merrill v. Saffa*, 42 Colo. 195, 93 Pac. 1099,

54. *McClintock v. Young Republicans*, 210 Pa. 115, 59 Atl. 691, 105 Am. St. Rep. 784, 68 L. R. A. 459; *State v. Thompson's Malted Food Co.*, 160 Wis. 671, 152 N. W. 458.

[a] The general officers of the corporation have been held not to be improperly joined as defendants. *People ex rel. Bajohr v. Weber Co.*, 159 Ill. App. 588.

55. *Ala.*—*Winter v. Baldwin*, 89 Ala. 483, 7 So. 734. *Colo.*—*Merrill v. Saffa*, 42 Colo. 195, 93 Pac. 1099. *Conn.*—*State ex rel. G. Elliott & Co. v. Lake Torpedo Boat Co.*, 90 Conn. 638, 98 Atl. 580, L. R. A. 1916F, 1033, joinder improper but not fatal. *Del.*—*Swift v. State*, 7 Houst. 338, 6 Atl. 856, 32 Atl. 143, 40 Am. St. Rep. 127, a foreign corporation.

56. See generally 19 STANDARD PROC. 258.

57. See *People v. Nassau Ferry Co.*, 86 Hun 128, 33 N. Y. Supp. 244.

58. *Coquard v. National Linseed Oil Co.*, 171 Ill. 480, 49 N. E. 563; *Taylor v. Citizens' Nat. Bk.*, 117 App. Div. 348, 101 N. Y. Supp. 1039; *Latimer v. Herzog Teleseme Co.*, 75 App. Div. 522, 78 N. Y. Supp. 314, 12 N. Y. Ann. Cas. 9.

59. *N. J.*—*Garcin v. Trenton Rubber Mfg. Co.* (N. J. L.), 60 Atl. 1098. *N. Y.*—*In re Hatt*, 57 Misc. 320, 108 N. Y. Supp. 468. But see *Henry v. Babcock & W. Co.*, 196 N. Y. 302, 89 N. E. 942, 134 Am. St. Rep. 835. *Ore.* *Davidson v. Alameda Mines Co.*, 66 Ore. 412, 134 Pac. 782, 48 L. R. A. (N. S.) 847.



states this is unnecessary, where the right of inspection is given by statute;<sup>60</sup> that a demand for the right to inspect was made upon the proper officer and refused,<sup>61</sup> or circumstances excusing the necessity for a demand.<sup>62</sup> The petition should be verified.<sup>63</sup>

The alternative writ must show a clear prima facie case in favor of the petitioner.<sup>64</sup>

A demurrer to an alternative writ<sup>65</sup> stands in the same position as a demurrer in an ordinary action.<sup>66</sup>

The answer or return, to constitute a defense, must fully meet the case made by the petition,<sup>67</sup> and must plead the facts relied upon to bring the case within any exception to the general rule created by statute.<sup>68</sup>

d. *Issuance of the Writ.*—While the issuance of a writ of mandate is commonly held to be discretionary with the court,<sup>69</sup> the petitioner's

60. **Cal.**—*Johnson v. Langdon*, 135 Cal. 624, 67 Pac. 1050, 87 Am. St. Rep. 156; *Poor v. Yarnell*, 28 Cal. App. 714, 153 Pac. 976. **Ill.**—*Venner v. Chicago City R. Co.*, 246 Ill. 170, 92 N. E. 643, 138 Am. St. Rep. 229, 20 Ann. Cas. 607; *Pease v. Chicago Crayon Co.*, 167 Ill. App. 31. **Me.**—*White v. Manter*, 109 Me. 408, 84 Atl. 890, 42 L. R. A. (N. S.) 332. **Utah.**—*Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729, an evil purpose is matter of defense.

61. **Ala.**—*Home Guano Co. v. State*, 193 Ala. 548, 69 So. 419. **Ill.**—*Mathews v. McClaughry*, 83 Ill. App. 224. **N. Y.** *Latimer v. Herzog Teleseme Co.*, 75 App. Div. 522, 78 N. Y. Supp. 314, 12 N. Y. Ann. Cas. 9.

**Necessity of making a demand** precedent to institution of the proceedings, see 4 Fletcher, sec. 2826, et seq.

62. *Bay State Gas Co. v. State*, 4 Penne. (Del.) 238, 56 Atl. 1114.

63. *State ex rel. G. Elliott & Co. v. Lake Torpedo Boat Co.*, 90 Conn. 638, 98 Atl. 580, L. R. A. 1916F, 1033. See 19 STANDARD PROC. 259.

64. *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383. See 19 STANDARD PROC. 265.

65. See 19 STANDARD PROC. 268.

66. *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

67. See 19 STANDARD PROC. 269, 271.

[a] **Reasons why an inspection should not be permitted** are matters of defense. *Foster v. White*, 86 Ala. 467, 6 So. 88; *State v. Bergenthal*, 72 Wis. 314, 39 N. W. 566.

[b] **Allegation on information and belief** that petitioner has full knowledge of the facts contained in the rec-

ord, constitutes no defense. *Stone v. Kellogg*, 62 Ill. App. 444, affirmed, 165 Ill. 192, 46 N. E. 222, 56 Am. St. Rep. 240. Compare 19 STANDARD PROC. 273.

[c] **Answer that defendant is willing to furnish all "necessary" information is not a defense.** *State ex rel. Nat. Bank v. Jessup & Moore Paper Co.*, 4 Boyce (Del.) 248, 88 Atl. 449.

**As to contents of return or answer**, see generally 19 STANDARD PROC. 270.

68. *Gavin v. Pacific Coast M. F. Union*, 2 Cal. App. 638, 84 Pac. 270, fact that the corporation is a benevolent corporation and as such free from the duty of allowing an inspection.

69. **Conn.**—*State ex rel. Costello v. Middlesex Banking Co.*, 87 Conn. 483, 88 Atl. 861. **Del.**—*State ex rel. Brumley v. Jessup & Moore Paper Co.*, 1 Boyce 379, 77 Atl. 16, 30 L. R. A. (N. S.) 290. **Md.**—*Wight v. Heublein*, 111 Md. 649, 75 Atl. 507. **Mass.**—*Butler v. Martin*, 220 Mass. 224, 107 N. E. 999. **Mo.**—*State ex rel. Holmes v. Doe Run Lead Co.* (Mo. App.), 178 S. W. 298; *State v. German Mut. Life Ins. Co.*, 169 Mo. App. 354, 152 S. W. 618. **N. Y.**—*Hitchcock v. Union Ferry Co.*, 157 App. Div. 328, 142 N. Y. Supp. 247. **R. I.**—*Dintenfass v. Amber Star Films Corp.*, 39 R. I. 555, 99 Atl. 516.

[a] **Improper motives and bad faith**, (1) is a sufficient reason for refusing to issue the writ, in some states (**U. S.** *Guthrie v. Harkness*, 199 U. S. 148, 26 Sup. Ct. 4, 50 L. ed. 130, 4 Am. & Eng. Ann. Cas. 433. **Me.**—*Eaton v. Manter*, 114 Me. 259, 95 Atl. 948. **N. Y.**—*People v. Klauder-Weldon Dyeing Mach. Co.*, 180 App. Div. 149, 167 N. Y. Supp. 429; *People ex rel. Lehman v. Consolidated F. A. Co.*, 142 App. Div. 753,

right being clearly established, the writ will usually issue as a matter of course,<sup>70</sup> especially where the right of inspection is expressly recognized by statute.<sup>71</sup> In a few states, where under the general practice in mandamus proceedings, direct and circumstantial denials in the answer or return, are taken to overcome averments of the petition,<sup>72</sup> positive averments in the return of bad faith and improper purposes on the part of the petitioner, require the denial of the writ.<sup>73</sup> A peremptory writ will issue in the first instance only when the facts are undisputed.<sup>74</sup>

e. *Scope of Relief*.—Suitable safeguards should be adopted by the court to protect the interests of all concerned,<sup>75</sup> such as trade secrets,<sup>76</sup> and the inspection will be so controlled as to the time and method by which it is made as to occasion as little inconvenience as is reasonably possible to the corporation.<sup>77</sup> The stockholder will be allowed the aid

127 N. Y. Supp. 348; *In re Wygant*, 101 Misc. 509, 167 N. Y. Supp. 369. **Tex.** *Roberts v. Munroe* [Tex. Civ. App.], 193 S. W. 734, even (2) under a statute (**Ala.**—*Foster v. White*, 86 Ala. 467, 6 So. 88. **Md.**—*Wight v. Heublein*, 111 Md. 649, 75 Atl. 507; *Weihenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446. **Minn.**—*State v. Monida & Y. Stage Co.*, 110 Minn. 193, 203, 124 N. W. 971, 125 N. W. 676. **Mo.** *State ex rel. Holmes v. Doe Run Lead Co.* (Mo. App.), 178 S. W. 298. **N. J.** *State ex rel. O'Hara v. National Biscuit Co.*, 69 N. J. L. 198, 54 Atl. 241), but (3) not in others. *White v. Manter*, 109 Me. 408, 84 Atl. 890, 42 L. R. A. (N. S.) 332.

70. *Eldred v. Elliott*, 161 Mich. 262, 126 N. W. 219; *State ex rel. Watkins v. Donnell Mfg. Co.*, 129 Mo. App. 206, 107 S. W. 1112.

71. **Cal.**—*Johnson v. Langdon*, 135 Cal. 624, 67 Pac. 1050, 87 Am. St. Rep. 156. **Idaho.**—*Pfirman v. Success Min. Co.*, 30 Idaho 468, 166 Pac. 216. **Ill.** *Venner v. Chicago City R. Co.*, 246 Ill. 170, 92 N. E. 643, 138 Am. St. Rep. 229, 20 Ann. Cas. 607. **Ia.**—*Ellsworth v. Dorwart*, 95 Iowa 108, 63 N. W. 588, 58 Am. St. Rep. 427. **Me.**—*Withington v. Bradley*, 111 Me. 384, 89 Atl. 201. But see *Eaton v. Manter*, 114 Me. 259, 95 Atl. 948. **N. Y.**—*In re Steinway*, 159 N. Y. 250, 53 N. E. 1103, 45 L. R. A. 461, "although even then, doubtless, due precautions may be taken as to time and place so as to prevent interruption of business, or other serious inconvenience." **N. D.** *Schmidt v. Anderson*, 29 N. D. 262, 150 N. W. 871. **Utah.**—*Kimball v. Dern*,

39 Utah 181, 115 Pac. 28, Ann. Cas. 1913E, 166, 35 L. R. A. (N. S.) 134.

72. *State ex rel. Nat. Bank v. Jessup & Moore Paper Co.*, 4 Boyce (Del.) 248, 88 Atl. 449.

73. *State ex rel. Linihan v. United Brokerage Co.*, 6 Boyce (Del.) 570, 101 Atl. 433; *State ex rel. Nat. Bank v. Jessup & Moore Paper Co.*, 4 Boyce (Del.) 248, 88 Atl. 449.

74. *People v. Klauder-Weldon Dyeing Mach. Co.*, 180 App. Div. 149, 167 N. Y. Supp. 429; *Hitchcock v. Union Ferry Co.*, 157 App. Div. 328, 142 N. Y. Supp. 247; *In re Wygant*, 101 Misc. 509, 167 N. Y. Supp. 369. See 19 STANDARD PROC. 282.

75. *Matter of Steinway*, 159 N. Y. 250, 263, 53 N. E. 1103, 45 L. R. A. 461.

[a] **Correspondence relating to pending litigation**, over rights which are uncertain, may properly be kept from the petitioner. *Dintenfass v. Amber Star Films Corp.*, 39 R. I. 555, 99 Atl. 516.

[b] **Appointment of Master**.—Where there is no uncertainty as to what records are to be kept from the petitioner, it is unnecessary to appoint a master to supervise the inspection. *Dintenfass v. Amber Star Films Corp.*, 39 R. I. 555, 99 Atl. 516.

76. *Klotz v. Pan-American Match Co.*, 221 Mass. 38, 108 N. E. 764, Ann. Cas. 1917D, 895.

77. *State v. St. Louis & S. F. R. Co.*, 29 Mo. App. 301; *In re Wygant*, 101 Misc. 509, 167 N. Y. Supp. 369. See *Matter of Steinway*, 159 N. Y. 250, 263, 53 N. E. 1103, 45 L. R. A. 461.

of a stenographer, attorney or accountant in making the examination,<sup>78</sup> and may make the examination through an agent or representative.<sup>79</sup>

**3. Actions for Damages.**—An action for damages occasioned by the denial of the stockholder's right to inspect corporate records may be maintained against the officer responsible therefor,<sup>80</sup> and against the corporation.<sup>81</sup>

**4. Recovery of Penalties.**—A statutory penalty for refusal to permit inspection may be recovered by action<sup>82</sup> in accordance with the rules elsewhere treated.<sup>83</sup>

**5. Criminal Proceedings.**—Refusal to permit inspection of corporate records is in some states by statute punishable as a misdemeanor.<sup>84</sup>

**C. RIGHTS AND REMEDIES IN RELATION TO DIVIDENDS.**—**1. In General.**—When a dividend has been declared by a corporation it becomes a debt owing to the stockholder upon which an action may be maintained.<sup>85</sup> Declaration of dividends is compelled by resort to equity<sup>86</sup>

**78. Idaho.**—*Pfirman v. Success Min. Co.*, 30 Idaho 468, 166 Pac. 216. **Ia.** *Ellsworth v. Dorwart*, 95 Iowa 108, 63 N. W. 588, 58 Am. St. Rep. 427. **Mass.** *Powelson v. Tennessee Eastern Elec. Co.*, 220 Mass. 380, 107 N. E. 997, Ann. Cas. 1917A, 102; *Varney v. Baker*, 194 Mass. 239, 80 N. E. 524, 10 Ann. Cas. 989. **Mo.**—*State v. St. Louis Transit Co.*, 124 Mo. App. 111, 100 S. W. 1126. **N. Y.**—*People v. Nassau Ferry Co.*, 86 Hun 128, 33 N. Y. Supp. 244. **Tenn.** *Deaderick v. Wilson*, 8 Baxt. 108.

[a] Reasonable extracts from the records, may be made. **Del.**—*Swift v. State*, 7 Houst. 338, 6 Atl. 856, 32 Atl. 143, 40 Am. St. Rep. 127. **Idaho.** *Pfirman v. Success Min. Co.*, 30 Idaho 468, 166 Pac. 216. **Me.**—*Withington v. Bradley*, 111 Me. 384 89 Atl. 201, only such portions as directly concern his interests may be copied. **Mo.**—*State v. German Mutual Life Ins. Co.*, 169 Mo. App. 354, 152 S. W. 618. **N. Y.** *People ex rel. Lorge v. Consolidated Nat. Bank*, 105 App. Div. 409, 94 N. Y. Supp. 173. **Tenn.**—*Deaderick v. Wilson*, 8 Baxt. 108.

**79. Ala.**—*Foster v. White*, 86 Ala. 467, 6 So. 88. **La.**—*State ex rel. Burke v. Citizens Bank*, 51 La. Ann. 426, 25 So. 318. **Utah.**—*Clawson v. Clayton*, 33 Utah 266, 93 Pac. 729.

**80.** *Legendre v. New Orleans Brewing Assn.*, 45 La. Ann. 669, 12 So. 837, 40 Am. St. Rep. 243; *Lewis v. Brainard*, 53 Vt. 510.

**81.** *Boardman v. Marshalltown Grocery Co.*, 105 Iowa 445, 75 N. W. 343.

**82.** *People ex rel. Britton v. American Press Assn.*, 148 App. Div. 651,

133 N. Y. Supp. 216; *Kelsey v. Pfandler Process Fermentation Co.*, 51 Hun 636, 3 N. Y. Supp. 723, 20 N. Y. St. 533; *Brown v. Kildea*, 58 Wash. 184, 108 Pac. 452, 1135. See generally the title "Penalties, Forfeitures and Fines."

[a] A reasonable time must be given the corporation to allow the inspection, before instituting the action. *Fuller v. O'Connor*, 61 Misc. 279, 113 N. Y. Supp. 684.

[b] Knowledge of the officer in charge of the books that petitioner was a stockholder, must be alleged. *Williams v. College Corner & R. G. R. Co.*, 45 Ind. 170.

**83.** See the title "Penalties, Forfeitures and Fines."

**84.** See the statutes and *Poor v. Yarnell*, 28 Cal. App. 714, 153 Pac. 976; *People v. Bowie*, 166 N. Y. Supp. 905.

**85.** See 5 STANDARD PROC. 693.

**86. U. S.**—*American Steel Foundries v. Lazear*, 204 Fed. 204, 124 C. C. A. 231. **Colo.**—*Rollins v. Denver Club*, 43 Colo. 345, 96 Pac. 188, 18 L. R. A. (N. S.) 733. **Ill.**—*Cratty v. Peoria Law Library Assn.*, 219 Ill. 516, 76 N. E. 707. **La.**—*Crichton v. Webb Press Co.*, 113 La. 167, 36 So. 926, 104 Am. St. Rep. 500, 67 L. R. A. 76. **Me.** *Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754. **Mass.**—*Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833. **Mich.**—*Knight v. Alamo Mfg. Co.*, 190 Mich. 223, 157 N. W. 24. **Minn.**—*Anderson v. W. J. Dyer & Bro.*, 94 Minn. 30, 101 N. W. 1061. **N. J.**—*Griffing v. A. Griffing Iron Co.*, 61 N. J. Eq. 269,



rather than by mandamus.<sup>87</sup> And statutes sometimes authorize suit by a specified percentage of the stockholders for dissolution and a receiver where dividends have not been declared for a number of years.<sup>88</sup> The discretion of the board of directors in determining whether a dividend shall be declared, will not ordinarily be interfered with, though an abuse of discretion will be remedied.<sup>89</sup> A stockholder may resort to equity to remedy discrimination against him in the matter of dividends.<sup>90</sup> A court of equity will enjoin the declaration of an illegal dividend.<sup>91</sup>

**2. Preferred Stock.**—The general rule that no action at law can be maintained for the recovery of a dividend until it has been regularly declared by the corporation, applies to dividends upon preferred stock.<sup>92</sup> But in equity, under the rule that equity regards that as done which ought to be done, a preferred stockholder, found to have been entitled to a dividend upon his stock, will be given such relief as the facts

48 Atl. 910. **Ore.**—Baillie v. Columbia Gold Min. Co., 86 Ore. 1, 166 Pac. 965, 167 Pac. 1167. **Pa.**—Corgan v. George F. Lee Coal Co., 218 Pa. 386, 67 Atl. 655, 120 Am. St. Rep. 891, 11 Ann. Cas. 838.

**In case of preferred stock, see *infra*, III, C, 2.**

[a] **Action by Trustee in Bankruptcy of Stockholder.**—*In re Brantman*, 244 Fed. 101, 156 C. C. A. 529.

[b] **The corporation is a necessary party plaintiff or defendant.** *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. 280; *Laurel Springs Land Co. v. Fougeray*, 50 N. J. Eq. 756, 26 Atl. 886. See also *Stevens v. United States Steel Corp.*, 68 N. J. Eq. 373, 59 Atl. 905.

[c] **The bill or complaint, in addition to the other facts showing the propriety of equitable interference, must show a demand upon the directors to declare a dividend or facts showing such a demand would be ineffectual.** **U. S.**—*Wilson v. American Ice Co.*, 206 Fed. 736; *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. 280. **Me.**—*Spear v. Rockland-Rockport Lime Co.*, 113 Me. 285, 93 Atl. 754. **N. C.**—*Winstead v. Hearne Bros. & Co.*, 173 N. C. 606, 92 S. E. 613. **Ore.** *Baillie v. Columbia Gold Min. Co.*, 86 Ore. 1, 166 Pac. 965, 167 Pac. 1167.

**87** *Rex v. Bank of England*, 2 B. & Ald. 620, 106 Eng. Reprint 492. But see *Griffing v. A. Griffing Iron Co.*, 61 N. J. Eq. 269, 48 Atl. 910, as to mandamus where the statute requires dividends to be declared if there are surplus profits.

**88.** See the statutes and *Winstead*

*v. Hearne Bros. & Co.*, 173 N. C. 606, 92 S. E. 613.

**89.** See cases in preceding note, and 5 STANDARD PROC. 694.

**90.** *Cratty v. Peoria Law Library Assn.*, 219 Ill. 516, 76 N. E. 707; *Hill v. Atoka Coal & Min. Co. (Mo.)*, 21 S. W. 508.

**91.** *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. ed. 793; *Coquard v. National Linseed Oil Co.*, 171 Ill. 480, 49 N. E. 563.

[a] **Where directors are by statute made personally liable for the wrongful declaration of dividends, and are not insolvent, the remedy at law against them has been held to be an adequate one.** *Schoenfeld v. American Can Co. (N. J. Eq.)*, 55 Atl. 1044.

[b] **Payment of a declared dividend may sometimes be enjoined.** *Marquand v. Federal Steel Co.*, 95 Fed. 725; *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98, 2 Am. Rep. 563. See also *Boardman v. Lake Shore, etc. R. Co.*, 84 N. Y. 157, foreign corporation. But see *Howell v. Chicago, etc. R. Co.*, 51 Barb. (N. Y.) 378.

**92. U. S.**—*American Steel Foundries v. Lazear*, 204 Fed. 204, 124 C. C. A. 231. **Ill.**—*Hamblock v. Clipper Lawn Mower Co.*, 148 Ill. App. 618. **Ky.** *Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477. **Mass.**—*Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136. **Mo.**—*Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784. **N. Y.**—*Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157.

[a] **A guaranty of dividends does**

of the case may warrant.<sup>93</sup> A suit in equity to require the declaration of a dividend on preferred stock may be maintained,<sup>94</sup> though, unless the right to a dividend under the stockholder's contract is dependent merely upon the existence of net profits,<sup>95</sup> the discretion of the directors exercised in good faith, will not be controlled.<sup>96</sup>

**D. RIGHTS IN UNISSUED OR INCREASED CAPITAL STOCK.**—The preferential right of stockholders to subscribe for an increased issue of the capital stock of the corporation, or, in some states, to purchase unissued stock, may be enforced by resort to a court of equity,<sup>97</sup> but

not make dividends a debt. *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784. And see *Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136.

93. *Burk v. Ottawa Gas & E. Co.*, 87 Kan. 6, 123 Pac. 857, Ann. Cas. 1913D, 772.

94. **Ky.**—*Westerfield-Bonte Co. v. Burnett*, 176 Ky. 188, 195 S. W. 477; *Smith v. Southern Foundry Co.*, 166 Ky. 208, 179 S. W. 205. **Mo.**—*Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784. **N. Y.**—*Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157.

See generally *supra*, III, C, 1.

[a] **But not against a foreign corporation.** *Williston v. Michigan S. & N. I. R. Co.*, 13 Allen (Mass.) 400. And see *Howell v. Chicago & N. W. R. Co.*, 51 Barb. (N. Y.) 378. But see *contra*, *Boardman v. Lake Shore, etc. R. Co.*, 84 N. Y. 157. Compare *Prouty v. Michigan S. & N. I. R. Co.*, 4 Thomp. & C. (N. Y.) 230, 1 Hun 655.

[b] **Common stockholders are proper but not necessary parties to the action.** *Thompson v. Erie R. Co.*, 45 N. Y. 468.

[c] **An injunction against the declaration of dividends upon common stock may be obtained.** *Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157, 180.

95. **Kan.**—*Burk v. Ottawa Gas & E. Co.*, 87 Kan. 6, 123 Pac. 857, Ann. Cas. 1913D, 772. **Me.**—*Haseltine v. Belfast & M. L. R. Co.*, 79 Me. 411, 10 Atl. 328, 1 Am. St. Rep. 330. **N. Y.**—*Boardman v. Lake Shore & M. S. Ry. Co.*, 84 N. Y. 157, 180.

96. **New York**, *L. E. & W. R. Co. v. Nickals*, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. ed. 363; *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833; *Field v. Lamson & Goodnow Mfg. Co.*, 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136.

97. **U. S.**—*Bates v. United Shoe Mach. Co.*, 216 Fed. 140, 132 C. C. A. 384, *affirming* 206 Fed. 716. **Ia.** *Schmidt v. Pritchard*, 135 Iowa 240, 112 N. W. 801, where the stock had no market value. **Me.**—*Trask v. Chase*, 107 Me. 137, 77 Atl. 698. **Neb.**—*Bennett v. Baum*, 90 Neb. 320, 133 N. W. 439, specific performance decreed. **N. J.** *Way v. American Grease Co.*, 60 N. J. Eq. 263, 47 Atl. 44. **Pa.**—*Cunningham's Appeal*, 108 Pa. 546. **Wis.**—*Wells v. Green Bay & M. Canal Co.*, 90 Wis. 442, 64 N. W. 69; *Dousman v. Wisconsin & L. S. M. & S. Co.*, 40 Wis. 418. And see generally, note, *L. R. A.* 1918D, 741.

[a] **The right of a stockholder not to be discriminated against in the sale (1) of unissued stock of the corporation will be enforced in equity** (*Trask v. Chase*, 107 Me. 137, 77 Atl. 698; *Essex v. Essex*, 141 Mich. 200, 104 N. W. 622), unless (2) the purchase is made bona fide. *Rural Homestead Co. v. Wildes*, 54 N. J. Eq. 668, 35 Atl. 896. (3) Stock so wrongfully issued will be cancelled. *Perry v. Tuskaloosa Cotton-Seed Oil-Mill Co.*, 93 Ala. 364, 9 So. 217; *Luther v. C. J. Luther Co.*, 118 Wis. 112, 94 N. W. 69, 99 Am. St. Rep. 977.

[b] **Individual stockholders may join in maintaining the action.** *Snelling v. Richard*, 166 Fed. 635. Compare *Dousman v. Wisconsin & L. S. M. & S. Co.*, 40 Wis. 418.

[c] **No injury to the corporation is inflicted by the disregarding of the right and an uninjured stockholder cannot maintain a derivative action in its behalf.** *Waters v. Waters & Co.*, 201 N. Y. 184, 94 N. E. 602; *Dusenberry v. Sagamore Dev. Co.*, 164 App. Div. 573, 150 N. Y. Supp. 229. Compare *Proctor v. Piedmont Portland Cement & Lime Co.*, 134 Ga. 391, 67 S. E. 942.

not by mandamus proceedings.<sup>98</sup> An injunction will issue to prevent an increase in capital stock which will operate injuriously to the rights of existing stockholders,<sup>99</sup> or to prevent the imposition of illegal conditions upon the right of a stockholder to subscribe for the increased stock,<sup>1</sup> or to prevent the voting of stock thus fraudulently and improperly issued.<sup>2</sup> An action in assumpsit for damages may also be maintained against the corporation,<sup>3</sup> or directors who have themselves taken the stock.<sup>4</sup>

**E. RESTRAINING ABUSES IN CORPORATE MANAGEMENT AND CONTROL.**<sup>5</sup> Stockholders of a corporation may resort to a court of equity to prevent the consummation of threatened ultra vires acts,<sup>6</sup> the illegal misappropriation of corporate funds,<sup>7</sup> fraudulent and oppressive acts on the part of majority stockholders,<sup>8</sup> or breaches of trust by the directors.<sup>9</sup> From the complaint it must appear that plaintiff was a stock-

98. *United States v. Bank of Alexandria*, 1 Cranch C. C. 7, 24 Fed. Cas. No. 14,514.

99. *Snelling v. Richard*, 166 Fed. 635.

1. *Cunningham's Appeal*, 108 Pa. 546.

2. *Snelling v. Richard*, 166 Fed. 635; *Way v. American Grease Co.*, 60 N. J. Eq. 263, 47 Atl. 44.

3. *Md.*—*Real Estate Trust Co. v. Bird*, 90 Md. 229, 44 Atl. 1048. *Mass.* *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156. *N. Y.*—*Stokes v. Continental Trust Co.*, 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738. *Pa.*—*Reese v. Bank of Montgomery*, 31 Pa. 78, 72 Am. Dec. 726, a case involving unissued original stock. *Tex.*—*Bonnet v. First Nat. Bank*, 24 Tex. Civ. App. 613, 60 S. W. 325, a demand for the stock must have been made by plaintiff. *Wis.*—*Dousman v. Wisconsin & L. S. M. & S. Co.*, 40 Wis. 418.

4. *Strickler v. McElroy*, 45 Pa. Super. 165.

5. **Suits in equity by stockholders** generally, see 5 STANDARD PROC. 697.

6. *Taylor Feed Pen Co. v. Taylor Nat. Bank* (Tex. Civ. App.), 181 S. W. 534; *Northern Trust Co. v. Snyder*, 113 Wis. 516, 89 N. W. 460, 90 Am. St. Rep. 867.

[a] **The making of a usurious contract** will be enjoined. See *Fletcher & Sons v. Alpena Circuit Judge*, 136 Mich. 511, 99 N. W. 748.

[b] **An unauthorized consolidation** of corporations will be enjoined. *Nathan v. Tompkins*, 82 Ala. 437, 2 So. 747; *Young v. Rondout & K. Gas Light Co.*,

61 Hun 619, 39 N. Y. St. 602, 15 N. Y. Supp. 443. And see note, 52 L. R. A. 390.

7. **U. S.**—*Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. ed. 759. *Ala.*—*Moses v. Tompkins*, 84 Ala. 613, 4 So. 763. *Cal.* *Bacon v. Irvine*, 70 Cal. 221, 11 Pac. 646. *Ill.*—*Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738. *Ind.*—*Redkey Citizens' Nat. Gas, L. F. & P. Co. v. Orr*, 27 Ind. App. 1, 60 N. E. 716. *Ia.*—*Carson v. Iowa Gas-Light Co.*, 80 Iowa 638, 45 N. W. 1068. *N. H.*—*March v. Eastern R. Co.*, 43 N. H. 515.

8. **U. S.**—*Jones v. Missouri-Edison Elec. Co.*, 144 Fed. 765, 75 C. C. A. 631; *Smith v. Chase & Baker Piano Mfg. Co.*, 197 Fed. 466; *Mumford v. Ecuador Dev. Co.*, 111 Fed. 639. *Mo.* *Tanner v. Lindell Ry. Co.*, 180 Mo. 1, 79 S. W. 155, 103 Am. St. Rep. 534. *N. Y.*—*Gamble v. Queens County Water Co.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527.

[a] **A fraudulent reduction of the capital stock** of a corporation will be prevented. *Theis v. Durr*, 125 Wis. 651, 104 N. W. 985, 110 Am. St. Rep. 880, 1 L. R. A. (N. S.) 571.

9. *Ala.*—*Decatur Mineral & Land Co. v. Palm*, 113 Ala. 531, 21 So. 315, 59 Am. St. Rep. 140, voting excessive salary. *Cal.*—*Wright v. Oroville G. S. & C. M. Co.*, 40 Cal. 20. *Ill.*—*Forster v. Fruin & Walker Co.*, 170 Ill. App. 89, injunction pendente lite granted. *Mass.*—*Brewer v. Boston Theater*, 104 Mass. 378. *Pa.*—*Manderson v. Commercial Bank*, 28 Pa. 379.



holder<sup>10</sup> at the time the acts complained of were committed,<sup>11</sup> that he has not acquiesced in the conduct attacked,<sup>12</sup> and that relief was sought from the corporation, or that an application for relief would have been useless.<sup>13</sup>

**F. STOCKHOLDERS' MEETINGS AND ELECTIONS. — 1. Compelling or Enjoining Holding.** — A writ of mandate will issue to compel the calling and holding of a stockholder's meeting in accordance with the by-laws of the corporation,<sup>14</sup> or the statutes of the state,<sup>15</sup> and if the meeting is not called, in accordance with the order of the court, a commissioner may be appointed to call and hold it.<sup>16</sup> The inspectors of an election can be compelled to canvass and certify the result of the election,<sup>17</sup> but they cannot be required to make a recanvass.<sup>18</sup> If the officers of a foreign corporation reside within the state, they will be ordered to call the meeting.<sup>19</sup> Where the officers of a corporation

10. See *infra*, this note.

[a] **The manner in which the stock was acquired** need not be stated. *Gowdy Gas Well, Oil & M. W. Co. v. Pattison*, 29 Ind. App. 261, 64 N. E. 485.

11. *Robinson v. West Virginia Loan Co.*, 90 Fed. 770.

12. See *infra*, this note.

[a] **Lack of acquiescence by his predecessor in interest** must also be alleged. *Trimble v. American Sugar Ref. Co.*, 61 N. J. Eq. 340, 48 Atl. 912.

13. *Louisville & N. R. Co. v. Neal*, 128 Ala. 149, 29 So. 865; *Insurance Press v. Montauk Fire Det. Wire Co.*, 83 App. Div. 259, 82 N. Y. Supp. 104, *affirmed*, 178 N. Y. 623, 70 N. E. 1100.

14. *O'Hara v. Williamstown Cemetery Co.*, 133 Ky. 828, 119 S. W. 234; *State ex rel. Bellamore v. Rombotis*, 120 La. 150, 45 So. 43.

15. *Ala.*—*Walsh v. State ex rel. Cook*, 74 So. 45. *Cal.*—*Potomac Oil Co. v. Dye*, 14 Cal. App. 674, 113 Pac. 126, 130. *Conn.*—*Bassett v. Atwater*, 65 Conn. 355, 32 Atl. 937, 32 L. R. A. 575, special stockholders' meeting. *Ga.* *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806. *Ill.*—*People v. Fairbury*, 51 Ill. 149. *Md.*—*Mottu v. Primrose*, 23 Md. 482. *Mass.*—*Granara v. Italian Catholic Cemetery Assn.*, 218 Mass. 387, 105 N. E. 1073. *Minn.* *State ex rel. L. S. Tel. & Tel. Co. v. De Groat*, 109 Minn. 168, 123 N. W. 417, 134 Am. St. Rep. 764. *Nev.*—*State v. Wright*, 10 Nev. 167; *State v. Lady Bryan Min. Co.*, 4 Nev. 400. *N. J.* *McNeely v. Woodruff*, 13 N. J. L. 352. *N. Y.*—*People ex rel. Miller v. Cummings*, 72 N. Y. 433; *People ex rel.*

*Blackhurst v. Weeks*, 11 N. Y. Supp. 671. *Okla.*—*Cummings v. State ex rel. Wallower*, 47 Okla. 627, 149 Pac. 864, L. R. A. 1915E, 774, special directors' meeting. *Pa.*—*Com. ex rel. McCalmont v. Keim*, 15 Phila. 1.

[a] **A demand upon the directors to hold an election** need not be made where the duty to hold it is plainly imposed upon them. *Mottu v. Primrose*, 23 Md. 482; *People ex rel. Walker v. Albany Hospital*, 61 Barb. (N. Y.) 397, 11 Abb. Pr. (N. S.) 4.

[b] **The board of directors, and not the president of the corporation, is the proper respondent.** *Knoll v. Levert*, 136 La. 241, 66 So. 959; *Dusenbury v. Looker*, 110 Mich. 58, 67 N. W. 986.

[c] **Where the directors are non-residents** jurisdiction may be acquired by service of process on the corporation. *Potomac Oil Co. v. Dye*, 14 Cal. App. 674, 113 Pac. 126, 130.

[d] **Where the real question in issue is title to office** the writ will not issue. *Smith v. Trustees Bethel African Church*, 89 N. J. L. 397, 99 Atl. 102.

16. *Potomac Oil Co. v. Dye*, 14 Cal. App. 674, 113 Pac. 126, 130.

17. *State v. McGann*, 64 Mo. App. 225.

18. *Hayes v. Morgan*, 81 Ill. App. 665, their functions are merely temporary.

19. *Stabler v. El Dora Oil Co.*, 27 Cal. App. 516, 150 Pac. 643. *Compare State ex rel. Ferencz v. Unida Gold Min. Co.*, 32 Ohio C. C. 60, 13 Ohio C. C. (N. S.) 100.

[a] **Illustration.**—“In the case at bar the respondents, as directors of the

wrongfully or fraudulently refuse to call a stockholder's meeting, a court of equity will also grant relief,<sup>20</sup> and if necessary, a master will be appointed to supervise and control the meeting.<sup>21</sup> The fraudulent or illegal holding of a corporate meeting will be enjoined.<sup>22</sup> Statutes sometimes provide a method for calling and holding stockholders' meetings where the directors neglect or refuse to do so.<sup>23</sup> Although a court of equity will not ordinarily try title to a corporate office, in a suit brought merely for that purpose,<sup>24</sup> it may do so incidentally in

corporation and charged with the performance of a duty to the stockholders, are all residents of this state, and as such board of directors they transact all the business of the corporation, not in Arizona, but in California. The resolution calling the election can be, and, if passed at all, no doubt will be, adopted at a meeting of the board held at its offices in Los Angeles, where it appears all its meetings have been held and all of the corporate acts, other than that here involved, have been performed. Since all of the members of the board of directors reside in this state, wherein all its property is situate and all its corporate business, including that of its board of directors, is transacted, the corporation, although organized under the laws of Arizona, must be deemed a resident of this state and subject to the jurisdiction of the courts thereof. Clearly this court has jurisdiction of the question presented, the circumstances of which strongly appeal to it for an exercise of its discretion in behalf of, rather than against petitioners." *Stabler v. El Dora Oil Co.*, 27 Cal. App. 516, 150 Pac. 643.

[b] Where the purpose of the meeting is to amend the corporate charter, the courts will not order the holding of an election by a foreign corporation. *State ex rel. L. S. Tel. & Tel. Co. v. De Groat*, 109 Minn. 168, 123 N. W. 417, 134 Am. St. Rep. 764.

20. U. S.—*Bartlett v. Gates*, 118 Fed. 66. Ky.—*Orr v. Bracken County*, 81 Ky. 593. N. J.—*Lehigh Coal & Nav. Co. v. Central R. Co.*, 35 N. J. Eq. 349.

*Compare Granara v. Italian Catholic Cemetery Assn.*, 218 Mass. 387, 105 N. E. 1073.

[a] Lack of Quorum.—Where a by-law provided that four-fifths of the stock was necessary to constitute a quorum and directors were using the by-law to perpetuate themselves in of-

fice, a court of equity had jurisdiction to determine to what extent the by-law was lawful and to decree the holding of an election at which a majority of the stock should constitute a quorum. *Lutz v. Webster*, 249 Pa. 226, 94 Atl. 834.

[b] Form of decree, ordering calling and holding of meeting and appointing master in chancery to supervise it, see *Bartlett v. Gates*, 118 Fed. 66.

[c] Fraudulent postponement of an election by the directors, will be enjoined. *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 467.

21. U. S.—*Bartlett v. Gates*, 118 Fed. 66. N. Y.—*King v. Barnes*, 51 Hun 550, 4 N. Y. Supp. 247, 22 N. Y. St. 47, 51, 54. Pa.—*Deal v. Erie Coal & Coke Co.*, 248 Pa. 48, 93 Atl. 829; *Tunis v. Hestonville M. & F. Pass. R. Co.*, 149 Pa. 70, 24 Atl. 88, 15 L. R. A. 665.

[a] An appeal cannot be taken from an order appointing a master, as it is not a final order. *National Transit Co. v. United States Pipe Line Co.*, 180 Pa. 224, 36 Atl. 724.

22. Mich.—*Chiera v. Wayne Circuit Judge*, 97 Mich. 638, 57 N. W. 193. N. J.—*Archer v. American Water Works Co.*, 50 N. J. Eq. 33, 24 Atl. 508. N. Y.—*Ripin v. United States Woven Label Co.*, 205 N. Y. 442, 98 N. E. 855. Pa.—*Deal v. Erie Coal & Coke Co.*, 248 Pa. 48, 93 Atl. 829.

23. See the statutes, and see *Cal. Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508. Del.—*In re Jackson*, 9 Del. Ch. 279, 81 Atl. 992, election ordered summarily by chancellor. N. C.—*Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892.

24. N. J.—*Owen v. Whitaker*, 20 N. J. Eq. 122; *Kearney v. Andrews*, 10 N. J. Eq. 70. N. Y.—*Hart v. Harvey*, 10 Abb. Pr. 321, 32 Barb. 55, 19 How. Pr. 245. Ohio.—*Hullman v. Honcomp*, 5 Ohio St. 237. Pa.—*Deal v. Miller*, 245 Pa. 1, 90 Atl. 1070. Tex.—*De Zavala v. Daughters of the Republic*,

the exercise of its jurisdiction with respect to the calling and holding of stockholders' meetings,<sup>25</sup> or when it has jurisdiction on other grounds.<sup>26</sup> Quo warranto proceedings may be invoked to try title to corporate office,<sup>27</sup> and in some states special statutory remedies have been created.<sup>28</sup>

**2. Right To Vote.**—A stockholder whose right to vote,<sup>29</sup> or to cumulate his vote as prescribed by statute,<sup>30</sup> is denied by the officers of the corporation, may resort to a court of equity to protect and enforce his right. A stockholder entitled to vote cannot be enjoined from voting his stock because he might thereby injure minority stockholders.<sup>31</sup> But a person who improperly claims the right to vote at a stockholders' meeting will be enjoined from voting.<sup>32</sup>

**3. Remedies Under Voting Trusts.**—Even where agreements controlling the voting of corporate stock are held to be legal,<sup>33</sup> the courts

58 Tex. Civ. App. 19, 124 S. W. 160. *Contra*, *Haskell v. Read*, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007.

25. *West Side Hospital v. Steele*, 124 Ill. App. 534.

26. *De Zavala v. Daughters of the Republic*, 58 Tex. Civ. App. 19, 124 S. W. 160.

27. See 22 STANDARD PROC. 30, and the following: Fla.—*Davidson v. State*, 20 Fla. 784. Ill.—*People v. Healy*, 230 Ill. 280, 82 N. E. 599, 15 L. R. A. (N. S.) 603. N. J.—*Schilstra v. Van Den Heuvel*, 82 N. J. Eq. 155, 612, 90 Atl. 1056. Vt.—*Clark v. Wild*, 85 Vt. 212, 81 Atl. 536, Ann. Cas. 1914C, 661.

28. See the statutes and the following: Cal.—*Dulin v. Pacific Wood & Coal Co.*, 103 Cal. 357, 35 Pac. 1045, 37 Pac. 207. Mo.—*Gregg v. Granby Min. & S. Co.*, 164 Mo. 616, 65 S. W. 312. N. J.—*Stratford v. Mallory*, 70 N. J. L. 294, 58 Atl. 347. N. Y.—*In re Westchester Trust Co.*, 186 N. Y. 215, 78 N. E. 875.

29. *Granite Brick Co. v. Titus*, 226 Fed. 557, 141 C. C. A. 313; *Supreme Lodge v. Simmering*, 88 Md. 276, 40 Atl. 723, 71 Am. St. Rep. 409, 41 L. R. A. 720.

[a] The right to vote is a property right which will be protected in equity. *Taylor & Co. v. Southern Pac. Co.*, 122 Fed. 147.

30. *West Side Hospital v. Steele*, 124 Ill. App. 534.

31. *Lersner v. Adair Mach. Co.*, 137 N. Y. Supp. 565 (by ousting their directors); *Oelbermann v. New York & N. R. Co.*, 76 Hun 613, 77 Hun 332, 29 N. Y. Supp. 545, 59 N. Y. St. 881, 60

N. Y. St. 876. See *Taylor & Co. v. Southern Pac. Co.*, 122 Fed. 147, stockholder a necessary party to such suit.

32. U. S.—*Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 525, 4 Fed. Cas. No. 2,025. Ala.—*George v. Central R. R. & Banking Co.*, 101 Ala. 607, 14 So. 752. Cal.—*Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530. Iowa.—*Stewart v. Pierce*, 116 Iowa 733, 89 N. W. 234. Neb.—*Haskell v. Read*, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007, stock issued without consideration and in excess of amount authorized by law. N. J.—*Way v. American Grease Co.*, 60 N. J. Eq. 263, 47 Atl. 44. Wash.—*Parsons v. Tacoma Smelting & Refining Co.*, 25 Wash. 492, 65 Pac. 765.

[a] The stockholder whose right to vote is being questioned by other stockholders is (1) a necessary party to the action, since he is not represented by the corporation in such an action. *Taylor & Co. v. Southern Pacific Co.*, 122 Fed. 147; *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530. And see *Hollifield v. Wrightsville & T. R. Co.*, 99 Ga. 365, 27 So. 715. (2) The holder of a proxy may be enjoined from voting although the owner of the stock is not a party. *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525, 4 Fed. Cas. No. 2,025.

[b] Where no practical benefit would result, and the result of an election would not be affected by the voting of the stock, an injunction will not issue. *Bache v. Central Leather Co.*, 78 N. J. Eq. 484, 81 Atl. 571.

33. See notes, 16 L. R. A. (N. S.) 1136, 31 L. R. A. (N. S.) 1186.



have sometimes refused to specifically enforce such agreements,<sup>34</sup> preferring to leave the parties to their legal remedy. Where the pooling agreement is illegal, the voting of the stock may be enjoined,<sup>35</sup> and an action maintained by the owner to recover its possession.<sup>36</sup>

**IV. LIABILITIES OF STOCKHOLDERS TO CREDITORS. — A. UPON UNPAID SUBSCRIPTIONS. — 1. Form and Nature of the Remedy.**  
**a. In General.** — Creditors of a corporation have the right to assume that the capital stock of a corporation has been or will be fully paid up,<sup>37</sup> and where the full par value of the stock has not been received by the corporation in money or money's worth, payment of the balance will be enforced by the courts at the instance of a creditor who extended his credit without knowledge of the facts and in an appropriate proceeding.<sup>38</sup> In some states, this liability is now embodied in statutes.<sup>39</sup> The right to maintain an action to enforce this liability is not barred by the dissolution of the corporation,<sup>40</sup> nor by the enactment of a statute imposing an additional and different liability upon stockholders,<sup>41</sup> and the cause of action survives the death of the stockholder.<sup>42</sup> The form of remedy to be adopted is governed by the forum

34. **Ill.**—Teich *v.* Kaufman, 174 Ill. App. 306. **Ia.**—Kennedy *v.* Monarch Mfg. Co., 123 Iowa 344, 98 N. W. 796. **N. D.**—Gage *v.* Fisher, 5 N. D. 297, 65 N. W. 809, 31 L. R. A. 557. **Wash.** Gleason *v.* Earles, 78 Wash. 491, 139 Pac. 213, 51 L. R. A. (N. S.) 785.

And see *Fremont v. Stone*, 42 Barb. (N. Y.) 169. But see *Smith v. San Francisco & N. P. R. Co.*, 115 Cal. 584, 47 Pac. 582, 56 Am. St. Rep. 119, 35 L. R. A. 309.

[a] Where voting trustees cannot agree upon the manner of voting specific performance cannot be awarded. *Sullivan v. Parkes*, 69 App. Div. 221, 74 N. Y. Supp. 787.

[b] A return of the stock will not be ordered as alternative relief, even where specific performance is denied. *Kennedy v. Monarch Mfg. Co.*, 123 Iowa 344, 98 N. W. 796.

35. **Luthy v. Ream**, 270 Ill. 170, 110 N. E. 373, Ann. Cas. 1917B, 368; *Shepard v. Rockingham Power Co.*, 150 N. C. 776, 64 S. E. 894.

36. *Warren v. Pim*, 65 N. J. Eq. 36, 55 Atl. 66.

37. *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885.

38. **U. S.**—*Wood v. Dummer*, 3 Mason 308, 30 Fed. Cas. No. 17,944. **Cal.** *Llewellyn Iron Wks. v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986; *R. H. Herron Co. v. Shaw*, 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A, 1265. **Minn.** *Hospes v. Northwestern Mfg. & Car*

*Co.*, 48 Minn. 174, 50 N. W. 1117, 31 Am. St. Rep. 637, 15 L. R. A. 470.

[a] Preferred and common stockholders are equally liable. *Kirkpatrick v. American Alkali Co.*, 140 Fed. 186.

39. See the statutes and **U. S.**—*Patterson v. Lynde*, 106 U. S. 519, 1 Sup. Ct. 432, 27 L. ed. 265. **Idaho.**—*Feehan v. Kendrick*, 179 Pac. 507. **Mont.** *Kelly v. Clark*, 21 Mont. 291, 53 Pac. 959, 69 Am. St. Rep. 668, 42 L. R. A. 621.

[a] Jurisdiction of court of equity is not affected by the fact that the liability is recognized and fixed by statute. *Second National Bank v. Georger*, 246 Fed. 517.

40. **Ala.**—*Pankey v. Lippman*, 187 Ala. 199, 65 So. 771, during the period during which the existence of the corporation for the purpose of winding up its affairs is continued by statute. **Cal.**—*Robinson v. Blood*, 151 Cal. 504, 91 Pac. 258. **Ga.**—*Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412. **Ohio.** *Rowland v. Meader Furniture Co.*, 38 Ohio St. 269. **Pa.**—*Germantown Passenger Ry. Co. v. Fitler*, 60 Pa. 124, 100 Am. Dec. 546.

Necessity of obtaining judgment against the corporation, see *infra*, IV, A, 3, b.

41. *Baines v. Babcock*, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158.

42. *Thomas v. Kalbfus*, 97 Ohio St.

in which the action is instituted.<sup>43</sup>

b. *Execution Against Stockholder*.—In a few states, after execution on the judgment obtained against the corporation has been returned unsatisfied, the creditor may have execution issued against the stockholders to the extent of the amount remaining unpaid upon their stock, either without notice,<sup>44</sup> or upon motion, after notice.<sup>45</sup> In some states a bill in equity in aid of the execution and to discover debts due the corporation may be maintained.<sup>46</sup>

c. *Suits in Equity*.—The remedy most commonly employed to enforce a stockholder's liability to corporate creditors, and the remedy best adapted to this end,<sup>47</sup> is a suit in equity, in the nature of a creditor's bill to reach the equitable assets of the corporation including the unpaid balance owing by stockholders upon their stock.<sup>48</sup> This

232, 119 N. E. 412; *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736.

43. *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 139 N. W. 606, 43 L. R. A. (N. S.) 706. And see *Covell v. Fowler*, 144 Fed. 535.

Right to enforce the liability outside the domain of the corporation, see *infra*, IV, A, 2.

44. Fla.—*Armour Fertilizer Works v. Parrish Vegetable & F. Co.*, 63 Fla. 64, 58 So. 231. Ga.—*Heard v. Sibley*, 52 Ga. 310. Ia.—*Calumet Paper Co. v. Stotts Inv. Co.*, 96 Iowa 147, 64 N. W. 782, 59 Am. St. Rep. 362. Tex.—*Herf & Frerichs Chemical Co. v. Brewster*, 54 Tex. Civ. App. 217, 117 S. W. 880; *Galvin v. McConnell*, 53 Tex. Civ. App. 486, 117 S. W. 211.

45. *Wilson v. St. Louis & S. F. R. Co.*, 108 Mo. 588, 18 S. W. 286, 32 Am. St. Rep. 624; *Erskine v. Loewenstein*, 82 Mo. 301; *Bonet Const. Co. v. Central Amusement Co.*, 153 Mo. App. 185, 132 S. W. 270.

[a] *Nature of the Proceeding*.—"The proceeding by motion for execution against a stockholder . . . is as a summary proceeding and a statutory substitute for a bill in equity, the statute contemplating a hearing and determination of the motion by the court without the intervention of a jury, the trial itself is practically as in a suit in equity, and on appeal the case is subject to review in this court in the same manner as causes in equity." *Bonet Const. Co. v. Central Amusement Co.*, 153 Mo. App. 185, 132 S. W. 270, 273.

[b] The remedy is concurrent with a suit in equity or an action at law. *Rood v. Crocus Hill Min. Co.*, 157 Mo.

App. 405, 139 S. W. 222; *State v. Goodrich*, 138 Mo. App. 283, 120 S. W. 646.

46. *De Shelter v. American S. W. Supply Co.*, 182 Ill. App. 403 (where property conveyed in consideration for stock had been grossly overvalued); *Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330.

47. U. S.—*Potts v. Wallace*, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. ed. 1135. Ga.—*Dalton & M. R. Co. v. McDaniel*, 56 Ga. 191. N. Y.—*Mann v. Pentz*, 3 N. Y. 415. Ore.—*Hodges v. Silver Hill Min. Co.*, 9 Ore. 200.

48. U. S.—*Patterson v. Lynde*, 106 U. S. 519, 1 Sup. Ct. 432, 27 L. ed. 265; *Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885; *In re Putnam*, 193 Fed. 464. Ala.—*Bellview Cemetery Co. v. Faulks*, 73 So. 927; *Hall v. Alabama Terminal & Imp. Co.*, 173 Ala. 398, 56 So. 235, jurisdiction is based upon the inadequacy of the legal remedy and is not dependent upon the existence of fraud. Ark.—*Ford Hardwood Lumb. Co. v. Clement*, 97 Ark. 522, 135 S. W. 343. Cal.—*Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986; *Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204; *Blood v. La Serena Land & Water Co.*, 150 Cal. 764, 89 Pac. 1090; *Baines v. Babcock*, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158. Colo.—*Universal Fire Ins. Co. v. Tabor*, 16 Colo. 531, 27 Pac. 890. Del.—*Du Pont v. Ball*, 106 Atl. 39. Ga.—*Dalton & M. R. Co. v. McDaniel*, 56 Ga. 191; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412. Ill.—*Edwards v. Schillinger*, 245 Ill. 231, 91 N. E. 1048, 137 Am. St. Rep. 308, 33 L. R. A. (N. S.) 895. Ind.—*Indiana Novelty Mfg. Co. v. McGill*, 15

remedy is sometimes held to be the exclusive remedy of the creditor,<sup>49</sup> at least where the amount that each individual stockholder is liable for is unknown and depends upon facts not yet ascertained and upon equities to be adjusted between creditors or stockholders, or both;<sup>50</sup> in other states it is concurrent with the remedy at law.<sup>51</sup> Equitable jurisdiction is not based upon the ground of preventing a multiplicity of suits.<sup>52</sup> In a few states, by statute, the creditors' right to maintain a suit in equity has been taken away, and the exclusive right of action vested in a receiver for the benefit of all the creditors,<sup>53</sup> and in other states, by statute, an action at law has been made the exclusive remedy of creditors.<sup>54</sup>

Ind. App. 1, 43 N. E. 464. **Mo.**—Shields *v.* Hobart, 172 Mo. 491, 72 S. W. 669, 95 Am. St. Rep. 669. **Mont.**—Kelly *v.* Clark, 21 Mont. 291, 53 Pac. 959, 69 Am. St. Rep. 668, 42 L. R. A. 621. **N. M.**—Albright *v.* Texas, S. F. & N. R. Co., 8 N. M. 422, 46 Pac. 448. **Nev.** Thompson *v.* Reno Sav. Bank, 19 Nev. 242, 9 Pac. 121, 3 Am. St. Rep. 883. **Okla.**—Dill *v.* Ebey, 27 Okla. 584, 112 Pac. 973, 46 L. R. A. (N. S.) 440. **Ore.** Macbeth *v.* Banfield, 45 Ore. 553, 78 Pac. 693, 106 Am. St. Rep. 670; Ladd *v.* Cartwright, 7 Ore. 329. **Pa.**—Lane's Appeal, 105 Pa. 49, 51 Am. Rep. 166. **S. C.**—Efid *v.* Piedmont Land Imp. & Inv. Co., 55 S. C. 78, 32 S. E. 758, 897. **Wash.**—Burch *v.* Taylor, 1 Wash. 245, 24 Pac. 438. **Wis.**—Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57.

See the title "Creditors' Bills."

[a] **An accounting need not be sought** in order to confer jurisdiction on a court of equity. Cook *v.* Carpenter, 212 Pa. 165, 61 Atl. 799, 108 Am. St. Rep. 854, 1 L. R. A. (N. S.) 900, 4 Ann. Cas. 723.

[b] **As an incident to receivership proceedings** the liability of stockholders to corporate creditors cannot be enforced, since stockholders are not parties, as individuals, to the receivership proceeding. Dilzell Eng. & Const. Co. *v.* Lehmann, 120 La. 273, 45 So. 138.

[c] **In an action to foreclose a corporate mortgage**, the defendant trustee in bankruptcy cannot obtain the levying of an assessment upon stock owned by the plaintiff. Myers *v.* Indiana Min. Co., 86 Ore. 664, 168 Pac. 719.

49. Graeber *v.* Ehr Gott, 182 App. Div. 377, 169 N. Y. Supp. 32.

50. Kennedy *v.* Gibson, 8 Wall. (U.

S.) 498, 19 L. ed. 476; Dickinson *v.* Kline, 96 Neb. 435, 148 N. W. 141.

51. **Ala.**—Montgomery Iron Works *v.* Roman, 147 Ala. 434, 41 So. 811. **Del.** John W. Cooney Co. *v.* Arlington Hotel Co. (Del. Ch.), 101 Atl. 879. **Ill.** Cohen *v.* Toy Gun Mfg. Co., 172 Ill. App. 330. **Okla.**—Dill *v.* Ebey, 27 Okla. 584, 112 Pac. 973, 46 L. R. A. (N. S.) 440.

[a] **Creation of a statutory remedy at law** does not ordinarily affect the jurisdiction of a court of equity. Miss. Payne *v.* Bullard, 23 Miss. 88, 55 Am. Dec. 74, concurrent with garnishment proceedings. **Mo.**—Shields *v.* Hobart, 172 Mo. 491, 72 S. W. 669, 95 Am. St. Rep. 669. **Okla.**—Dill *v.* Ebey, 27 Okla. 584, 112 Pac. 973, 46 L. R. A. (N. S.) 440. **Pa.**—Cook *v.* Carpenter, 212 Pa. 165, 61 Atl. 799, 108 Am. St. Rep. 854, 1 L. R. A. (N. S.) 900, 4 Ann. Cas. 723.

[a] **The fact that the liability is recognized and embodied in a statute** which, however, prescribes no remedy does not affect the jurisdiction of a court of equity. Kelly *v.* Clark, 21 Mont. 291, 53 Pac. 959, 69 Am. St. Rep. 668, 42 L. R. A. 621.

[b] **A statutory remedy will not exclude resort to a court of equity**, unless that remedy is expressly made exclusive. Second Nat. Bank *v.* Georger, 246 Fed. 517.

52. John A. Roebling's Sons Co. *v.* Kinnicutt, 248 Fed. 596.

53. Hughes *v.* Hall, 117 Md. 547, 83 Atl. 1023. See Douglass *v.* Loftus, 85 Kan. 720, 119 Pac. 74, Ann. Cas. 1913A, 378, L. R. A. 1915B, 797, between 1899 and 1903, and *infra*, IV, C.

54. See *infra*, IV, A, 1, e.



Discovery of the names of stockholders and the amount unpaid upon their stock may be compelled in equity.<sup>55</sup>

d. *Garnishment and Attachment Proceedings.*—If a call upon a subscription has been made by the corporation and remains unpaid, garnishment proceedings may be maintained by the creditor to enforce the call.<sup>56</sup> In some states the stockholder may be joined in the action against the corporation, the proceeding as to him being in the nature of a garnishment,<sup>57</sup> or the creditor may, after judgment against the corporation, resort to garnishment proceedings against the stockholder.<sup>58</sup> The liability of a resident stockholder in a foreign corporation may be enforced in an action instituted by attachment.<sup>59</sup> The stockholder's liability may also be enforced in sequestration proceedings, against the corporation.<sup>60</sup>

e. *Actions at Law.*—An action at law by the creditor or a receiver has been held to be authorized, to collect a call made by the corpora-

55. *Mich.*—*Brewer v. Michigan Salt Assn.*, 58 Mich. 351, 25 N. W. 374. *N. Y.*—*Morgan v. New York & A. R. Co.*, 10 Paige 290, 40 Am. Dec. 244. *N. C.*—*Bronson v. Wilmington N. C. Life Ins. Co.*, 85 N. C. 411. *Ohio.* *Miers v. Zanesville & M. Tpk. Co.*, 11 Ohio 273.

[a] Where the relief sought is legal and discovery is asked merely as an incident, it will not be ordered in courts retaining the distinction between law and equity. *John A. Roebling's Sons Co. v. Kinnicutt*, 248 Fed. 596.

[b] A receiver may maintain a bill for discovery. *Huey v. Brown*, 171 Fed. 641, 96 C. C. A. 443.

56. See *Dotson v. Hoggan*, 44 Utah 295, 140 Pac. 128.

57. *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725; *World's Fair Excursion Co. v. Gasch*, 162 Ill. 402, 44 N. E. 724 (the proceeding may be either concurrent with the original suit or subsequent thereto after judgment and execution); *Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330; *Doak v. Stahlman* (Tenn.), 58 S. W. 741.

[a] A judgment pro confesso against the corporation is not conclusive upon the stockholder. *Doak v. Stahlman* (Tenn.), 58 S. W. 741.

58. *U. S.*—*Faull v. Alaska G. & S. M. Co.*, 8 Sawy. 420, 14 Fed. 657. *Ala.* *Trotter Bros. v. Blount*, 162 Ala. 289, 50 So. 130; *Henderson v. Mayfield Woolen Mills*, 153 Ala. 625, 45 So. 211; *Enslin v. Nathan*, 136 Ala. 412, 34 So. 929 (a call is not a condition precedent to relief); *Roman v. Dimmick*, 123 Ala. 366, 26 So. 214. *Ark.*—*Tiger v. Rogers*

*Cotton Cleaner & Gin Co.*, 96 Ark. 1, 130 S. W. 585, Ann. Cas. 1912B, 488, 30 L. R. A. (N. S.) 694. *Cal.*—*Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244. *Ia.*—*Langford v. Ottumwa Water Power Co.*, 59 Iowa 283, 13 N. W. 303. *Neb.*—*Bohrer v. Adair*, 61 Neb. 824, 86 N. W. 495. *N. Y.*—*McNelus v. Stillman*, 172 App. Div. 307, 158 N. Y. Supp. 428. *N. C.*—*Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348. *Tenn.*—*Doak v. Stahlman*, 58 S. W. 741. *Tex.*—*Nesom v. City National Bank* (Tex. Civ. App.), 174 S. W. 715. *Utah.*—*Dotson v. Hoggan*, 44 Utah 295, 140 Pac. 128.

[a] A direct allegation that the judgment is unpaid is not necessary. *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244.

[b] An unpaid subscription is such property of the corporation as is liable to attachment in a state for the purpose of giving the courts of that state jurisdiction over the corporation. *Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348.

59. *N. Y.*—*McNelus v. Stillman*, 172 App. Div. 307, 158 N. Y. Supp. 428. *N. C.*—*Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348. *Va.*—*Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751.

60. *Argall v. Sullivan*, 83 Minn. 71, 85 N. W. 931, the proceedings may be maintained by an assignee of the judgment. And see *Greenfield v. Minnesota Min. & Dev. Co.*, 138 Minn. 446, 165 N. W. 274; *Beals v. Buffalo, etc. Construction Co.*, 49 App. Div. 589, 63 N. Y. Supp. 635.

tion,<sup>61</sup> and also when the amount due from each stockholder is fixed and determined and constitutes the full par value of the stock.<sup>62</sup> An assessment levied under the direction of a court may also be collected in an action at law.<sup>63</sup> But liability for an unpaid subscription cannot ordinarily be enforced by a corporation creditor in an action at law,<sup>64</sup> though there are some authorities to the contrary,<sup>65</sup> and in some states, also, by virtue of statutes, common law remedies have been created by which liability for the unpaid portion of a stockholder's subscription may be enforced.<sup>66</sup>

f. *Mandamus*.—Creditors of a corporation are not required, prior to instituting a suit in equity to recover an unpaid balance upon stock subscriptions, to apply for a writ of mandamus to compel directors to make a call upon the stockholders,<sup>67</sup> and indeed it is doubtful if the remedy by mandamus is open to them under any circumstances.<sup>68</sup>

2. **Jurisdiction and Venue.**<sup>69</sup>—An action to enforce the equitable liability of a stockholder is contractual in its nature and may be maintained in the courts of a state other than that in which the corporation itself was incorporated,<sup>70</sup> even where that liability is embodied in a

61. *Clevenger v. Moore*, 71 N. J. L. 148, 58 Atl. 88.

62. *Hale v. Allinson*, 188 U. S. 56, 78, 23 Sup. Ct. 244, 47 L. ed. 380; *Dickinson v. Kline*, 96 Neb. 435, 148 N. W. 141.

63. *Rosoff v. Gilbert Transportation Co.*, 221 Fed. 972; *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375. And see *Covell v. Fowler*, 144 Fed. 535.

[a] After the courts of the domicile of the corporation have made the assessment, an action at law to collect it may be maintained in the courts of another state in which the stockholder may be found. *Chicago Title & Trust Co. v. Young's Exrs.* (N. J. Eq.), 105 Atl. 601; *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375.

64. U. S.—*Patterson v. Lynde*, 106 U. S. 519, 1 Sup. Ct. 432, 27 L. ed. 265; *Brown v. Fisk*, 23 Fed. 228. Ark.—*Jones v. Jarman*, 34 Ark. 323. Neb.—*Reed v. Burg*, 2 Neb. (Unof.) 117, 96 N. W. 414. N. J.—*Thompson-Houston Elec. Co. v. Murray*, 60 N. J. L. 20, 37 Atl. 443. Utah.—*Dotson v. Hoggan*, 44 Utah 295, 140 Pac. 128.

[a] Reason for the Rule.—“The subscription is part of the assets of the corporation, at least so far as creditors are concerned. The liability of the stockholder to the creditor is through the corporation, not direct. There is no privity of contract between them.”

*Patterson v. Lynde*, 106 U. S. 519, 1 Sup. Ct. 432, 27 L. ed. 265.

65. *Steam Stone Cutter Co. v. Scott*, 157 Mo. 520, 57 S. W. 1076; *O'Kell v. Chama Valley Lands & Irr. Co.*, 181 Mo. App. 466, 168 S. W. 887.

66. *Dickens v. Radford-Willis So. R. Co.*, 121 Va. 353, 93 S. E. 625 (the common law remedy is exclusive); *Shickell v. Berryville Land & Imp. Co.*, 99 Va. 88, 37 S. E. 813. Compare *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

[a] A jury trial may be had. *Dickens v. Radford-Willis So. R. Co.*, 121 Va. 353, 93 S. E. 625.

67. U. S.—*Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885. Conn.—*Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593. Ga.—*Dalton & M. R. Co. v. McDaniel*, 56 Ga. 191.

Necessity of a call as a condition precedent to a suit in equity by creditors, see *infra*, IV, A, 3, a.

68. *Hays v. Lyeoming Fire Ins. Co.*, 98 Pa. 184. But see *Patterson v. Lynde*, 112 Ill. 196.

69. See the titles “Jurisdiction;” “Venue.”

70. U. S.—*National Tube Works Co. v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. ed. 1070. Cal.—*Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204. Conn.—*Lewisohn v. Stoddard*, 78 Conn. 575, 63 Atl. 621; *Fish v. Smith*, 73 Conn. 377, 47 Atl. 711, 84

statute,<sup>71</sup> except in those jurisdictions in which the action is treated as one virtually for the winding up of the affairs of an insolvent corporation.<sup>72</sup> A receiver appointed by the courts of another state, cannot ordinarily maintain an action to enforce a stockholder's liability.<sup>73</sup>

If the claim of any creditor is sufficient in amount to confer jurisdiction upon a court, other creditors whose claims by themselves would be insufficient in amount may join in the action.<sup>74</sup>

**Venue.** — A creditor's suit in equity may be instituted in the county of the principal place of business of the corporation, in jurisdictions in which the corporation is a necessary party to the suit.<sup>75</sup> Where the liability of the stockholder is a several liability and the corporation is not a necessary party, the action may be maintained at the residence of the stockholder.<sup>76</sup>

**3. Conditions Precedent.** — a. *In General.* — Any conditions precedent must be met before suit is brought against the stockholder.<sup>77</sup> But it is unnecessary for the creditor to first exhaust a statutory lia-

Am. St. Rep. 161. **Ill.**—*Edwards v. Schillinger*, 245 Ill. 231, 91 N. E. 1048, 137 Am. St. Rep. 308, 33 L. R. A. (N. S.) 895. **Ky.**—*Williams' Exr. v. Chamberlain*, 123 Ky. 150, 94 S. W. 29. **Minn.** *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 139 N. W. 606, 43 L. R. A. (N. S.) 706. **N. Y.** *Stoddard v. Lum*, 159 N. Y. 265, 53 N. E. 1108, 70 Am. St. Rep. 541, 45 L. R. A. 551. **Utah.**—*Crofoot v. Thatcher*, 19 Utah 212, 57 Pac. 171, 75 Am. St. Rep. 725. **Va.**—*Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751. Compare *Parkhurst v. Mexican S. E. R. Co.*, 102 Ill. App. 507.

[a] No interference with the internal affairs of a foreign corporation is involved in such an action. *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751.

[b] A suit by a trustee in bankruptcy of the insolvent corporation should be brought in the court where bankruptcy proceedings are pending. *In re Crystal Spring Bottling Co.*, 96 Fed. 945.

71. See *supra*, IV, A, 1, a, and *Lattimer v. Citizens' State Bank*, 102 Iowa 162, 71 N. W. 225.

72. *Chicago Title & Trust Co. v. Young's Exrs.* (N. J. Eq.), 105 Atl. 601; *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375.

73. See *infra*, IV, C, 2

74. *Williams' Exr. v. Chamberlain*, 123 Ky. 150, 94 S. W. 29.

Jurisdiction as affected by amount in controversy, see the title "Jurisdiction."

75. *Dickinson v. Kline*, 96 Neb. 435, 148 N. W. 141.

76. *Williams' Exr. v. Chamberlain*, 123 Ky. 150, 94 S. W. 29.

77. See *infra*, this section.

[a] Before action can be maintained by a receiver or trustee of an insolvent corporation against its stockholders (1) the latter must, under some statutes, have had notice and an opportunity to be heard upon the validity of the claims of creditors. *Rea v. Eslick*, 87 Wash. 125, 151 Pac. 256; *Chamberlain v. Piercy*, 82 Wash. 157, 143 Pac. 977; *Beddow v. Huston*, 65 Wash. 585, 118 Pac. 752; *Grady v. Graham*, 64 Wash. 436, 116 Pac. 1098, 36 L. R. A. (N. S.) 177. (2) Where after a call has been made the corporation becomes insolvent and a trustee in bankruptcy is appointed, the general rule is applicable. *Chamberlain v. Piercy*, 82 Wash. 157, 143 Pac. 977. (3) Compliance with these conditions must appear on the face of the complaint. *Rea v. Eslick*, 87 Wash. 125, 151 Pac. 256; *Chamberlain v. Piercy*, 82 Wash. 157, 143 Pac. 977. (4) If the stock was issued under an agreement that it should be regarded as fully paid, this agreement must be set aside before a receiver or trustee in bankruptcy may sue. *Felker v. Sullivan*, 34 Colo. 212, 83 Pac. 213.

[b] In New York, (1) it is a condition to maintenance of the action that the debt was payable within two years from the date it was contracted (*Graeber v. Ehr Gott*, 182 App. Div. 377, 169 N. Y. Supp. 32), and (2) that



bility and remedy;<sup>78</sup> nor need he first give notice to or obtain the consent of other creditors.<sup>79</sup> Proceedings against the holders of preferred stock need not be maintained prior to bringing actions against the holders of common stock.<sup>80</sup> Application for the appointment of a receiver to wind up the affairs of the corporation and distribute its assets, need not have been made,<sup>81</sup> and the winding up of an insolvent corporation need not be awaited by the creditors.<sup>82</sup> It has been held unnecessary to prevent a claim against the estate of a deceased stockholder before suing his personal representative.<sup>83</sup> While ordinarily no call or assessment by the corporation need first be made, this rule is not without its limitations.<sup>84</sup>

*b. Exhausting Remedy Against Corporation. — (I.) In General.* The liability of a stockholder in equity is regarded as secondary rather than primary and the general rule is that a creditor's suit cannot be maintained until after a judgment at law<sup>85</sup> has been obtained against

action for its collection was brought within two years from its becoming due. *Graeber v. Ehr Gott*, 182 App. Div. 377, 169 N. Y. Supp. 32.

78. *Baines v. Babcock*, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158.

79. *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797.

[a] **He Is Under No Legal or Moral Obligation To Bring in Other Creditors.** He may proceed to secure his own rights independent of them. *McBryan v. Universal Elevator Co.*, 130 Mich. 111, 89 N. W. 683, 97 Am. St. Rep. 453.

80. *Du Pont v. Ball* (Del.), 106 Atl. 39.

81. *American Spirits Mfg. Co. v. Eldridge*, 209 Mass. 590, 95 N. E. 942.

82. *Patterson v. Lynde*, 112 Ill. 196; *Schneider v. Johnson*, 164 Mo. App. 639, 147 S. W. 538.

83. *Thompson v. Reno Sav. Bank*, 19 Nev. 242, 9 Pac. 121, 3 Am. St. Rep. 883. *Compare Lewisohn v. Stoddard*, 78 Conn. 575, 63 Atl. 621.

[a] **"Stockholders are trustees of the creditors, and suits to establish and enforce the trust are maintained against the representatives of deceased persons, upon the theory that the decedent held money equal to the amount of his unpaid subscription in trust for the creditors, and that the fund, although incapable of identification, has passed into the hands of the executor or administrator. Such a fund is properly no part of the estate of a deceased**

person. The deceased stockholders were trustees, and not debtors of the bank's creditors. No necessity therefore existed for the presentation of any demand before commencing suit." *Thompson v. Reno Sav. Bank*, 19 Nev. 242, 9 Pac. 121, 3 Am. St. Rep. 883, 884.

84. See *infra*, IV, F.

[a] **No demand upon the directors** that they make a call, is necessary. *Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204, *overruling* *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62.

85. **U. S.**—*New Hampshire Sav. Bank v. Richey*, 121 Fed. 956, 58 C. C. A. 294. **Ala.**—*Drennen v. Jenkins*, 180 Ala. 261, 60 So. 856; *Dickinson v. Traphagan*, 147 Ala. 442, 41 So. 272. **Ark.**—*Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518. **Cal.**—*Merchants' Mut. Adjusting Agency v. Davidson*, 23 Cal. App. 274, 137 Pac. 1091. **Neb.**—*Dickinson v. Kline*, 96 Neb. 435, 148 N. W. 141; *Talmage v. Minton-Woodward Co.*, 83 Neb. 29, 118 N. W. 1099. **Utah.**—*Rolapp v. Ogden & W. R. Co.*, 37 Utah 540, 110 Pac. 364.

See 6 STANDARD PROC. 168, et seq.

[a] **In What State.**—(1) If a judgment has been obtained against the corporation at its domicile, and execution there returned unsatisfied, judgment need not be obtained in the state in which the action is brought, provided it is shown that the corporation has no property in that state. *Broadway Nat. Bank v. Baker*, 176 Mass. 294,

the corporation, and an execution returned unsatisfied.<sup>86</sup> Where, however, the stockholder's liability is, by virtue of a statutory provision, regarded as primary in its nature no judgment against the corporation need be obtained.<sup>87</sup>

57 N. E. 603. See *Doak v. Stahlman* (Tenn.), 58 S. W. 741. Compare *National Tube Works Co. v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165, 36 L. ed. 1070. (2) And where a judgment has been obtained in the state in which the principal place of business of the corporation is located, it is not necessary that a judgment be obtained in the state of the domicile of the corporation, where it is shown to have no assets in that state. *McConey v. Belton Oil & Gas Co.*, 97 Minn. 190, 106 N. W. 900.

[b] **Federal court judgment** as basis of creditor's suit, see 6 STANDARD PROC. 183, and *Fletcher v. Bank of Lonoke*, 71 Ark. 1, 69 S. W. 580.

[c] **If the corporation has forfeited its charter** a judgment against it is a nullity, and will not support a creditor's bill. *Llewellyn Iron Wks. v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986.

86. Ala.—*Vaughn v. Alabama Nat. Bank*, 143 Ala. 572, 42 So. 64, 5 Ann. Cas. 665; *Pickering v. Townsend*, 118 Ala. 351, 23 So. 703. Ark.—*Ford Hardwood Lumb. Co. v. Clement*, 97 Ark. 522, 135 S. W. 343; *Fletcher v. Bank of Lonoke*, 71 Ark. 1, 69 S. W. 580. Cal.—*Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986. Colo.—*Universal Fire Ins. Co. v. Tabor*, 16 Colo. 531, 27 Pac. 890. Del.—*John W. Cooney Co. v. Arlington Hotel Co.* (Del. Ch.), 101 Atl. 879. Fla.—*Knight & Wall Co. v. Tampa Sand Lime Brick Co.*, 55 Fla. 728, 46 So. 285. Ill.—*Patterson v. Lynde*, 112 Ill. 196; *Calder v. Calder Packing Co.*, 160 Ill. App. 620. Kan.—*Merrill v. Meade*, 6 Kan. App. 620, 49 Pac. 787. Ky.—*Hanger v. Apperson*, 168 Ky. 609, 182 S. W. 831. Minn.—*McConey v. Belton Oil & Gas Co.*, 97 Minn. 190, 106 N. W. 900. Miss.—*Payne v. Bullard*, 23 Miss. 88, 55 Am. Dec. 74. Mont.—*King v. Pony Gold Min. Co.*, 28 Mont. 74, 72 Pac. 309. Neb.—*Globe Pub. Co. v. State Bank*, 41 Neb. 175, 59 N. W. 683, 27 L. R. A. 854. N. M.—*Albright v. Texas, S. F. & N. R. Co.*, 8 N. M. 422, 46 Pac. 448. N. Y.—*Gause v. Boldt*, 49 Misc. 340, 99 N. Y. Supp. 442. Pa.—*Dreisbach v.*

*Price*, 133 Pa. 560, 19 Atl. 569. Tenn.—*Doak v. Stahlman*, 58 S. W. 741. Utah.—*Rolapp v. Ogden & N. W. R. Co.*, 37 Utah 540, 110 Pac. 364. Wash.—*Burch v. Taylor*, 1 Wash. 245, 24 Pac. 438. Wis.—*Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 57.

Compare, *Damon v. Webber*, 111 Me. 473, 89 Atl. 734.

See 6 STANDARD PROC. 177 et seq.

[a] **A return "nulla bona"** (1) is sufficient in form. *Thompson v. Pfeiffer*, 60 Kan. 409, 56 Pac. 763. (2) **A return that the corporation has no property is conclusive in the absence of fraud.** U. S.—*Jones v. Green*, 1 Wall. 330, 17 L. ed. 553. Cal.—*Baines v. Babcock*, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158. Kan.—*Thompson v. Pfeiffer*, 60 Kan. 409, 56 Pac. 763. Mo.—*Bagley v. Tyler*, 43 Mo. App. 195. See also 6 STANDARD PROC. 179, note.

[b] **If the corporation has property which is, however beyond the reach of execution the action may be maintained against a stockholder.** *Sleeper v. Norris*, 59 Kan. 555, 53 Pac. 757.

[c] **If a judgment has been obtained by one creditor, and execution thereon returned unsatisfied, other creditors are not required to take similar proceedings before joining in the action.** *Williams' Exr. v. Chamberlain*, 123 Ky. 150, 94 S. W. 29. See also 6 STANDARD PROC. 182, note 29. But see *Baines v. West Coast Lumber Co.*, 104 Cal. 1, 37 Pac. 767.

[d] **A contract of guaranty of the obligations of a corporation is not (1) regarded as an asset of the corporation which must be enforced by a creditor before the stockholders' liability may be enforced.** *Winthrop Nat. Bank v. Minneapolis Terminal Elev. Co.*, 77 Minn. 329, 79 N. W. 1010. (2) **If such a contract is given merely to accommodate individual stockholders, the guarantor, who has been compelled to satisfy the obligation may recover from the stockholders without first obtaining judgment against the corporation.** *Wilson v. Knowles*, 213 Fed. 782, 130 C. C. A. 440.

87. Mass.—*American Spirits Mfg.*

(II.) Where Judgment Against Corporation Obviously Ineffective or Impossible.<sup>88</sup> — If the corporation has been adjudged a bankrupt,<sup>89</sup> is notoriously insolvent,<sup>90</sup> if its affairs are being liquidated by a court of equity,<sup>91</sup> through a receiver,<sup>92</sup> or if it has lost its corporate franchise, or been dissolved,<sup>93</sup> or if the obtaining of a judgment is for some other reason, impossible,<sup>94</sup> or, in some jurisdictions, obviously of no benefit,<sup>95</sup> an attempt to obtain relief from the corporation need not be made prior to instituting the action against stockholders.

(III.) Effect of the Judgment Against the Corporation. — The judgment obtained by the creditor against the corporation is conclusive against all the stockholders, not only as to the validity<sup>96</sup> but also as to the

Co. v. Eldridge, 209 Mass. 590, 95 N. E. 942, applying the law of Illinois. N. D.—Marshall-Wells Hdw. Co. v. New Era Coal Co., 13 N. D. 396, 100 N. W. 1084. Wis.—Booth v. Dear, 96 Wis. 516, 71 N. W. 816.

88. When judgment unnecessary prerequisite to creditors' suit, see 6 STANDARD PROC. 174, et seq.

89. Shellington v. Howland, 53 N. Y. 371.

[a] A creditor who with leave of the bankruptcy court brings an action against the bankrupt corporation must fully exhaust his remedy against the corporation before he can maintain an action against the stockholders. Firestone Tire & Rubber Co. v. Agnew, 128 App. Div. 518, 112 N. Y. Supp. 907, affirmed, 194 N. Y. 165, 86 N. E. 1116, 24 L. R. A. (N. S.) 628, 16 Ann. Cas. 1150.

90. Cal.—Merchants' Mut. Adjusting Agency v. Davidson, 23 Cal. App. 274, 137 Pac. 1091. Ky.—Williams' Exr. v. Chamberlain, 123 Ky. 150, 94 S. W. 29. Mo.—Schneider v. Johnson, 164 Mo. App. 639, 147 S. W. 538. N. Y.—Ford v. Chase, 118 App. Div. 605, 103 N. Y. Supp. 30, affirmed, 189 N. Y. 504, 81 N. E. 1164. Ore.—Garetson Lumb. Co. v. Hinson, 69 Ore. 605, 140 Pac. 633; Shipman v. Portland Const. Co., 64 Ore. 1, 128 Pac. 989. R. I.—Andrews v. O'Reilly, 25 R. I. 231, 55 Atl. 688. Tex. Bank of De Soto v. Reed, 50 Tex. Civ. App. 102, 109 S. W. 256. Wash.—Chilberg v. Siebenbaum, 41 Wash. 663, 84 Pac. 598.

See 6 STANDARD PROC. 175.

[a] Mere insolvency is not a sufficient excuse for failure to obtain a judgment against the corporation, in some states. Dickinson v. Traphagan, 147 Ala. 442, 41 So. 272. See 6 STANDARD PROC. 175.

91. Graves v. Denny, 15 Ga. App. 718, 84 S. E. 187.

92. Du Pont v. Ball (Del.), 106 Atl. 39.

93. Ala.—Pankey v. Lippman, 18/ Ala. 199, 65 So. 771. Fla.—Knight & Wall Co. v. Tampa Sand Lime Brick Co., 55 Fla. 728, 46 So. 285. Ill. Standard Distilling & Dist. Co. v. Springfield Coal Min. & Tile Co., 146 Ill. App. 144. Kan.—Chase v. Bank of Horton, 9 Kan. App. 186, 59 Pac. 39; Dawson v. Sholly, 4 Kan. App. 367, 45 Pac. 949. N. Y.—Lang v. Lutz, 180 N. Y. 254, 73 N. E. 24; Hirshfeld v. Fitzgerald, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839; Hardman v. Sage, 124 N. Y. 25, 26 N. E. 354; Thompson v. Nicolai, 21 Misc. 700, 49 N. Y. Supp. 422.

See 6 STANDARD PROC. 182.

94. Rule v. Omega Stove & Grate Co., 64 Minn. 326, 67 N. W. 60. See 6 STANDARD PROC. 174.

[a] An order restraining creditors from suing the corporation made in an action brought by a stockholder for the appointment of a receiver, does not excuse a creditor who has made no attempt to have it modified, from the necessity of obtaining a judgment against the corporation. United Glass Co. v. Vary, 152 N. Y. 121, 46 N. E. 312. And see United States Glass Co. v. Levett, 24 Misc. 429, 53 N. Y. Supp. 688.

[b] The fact that the officers of the corporation are non-residents is insufficient where the statute requires foreign corporations to designate agents upon whom process may be served. Dickinson v. Traphagan, 147 Ala. 442, 41 So. 272.

95. See 6 STANDARD PROC. 175.

96. Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St.



amount<sup>97</sup> of the creditor's claim,<sup>98</sup> even though the stockholder was not a party and had no notice,<sup>99</sup> and though it was rendered by the courts of another state.<sup>1</sup> Such judgment may be impeached only under the same circumstances that other conclusive judgments may be attacked.<sup>2</sup>

**4. Attachments.**—The liability of a stockholder upon his unpaid subscription being contractual in its nature, it has been held that an attachment may issue in such an action.<sup>3</sup> In other states however, no attachment can issue.<sup>4</sup>

**5. Multifariousness and Joinder.**<sup>5</sup>—An action to recover unpaid subscriptions from several stockholders is not multifarious,<sup>6</sup> nor will

Rep. 158; *Silvain v. Benson*, 83 Wash. 271, 145 Pac. 175.

**97.** *Singer v. Hutchinson*, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133.

**98.** *Cal.*—*Baines v. Babcock*, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158; *Tatum v. Rosenthal*, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep.

**97.** *Ga.*—*Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626. *Ill.*—*Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330. *Kan.* *Ball v. Reese*, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638. *Md.*—*Hambleton v. Glenn*, 72 Md. 351, 20 Atl. 121.

*Mich.*—*Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 66 N. W. 1095, 62 Am. St. Rep. 693, 34 L. R. A. 694. *Mo.*—*Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514. *N. Y.*—*Stephens v. Fox*, 83 N. Y. 313. *Ore.*—*Robinson v. Phegley*, 84 Ore. 124, 163 Pac. 1166; *Saylor v. Com. Inv. & Bkg. Co.*, 38 Ore. 204, 62 Pac. 652. *Tex.*—*Cole v. Adams*, 19 Tex. Civ. App. 507, 49 S. W. 1052. *W. Va.*—*Swing v. Taylor*, 68 W. Va. 621, 70 S. E. 373.

**99.** *Glenn v. Springs*, 26 Fed. 494; *Howard v. Glenn*, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156.

**1.** *U. S.*—*Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. 867, 34 L. ed. 262. *Ala.*—*Semple v. Glenn*, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894. *Ga.*—*Howard v. Glenn*, 85 Ga. 238, 11 S. E. 610, 21 Am. St. Rep. 156. *Md.*—*Castleman v. Templeman*, 87 Md. 546, 40 Atl. 275, 67 Am. St. Rep. 363, 41 L. R. A. 367. *Mich.*—*Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 66 N. W. 1095, 62 Am. St. Rep. 693, 34 L. R. A. 694. But see *McBryan v. Universal Elevator Co.*, 130 Mich. 111, 89 N. W. 683, 97 Am. St. Rep. 453.

**2.** See the title "Judgments" and

*Coe v. Armour Fertilizer Works*, 237 U. S. 413, 35 Sup. Ct. 625, 59 L. ed. 1027.

[a] **Defenses personal to the stockholder** may be made. *Coe v. Armour Fertilizer Wks.*, 237 U. S. 413, 35 Sup. Ct. 625, 59 L. ed. 1027.

[b] **Want of Jurisdiction.**—*McBryan v. Universal Elevator Co.*, 130 Mich. 111, 89 N. W. 683, 97 Am. St. Rep. 453; *Missouri Valley Trust Co. v. St. Joseph, P. & K. C. R. Co.*, 162 Mo. App. 158, 144 S. W. 511.

[c] **Fraud.**—(1) *U. S.*—*Coe v. Armour Fertilizer Works*, 237 U. S. 413, 35 Sup. Ct. 625, 59 L. ed. 1027. *Mo.* *Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514. *Ore.*—*Robinson v. Phegley*, 84 Ore. 124, 163 Pac. 1166. *Utah.*—*Wilson v. Kiesel*, 9 Utah 397, 35 Pac. 488. (2) The facts constituting the fraud must be pleaded. *Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514.

[d] **Replication to Alleged Invalidity.**—Facts constituting an estoppel of the stockholder from claiming the invalidity of the judgment need not be pleaded in the complaint nor by replication, in jurisdictions where affirmative matters of defense set up in the answer are deemed to be denied. *Llewellyn Iron Works v. Abbott Kinney Co.*, 172 Cal. 210, 155 Pac. 986.

**3.** *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741.

**Attachments in actions to enforce a statutory liability,** see *infra*, IV, B, 5.

**4.** *Gilson v. Appleby*, 80 N. J. L. 542, 77 Atl. 1084, until after an order ascertaining the amount of the stockholders' liability has been made.

**5.** See generally the titles "Joinder of Actions;" "Multifariousness."

**6.** *Bellview Cemetery Co. v. Faulks*

it be multifarious if it also seeks to reach other equitable assets of the corporation.<sup>7</sup> With an action to recover an unpaid balance due on stock, may be joined an action to recover an assessment,<sup>8</sup> an action to recover corporate assets wrongfully distributed to the defendant,<sup>9</sup> an action seeking to hold defendant liable as an officer for wrongful dealings with the corporation property,<sup>10</sup> or an action to enforce a statutory liability in favor of creditors,<sup>11</sup> but not an action to set aside a fraudulent conveyance of corporate property to the stockholder,<sup>12</sup> or an action for deceit.<sup>13</sup> A cause of action based upon the ownership by defendant of a number of shares of stock is single and indivisible and cannot be split,<sup>14</sup> at least unless the stock is held in distinct blocks or parcels acquired under different circumstances.<sup>15</sup> All of the creditors may, of course, join their respective claims in a single suit.<sup>16</sup>

**6. Enjoining Numerous Actions.**—A court of equity may enjoin the prosecution of several and separate actions by different creditors to collect from stockholders the unpaid balance on their stock subscriptions.<sup>17</sup>

**7. Parties.**—*a. Plaintiffs.*—Any creditor may maintain an action in behalf of himself and such other creditors as may wish to come in, to enforce the stockholders' liability,<sup>18</sup> even though he is also a stock-

(Ala.), 73 So. 927; *Chappell v. Lowe*, 145 Ga. 717, 89 S. E. 777.

**Joinder of defendants**, see *infra*, IV, A, 7, b.

**7. Bellview Cemetery Co. v. Faulks** (Ala.), 73 So. 927, where setting aside of alleged fraudulent conveyances was sought.

**8. Fish v. Chase**, 114 Minn. 460, 131 N. W. 631.

**9. Lewisohn v. Stoddard**, 78 Conn. 575, 63 Atl. 621.

**10. First Nat. Bank v. Peavey**, 75 Fed. 154.

**11. See *infra***, IV, B, 6.

**12. First Nat. Bank v. Peavey**, 75 Fed. 154.

**13. First Nat. Bank v. Peavey**, 75 Fed. 154.

**14. Harrison v. Remington Paper Co.**, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314.

**15. Rogers v. Yoder**, 198 Mo. App. 27, 195 S. W. 50. See *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 5 Ann. Cas. 314, 3 L. R. A. (N. S.) 954.

**16. See *infra***, IV, A, 7, a; 6 STANDARD PROC. 186, et seq.; 20 STANDARD PROC. 64; and the title "Multiplicity of Suits."

**17. N. Y.**—*Pfohl v. Simpson*, 74 N. Y. 137; *Bagley & Sewall Co. v. Ehrlicher*, 8 App. Div. 581, 40 N. Y. Supp. 922, 75 N. Y. St. 317. **N. D.**—*Marshall-*

*Wells Hdw. Co. v. New Era Coal Co.*, 13 N. D. 396, 100 N. W. 1084, a statute authorizing an injunction is permissive and not mandatory. **Wis.**—*Bal-lin v. Loeb*, 73 Wis. 404, 47 N. W. 516, 10 L. R. A. 742.

See the title "Multiplicity of Suits."

**[a] Enforcement of a specific lien** by a creditor in a separate action, should not be enjoined. *Marshall-Wells Hdw. Co. v. New Era Coal Co.*, 13 N. D. 396, 100 N. W. 1084. And see *Minchin v. Second Nat. Bank*, 36 N. J. Eq. 436.

**18. U. S.**—*Patterson v. Lynde*, 106 U. S. 519, 1 Sup. Ct. 432, 27 L. ed. 265. **Cal.**—*Tatum v. Rosenthal*, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97. **Neb.**—*Reed v. Burg*, 2 Neb. (Unof.) 117, 96 N. W. 414. **Nev.**—*Thompson v. Reno Sav. Bank*, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797. **N. Y.**—*Citi-zens' Bank v. Weinberg*, 26 Misc. 518, 57 N. Y. Supp. 495.

See 6 STANDARD PROC. 190; 20 STANDARD PROC. 945, et seq.

**[a] A bill by a creditor in behalf of himself, alone, cannot (1) be maintained.** **U. S.**—*John A. Roebbling's Sons Co. v. Kinnicutt*, 248 Fed. 596; *George W. Signor Tie Co. v. Monett & S. W. Const. Co.*, 198 Fed. 412. **Neb.** *German Nat. Bank v. Farmers' & Merchants' Bank*, 54 Neb. 593, 74 N. W. 1086. **Nev.**—*Thompson v. Reno Sav.*

holder and liable as such for the unpaid portion of his stock subscription.<sup>19</sup> A mere stockholder, however, is not a creditor and entitled as such to sue,<sup>20</sup> though it is held that where he has fully paid for his stock and the corporation is insolvent he may sue to compel the delinquent stockholders to pay up.<sup>21</sup> Several creditors may join in the action,<sup>22</sup> unless the action is one at law.<sup>23</sup>

b. *Defendants.*—While the corporation is a proper, but not a necessary party to the action,<sup>24</sup> it should ordinarily be joined,<sup>25</sup> unless there be some good reason for not doing so.<sup>26</sup> Since the liability of the stockholders is several and not joint, the suit may be against any stockholder to recover the balance due and unpaid upon his stock,<sup>27</sup> and all

Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797. Wash.—Montesano v. Carr, 80 Wash. 384, 141 Pac. 894. (2) The proceeding must be by a general creditors' bill. Bickley v. Schlag, 46 N. J. Eq. 533, 20 Atl. 250. See generally the title "Creditors' Suits."

[b] Amendment of a complaint filed by plaintiff in his own behalf so as to change the action to one in behalf of all the creditors, is permissible. Thompson v. Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797. And see Montgomery Iron Works v. Capital City Ins. Co., 137 Ala. 134, 34 So. 210.

[c] A defect in this particular is waived if objection is not made by demurrer or answer. Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606, 43 L. R. A. (N. S.) 706.

[d] The assignee of a judgment creditor may maintain the action. Moore v. United States One Stave Barrel Co., 238 Ill. 544, 87 N. E. 536, 128 Am. St. Rep. 153. See 6 STANDARD PROC. 188, and Henderson v. Hall, 134 Ala. 455, 32 So. 840, 63 L. R. A. 673; Argall v. Sullivan, 83 Minn. 71, 85 N. W. 931.

19. U. S.—Rosoff v. Gilbert Transp. Co., 221 Fed. 972; Bissitt v. Kentucky River Nav. Co., 15 Fed. 353. Cal. Blood v. La Serena Land & Water Co., 150 Cal. 764, 89 Pac. 1090. See Richardson v. Chicago Packing & Prov. Co., 131 Cal. xviii, 63 Pac. 74. N. J.—Bickley v. Schlag, 46 N. J. Eq. 533, 20 Atl. 250. Utah.—Union Pac. R. Co. v. Blair, 48 Utah 38, 156 Pac. 948; Wilson v. Kiesel, 9 Utah 397, 35 Pac. 488.

[a] "He must, if delinquent, first pay in the unpaid portion of his subscription and then after having done

so he may share ratably with other creditors in the fund derived from unpaid subscriptions." Union Pac. R. Co. v. Blair, 48 Utah 38, 156 Pac. 948.

20. Esgen v. Smith, 113 Iowa 25, 84 N. W. 954. See also La Veine v. Tiffany Springs & L. Co. (Mo.), 187 S. W. 1186.

21. Bank of Des Arc v. Moody, 110 Ark. 39, 161 S. W. 134.

22. Baines v. West Coast Lumber Co., 104 Cal. 1, 37 Pac. 767; Hickling v. Wilson, 104 Ill. 54. And see Montgomery Iron Works v. Capital City Ins. Co., 137 Ala. 134, 34 So. 210.

Necessity of all having a judgment unsatisfied, see *supra*, IV, 3, b, (I), note 86 c.

Necessity of suing for all creditors, see *supra*, this section, note 18 a.

Enjoining separate actions, see *supra* IV, A, 6.

23. Bagnell v. Ives, 184 Fed. 466.

24. U. S.—First Nat. Bank v. Peavey, 75 Fed. 154. Cal.—Blood v. La Serena Land & Water Co., 150 Cal. 764, 89 Pac. 1090; Potter v. Dear, 95 Cal. 578, 30 Pac. 777. N. Y.—Citizens' Bank v. Weinberg, 26 Misc. 518, 57 N. Y. Supp. 495; Thompson v. Nicolai, 21 Misc. 700, 49 N. Y. Supp. 422.

[a] A receiver of an insolvent corporation is not a necessary defendant. Lang v. Lutz, 180 N. Y. 254, 73 N. E. 24; Thompson v. Nicolai, 21 Misc. 700, 49 N. Y. Supp. 422.

25. Patterson v. Lynde, 112 Ill. 196. 26. Walser v. Seligman, 21 Blatch. 130, 13 Fed. 415; Bogardus v. Rosendale Mfg. Co., 7 N. Y. 147.

27. Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

[a] A married woman may be made a defendant. Dickinson v. Traphagan, 147 Ala. 442, 41 So. 272.



the stockholders need not be made defendants.<sup>28</sup> All the stockholders may, however, be joined, as defendants,<sup>29</sup> and ordinarily it is the better practice to join all stockholders,<sup>30</sup> except those who are insolvent or beyond the jurisdiction of the court.<sup>31</sup> Where the action is in effect one to wind up the affairs of an insolvent corporation and apportion liability for its debts among the stockholders,<sup>32</sup> the corporation,<sup>33</sup> and all the stockholders must be made parties.<sup>34</sup> Creditors who do not join

28. **U. S.**—Hatch *v.* Dana, 101 U. S. 205, 25 L. ed. 885; Second Nat. Bank *v.* Georger, 246 Fed. 517. **Ala.**—Harris *v.* Gateway Land Co., 128 Ala. 652, 29 So. 611. **Cal.**—Blood *v.* La Serena Land & Water Co., 150 Cal. 764, 89 Pac. 1090; Walter *v.* Merced Academy Assn., 126 Cal. 582, 59 Pac. 136; Baines *v.* Babcock, 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 Am. St. Rep. 158. **Ga.** Harrell *v.* Blount, 112 Ga. 711, 38 S. E. 56. **Ill.**—Edwards *v.* Schillinger, 245 Ill. 231, 91 N. E. 1048, 137 Am. St. Rep. 308, 33 L. R. A. (N. S.) 895; Singer *v.* Hutchinson, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133; Coleman *v.* Howe, 154 Ill. 458, 39 N. E. 725, 45 Am. St. Rep. 133; Cohen *v.* Toy Gun Mfg. Co., 172 Ill. App. 330; Manufacturers' Paper Co. *v.* Lindblom, 80 Ill. App. 267. **Ky.**—Williams' Exr. *v.* Chamberlain, 123 Ky. 150, 94 S. W. 29. **Mass.**—American Spirits Mfg. Co. *v.* Eldridge, 209 Mass. 590, 95 N. E. 942. **Mo.**—Meyer *v.* Ruby Trust Min. & Mill. Co., 192 Mo. 162, 90 S. W. 821 (construing the law of Illinois); Perry *v.* Turner, 55 Mo. 418. **Nev.**—Thompson *v.* Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797. **N. Y.**—Lang *v.* Lutz, 180 N. Y. 254, 73 N. E. 24; Thompson *v.* Nicolai, 21 Misc. 700, 49 N. Y. Supp. 422. **N. C.**—Bronson *v.* Wilmington N. C. Life Ins. Co., 85 N. C. 411. **Ore.**—Sargent *v.* American Bank & Trust Co., 80 Ore. 16, 154 Pac. 759, 156 Pac. 431. **Va.**—Mountain Lake Land Co. *v.* Blair, 109 Va. 147, 63 S. E. 751; Martin *v.* South Salem Land Co., 94 Va. 28, 26 S. E. 591. **Wis.** Pierce *v.* Milwaukee Construction Co., 38 Wis. 253.

[a] If some of the defendants die pending the action, there need be no revival against their heirs or devisees. Meyer *v.* Ruby Trust Min. & Mill. Co., 192 Mo. 162, 90 S. W. 821.

29. **Ala.**—Bellview Cemetery Co. *v.* Faulks, 73 So. 927. **Ga.**—Spratling *v.* Westbrook, 140 Ga. 625, 79 S. E. 536. **Ind.**—Gainey *v.* Gilson, 149 Ind. 58, 48

N. E. 633. **La.**—Dilzell Eng. & Const. Co. *v.* Lehmann, 120 La. 273, 45 So. 138. **Mich.**—Schaub *v.* Welded-Barrel Co., 130 Mich. 606, 90 N. W. 335. **Ore.** Shipman *v.* Portland Const. Co., 64 Ore. 1, 128 Pac. 989.

*Compare* People's Nat. Bank *v.* Saville, 25 App. Cas. (D. C.) 139.

30. **Ga.**—Chappell *v.* Lowe, 145 Ga. 717, 89 S. E. 777, although they reside in different counties. **Mo.**—Leucke *v.* Tredway, 45 Mo. App. 507. **Neb.** German Nat. Bank *v.* Farmers' & Merchants' Bank, 54 Neb. 593, 74 N. W. 1086. **N. Y.**—Graeber *v.* Ehrgott, 182 App. Div. 377, 169 N. Y. Supp. 32; Warth *v.* Moore Blind Stitcher & Overseamer Co., 146 App. Div. 28, 130 N. Y. Supp. 748, *affirmed*, 207 N. Y. 673, 100 N. E. 1135. **Wash.**—Beddow *v.* Huston, 65 Wash. 585, 118 Pac. 752. But see Gordon *v.* Cummings, 78 Wash. 515, 139 Pac. 489. **Wis.**—Adler *v.* Milwaukee Patent Brick Mfg. Co., 13 Wis. 57.

[a] Subscribers who have not paid the proportion of the value of their stock required by law to make them stockholders need not be joined. Ford *v.* Chase, 118 App. Div. 605, 103 N. Y. Supp. 30, *affirmed*, 189 N. Y. 504, 81 N. E. 1164.

[b] Subscribers whose stock has been forfeited by the corporation need not be made parties. Ford *v.* Chase, 118 App. Div. 605, 103 N. Y. Supp. 30, *affirmed*, 189 N. Y. 504, 81 N. E. 1164.

31. Edwards *v.* Schillinger, 245 Ill. 231, 91 N. E. 1048, 137 Am. St. Rep. 308, 33 L. R. A. (N. S.) 895.

32. Sargent *v.* Waterbury, 83 Ore. 159, 161 Pac. 443, 163 Pac. 416.

33. **Ga.**—Commercial Bank *v.* Warthen, 119 Ga. 990, 47 S. E. 536. **Ind.** Indiana Novelty Mfg. Co. *v.* McGill, 15 Ind. App. 1, 43 N. E. 464. **N. J.**—McDermott *v.* Woodhouse, 87 N. J. Eq. 615, 101 Atl. 375.

34. Fremont Package Mfg. Co. *v.* Storey, 2 Neb. (Unof.) 325, 96 N. W.

as plaintiffs need not be made defendants.<sup>35</sup>

8. **Pleadings.**—a. *Complaint.*<sup>36</sup>—The complaint should contain clear and definite allegations, that defendants were stockholders<sup>37</sup> at the time the action was instituted,<sup>38</sup> or motion for execution against them made,<sup>39</sup> or judgment obtained against the corporation,<sup>40</sup> and the number of shares of stock owned by them,<sup>41</sup> that the stock owned by them is not fully paid for, and the amount that remains due upon it,<sup>42</sup> that judgment was obtained against the corporation and execution thereon issued and returned unsatisfied,<sup>43</sup> or a legally sufficient reason should be stated why this course was not pursued,<sup>44</sup> and compliance with any other conditions precedent to the maintenance of the action must be pleaded.<sup>45</sup>

416; *Bell's Appeal*, 115 Pa. 88, 8 Atl. 177, 2 Am. St. Rep. 532, 4 Sad. 423.

35. *Thompson v. Nicolai*, 21 Misc. 700, 49 N. Y. Supp. 422; *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751.

36. **Form of complaint**, see *Worth v. Wharton*, 122 N. C. 376, 29 S. E. 370.

37. *Schneider v. Johnson*, 164 Mo. App. 639, 147 S. W. 538, in the absence of a special demurrer an omission to state that defendant was a stockholder when the corporation was dissolved is harmless.

[a] **That defendant subscribed for the stock**, or the manner in which he became liable for an unpaid balance, need not be alleged, as the grounds of non-liability are matters of defense to be pleaded by him. *New Haven Trust Co. v. Nelson*, 73 Conn. 477, 47 Atl. 753. And see *McConey v. Belton Oil & Gas Co.*, 97 Minn. 190, 106 N. W. 900.

38. *Sargent v. Waterbury*, 83 Ore. 159, 161 Pac. 443, 163 Pac. 416.

[a] **Presumption Does Not Excuse Pleading.**—The presumption that things shown to exist are presumed to continue to exist, is a rule of evidence and not of pleading, and does not excuse the absence of such an allegation. *Sargent v. Waterbury*, 83 Ore. 159, 161 Pac. 443, 163 Pac. 416.

39. *Frogge v. Bullock*, 136 Mo. App. 431, 117 S. W. 1194.

40. *Dyer v. Drucker*, 108 App. Div. 238, 95 N. Y. Supp. 749.

41. See *infra*, this note.

[a] **Where the number of shares owned is unknown and discovery is sought**, such an allegation is unnecessary. *Bronson v. Wilmington N. C. Life Ins. Co.*, 85 N. C. 411.

42. *U. S.—Atlantic Trust Co. v. Os-*

*good*, 116 Fed. 1019. III.—*Wright v. Fitzgerald*, 90 Ill. App. 118. N. Y. *Dyer v. Drucker*, 108 App. Div. 238, 95 N. Y. Supp. 749.

[a] **An averment that stock was issued without consideration is insufficient**, as it is the condition at the time the action is brought which is material. *Graeber v. Ehrgott*, 182 App. Div. 377, 169 N. Y. Supp. 32.

[b] **Negating Defenses.**—The existence of circumstances which would render the purchaser of stock below par, free from liability, need not be negated by the complaint. *Republic Iron & Steel Co. v. Carlton*, 189 Fed. 126.

43. *Gause v. Boldt*, 49 Misc. 340, 99 N. Y. Supp. 442; *Doak v. Stahlman* (Tenn.), 58 S. W. 741. See *supra*, IV, A, 3, b.

44. *Knight & Wall Co. v. Tampa Sand Lime Brick Co.*, 55 Fla. 728, 46 So. 285 (insolvency); *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24. See *supra*, IV, A, 3, b, (II).

[a] **Failure to allege insolvency of the corporation is harmless where the fact of insolvency appears from the evidence and no point was made of the omission at the trial.** *Dilzell Eng. & Const. Co. v. Lehmann*, 120 La. 273, 45 So. 138.

[b] **Subsequent dissolution of a corporation cannot be set up as an excuse by a supplemental complaint, as it would not cure the defect in the original complaint.** *United States Glass Co. v. Levett*, 24 Misc. 429, 53 N. Y. Supp. 688.

45. See *supra*, IV, A, 3.

[a] **In New York the complaint must allege that plaintiff's debt was payable within two years from the date it was contracted and that ac-**

If fraud in the issuance of the stock is relied upon the circumstances must be set forth.<sup>46</sup> And it must also be alleged that the defendant was not a holder in good faith without notice of the fraud charged.<sup>47</sup> The indebtedness upon which the judgment against the corporation was rendered,<sup>48</sup> the fact that plaintiff is bringing the action in behalf of all the creditors of the corporation,<sup>49</sup> that the entire capital stock has been subscribed,<sup>50</sup> the fact that plaintiff extended credit to the corporation not knowing that a portion of the stock was not paid up,<sup>51</sup> and the making of a demand for payment,<sup>52</sup> need not be alleged. If discovery is sought the reasons why it is necessary must be alleged.<sup>53</sup>

b. *Answer.*—(I.) **Generally.**—A defense interposed by a stockholder which is sufficient to defeat plaintiff's cause of action inures to the benefit of those defendants who did not answer.<sup>54</sup>

(II.) **Set-Off and Counterclaim.**—Defendant stockholders will not be allowed to set-off against their liability, claims or obligations held by them against the corporation,<sup>55</sup> though by some authorities a right of

tion for its collection was brought within two years from the time it became due. *Graeber v. Ehrigott*, 182 App. Div. 377, 169 N. Y. Supp. 32. *Compare Citizens' Bank v. Weinberg*, 26 Misc. 518, 57 N. Y. Supp. 495.

46. See *infra*, this note.

[a] **Overvaluation of Property.**

(1) Where fraud in issuing stock in exchange for property at a gross overvaluation is charged, the circumstances of the fraud must be set forth. *John A. Roebling's Sons Co. v. Kinnicutt*, 248 Fed. 596. See *Bellview Cemetery Co. v. Faulk's (Ala.)*, 73 So. 927. (2) An averment showing that property valued at \$90,000 was exchanged for stock of a par value of \$1,250,000 is a sufficient allegation of fraud. *Lea v. Iron Belt Mercantile Co.*, 119 Ala. 271, 24 So. 28.

47. *Idaho.*—*Feehan v. Kendrick*, 179 Pac. 507, an amendment alleging that defendant was not a bona fide holder will be allowed. *Ky.*—*Hess v. Trumbo*, 27 Ky. L. Rep. 320, 84 S. W. 1153. *Pa.* *Finletter v. Appleton*, 195 Pa. 349, 45 Atl. 1063.

[a] **Rule Stated.**—"We are constrained to adhere to the conclusion announced in the opinion, to the effect that, it being disclosed by the complaint that the certificates of stock were issued as, and appeared on the corporate books to be, fully paid for, it was incumbent upon appellant in this case to allege that respondent was not a holder in good faith, without notice of the fraud charged, since that is a necessary element of the liability

of the latter, if any exists, and, therefore, a necessary link in the chain of proof in order that the former may recover." *Feehan v. Kendrick (Idaho)*, 179 Pac. 507, 509.

48. *Tatum v. Rosenthal*, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97. *Compare, Hess v. Trumbo*, 27 Ky. L. Rep. 320, 84 S. W. 1153.

[a] Where the liability only attaches to debts of a particular class or character, the nature of the original debt must be set forth. *Graeber v. Ehrigott*, 182 App. Div. 377, 169 N. Y. Supp. 32.

49. *Tatum v. Rosenthal*, 95 Cal. 129, 30 Pac. 136, 29 Am. St. Rep. 97, complaint held sufficient against a general demurrer. *Compare First Nat. Bank v. Peavey*, 75 Fed. 154. But see IV, A, 7, a, note 18.

50. *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415.

51. *U. S.*—*Northwestern Mut. Life Ins. Co. v. Cotton Exch. etc. Co.*, 46 Fed. 22. *Minn.*—*Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 50 N. W. 1117, 31 Am. St. Rep. 637, 15 L. R. A. 470. *Wis.*—*Gobebie Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427, 47 N. W. 726, 23 Am. St. Rep. 417.

52. See *Worth v. Wharton*, 122 N. C. 376, 29 S. E. 370.

53. *Clark v. Rhode Island Locomotive Works*, 24 R. I. 307, 53 Atl. 47.

54. *Fletcher v. Bank of Lonohe*, 71 Ark. 1, 69 S. W. 580, defense that corporation against which no judgment had been obtained, was not insolvent.

55. *U. S.*—*Seammon v. Kimball*, 92



set-off is recognized.<sup>56</sup> If the plaintiff is also a stockholder and liable upon an unpaid portion of his subscription, the amount of his liability in proportion to the liabilities of the defendants, may be set-off.<sup>57</sup>

c. *Cross-Complaint*.—A defendant may by cross-complaint bring in stockholders, who are not made parties to the action, for the purpose of enforcing contribution from them.<sup>58</sup>

9. *Trial or Hearing*.—The trial or hearing is conducted in accordance with the general rules.<sup>59</sup> Each creditor must present and prove his own claim.<sup>60</sup> A reference may properly be made to take testimony.<sup>61</sup> The evidence must conform to the pleadings.<sup>62</sup> The suit

U. S. 362, 23 L. ed. 483; *Fidelity Trust Co. v. Washington-Oregon Corp.*, 217 Fed. 588. **Colo.**—*Colorado Fuel & Iron Co. v. Sedalia Smelting Co.*, 13 Colo. App. 474, 59 Pac. 222. **Del.**—*John W. Cooney Co. v. Arlington Hotel Co.* (Del. Ch.), 101 Atl. 879. **Ga.**—*Wilkinson v. Bertock*, 111 Ga. 187, 36 S. E. 623. **Ill.**—*Thebus v. Smiley*, 110 Ill. 316; *Calder v. Calder Packing Co.*, 160 Ill. App. 620. **Ia.**—*Merrill v. Timbrell*, 123 Iowa 375, 98 N. W. 879. **Mass.**—*Everett v. Foster*, 223 Mass. 553, 112 N. E. 239. **Mich.**—*Utica Fire Alarm Tel. Co. v. Waggoner Watchman Clock Co.*, 166 Mich. 618, 132 N. W. 502. **Minn.**—*Richardson v. Merritt*, 74 Minn. 354, 77 N. W. 234. **Neb.**—*Wyman v. Williams*, 53 Neb. 670, 74 N. W. 48. **Nev.**—*Thompson v. Reno Sav. Bank*, 19 Nev. 103, 7 Pac. 68, 3 Am. St. Rep. 797, 826. **N. J.** See *v. Heppenheimer*, 69 N. J. Eq. 36, 85, 61 Atl. 843, corporate bonds. **N. C.** *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538. **S. C.**—*Lauraglen Mills v. Ruff*, 57 S. C. 53, 35 S. E. 387, 49 L. R. A. 448; *Efrd v. Piedmont Land Imp. & Inv. Co.*, 55 S. C. 78, 32 S. E. 758, 897. **Tex.**—*Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

56. *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62; *Washington Sav. Bank v. Butchers & Drovers' Bank*, 130 Mo. 155, 31 S. W. 761; *Jerman's Admr. v. Benton*, 79 Mo. 148; *Rood v. Crocus Hill Min. Co.*, 157 Mo. App. 405, 139 S. W. 222; *Austin Powder Co. v. Commercial Lead Co.*, 134 Mo. App. 183, 114 S. W. 67; *Stinebaker v. National Restaurant Co.*, 133 Mo. App. 250, 113 S. W. 237.

[a] Where money advanced to a corporation by a stockholder became a part of its corporate assets, the latter may set off the amount of the advancements against his liability as a stockholder. *Witt v. Nelson* (Tex. Civ. App.), 169 S. W. 381.

[b] When the action is regarded as an action at law a right of set off exists. *Indian Novelty Mfg. Co. v. McGill*, 15 Ind. App. 1, 43 N. E. 464.

[c] Statutes sometimes confer a right of set-off. *Appleton v. Turnbull*, 84 Me. 72, 24 Atl. 592.

57. *Blood v. La Serena Land & Water Co.*, 150 Cal. 764, 89 Pac. 1090.

[a] Even though the amount of plaintiff's liability exceeds the amount of his claim as a creditor, he will not be subjected to a set-off in the full amount of his liability. *Blood v. La Serena Land & Water Co.*, 150 Cal. 764, 89 Pac. 1090.

58. *Second Nat. Bank v. Georger*, 246 Fed. 517; *Coleman v. Howe*, 154 Ill. 458, 39 N. E. 725, 45 Am. St. Rep. 133.

59. See the titles "*Hearing*;" "*Trial*;" and the cross-references there made.

[a] *Dismissal*.—The plaintiff, if he desires to do so, may dismiss the action against some of the stockholders. *Singer v. Hutchinson*, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133. See generally the title "*Dismissal, Discontinuance and Nonsuit*."

[b] *Jury Trial*.—Where the action is in equity, there is no right to a trial by jury. *United States Trust Co. v. United States Fire Ins. Co.*, 18 N. Y. 199, 8 Abb. Pr. 192. See generally the title "*Juries and Jurors*." As to issues to jury in equity cases, see 14 STANDARD PROC. 526.

60. *Central Trust Co. v. Third Ave. R. R.*, 165 Fed. 478.

61. *Wilkes & Co. v. Arthur*, 85 S. C. 299, 67 S. E. 297. See generally the title "*References*."

62. See the title "*Variance and Failure of Proof*."

[a] Evidence of fraudulent overvaluation of property received in exchange for stock may be received where

need not be revived against the personal representative of a deceased stockholder who was made a party to it.<sup>63</sup>

**10. Judgment.**<sup>64</sup>—A several and not a joint judgment should be rendered against the individual stockholders,<sup>65</sup> for the full amount of the creditor's claim, not to exceed however the amount of the stockholder's unpaid subscription or indebtedness on his stock.<sup>66</sup> But the judgment may also decree contribution among the stockholders,<sup>67</sup> or authorize the maintenance of suits for contribution by such of the stockholders as become entitled thereto,<sup>68</sup> or where the action is brought by a receiver, direct the plaintiff to collect all the assessments levied by the court.<sup>69</sup> If one of the plaintiff creditors is also a stockholder,<sup>70</sup> and liable as such on his own claim, the judgment, as between him and the defendant stockholders, should be for the amount remaining after deducting his proportionate share of the liability.<sup>71</sup> Where judg-

the complaint alleges that a specified amount of certain stock subscriptions remain due and unpaid although there is no direct allegation of fraud. *Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330. And see *Herbert v. Duryea*, 34 App. Div. 478, 54 N. Y. Supp. 311.

[b] **Proof of Subscription.**—Proof that stock was issued without the formality of a subscription does not constitute a material variance from an allegation that stockholders were subscribers. *In re Phoenix Hardware Co.*, 249 Fed. 410, 161 C. C. A. 384.

63. *Meyer v. Ruby Trust, Min. & Mill. Co.*, 192 Mo. 162, 90 S. W. 821.

64. **Previous judgment against corporation**, see *supra*, IV, A, 3, b.

65. **U. S.**—*In re Phoenix Hardware Co.*, 249 Fed. 410, 161 C. C. A. 384. **Cal.**—*Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319. **Idaho.**—*McTamany v. Day*, 23 Idaho 95, 128 Pac. 563. **Neb.**—*Van Pelt v. Gardner*, 54 Neb. 701, 75 N. W. 874. **Ore.**—*Shipman v. Portland Const. Co.*, 64 Ore. 1, 128 Pac. 989.

[a] **Claim for Contribution.**—Judgment may properly be entered against stockholders who have answered but claimed contribution from stockholders who were not served with process. *Wolcott v. Waldstein*, 86 N. J. Eq. 63, 97 Atl. 951. As to contribution, see *infra*, IV, D.

[b] **Where, by virtue of a statute, the stockholder is liable as a surety for the corporation's debts, the judgment should direct execution to issue first against the corporation and, if unsatisfied, then against the stockholders.** *Texas, G. & N. Ry. Co. v.*

*Berlin* (Tex. Civ. App.), 165 S. W. 62.

66. **Cal.**—*Blood v. La Serena Land & Water Co.*, 150 Cal. 764, 89 Pac. 1090, not limited to the proportion which the stockholder's unpaid subscription bears to all unpaid subscriptions. **Ind.**—*Carnahan v. Campbell*, 59 N. E. 1054. **La.**—*Jackson Fire & Marine Ins. Co. v. Walle*, 105 La. 89, 29 So. 503.

[a] **Failure to limit the amount to the amount unpaid on the stock**, is harmless, where the amount unpaid largely exceeds the amount of the judgment against the corporation. *Frogge v. Bullock*, 136 Mo. App. 431, 117 S. W. 1194. See also *Carnahan v. Campbell* (Ind.), 59 N. E. 1054.

67. *Singer v. Hutchinson*, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133.

68. *Van Pelt v. Gardner*, 54 Neb. 701, 75 N. W. 874. See also *Richardson v. Chicago Packing & Prov. Co.*, 131 Cal. xviii, 63 Pac. 74, and *infra*, IV, D.

[a] **Although the judgment is several**, it should provide for execution against each stockholder for his proportionate share of the judgment with a proviso that if any execution should not be collected in full, the deficiency should then be collected from the other stockholders. *Van Pelt v. Gardner*, 54 Neb. 701, 75 N. W. 874.

69. *Du Pont v. Ball* (Del.), 106 Atl. 39.

70. **Right of stockholder to be plaintiff**, see *supra*, IV, A, 7, a.

71. *Richardson v. Chicago Packing*

ment has already gone against the defendant stockholder in another previous action by other creditors, the second judgment should provide against the issuance of execution until the former judgment had been satisfied, and then only to the extent of the amount which may remain due from the stockholder on his stock.<sup>72</sup> Interest should also be awarded by the judgment.<sup>73</sup>

**B. STATUTORY LIABILITIES. — 1. Form and Nature of the Action.**

**a. In General.**—Where a statute prescribes the remedy to be employed, to enforce the stockholder's statutory liability for corporate debts, such remedy is an exclusive one and must be strictly followed.<sup>74</sup> If no remedy is specifically given by the statute, the creditor may employ any remedy suitable to enforce the right.<sup>75</sup> In some states, the stockholder may be joined as a party to the action against the corporation,<sup>76</sup> or brought into the action after judgment has been obtained against the corporation, and execution may be levied against him, after execution against the corporation has been returned unsatisfied.<sup>77</sup> The form of remedy to be employed depends upon the practice and law of the state in which the stockholder is sued and not upon the law of the state of the domicile of the corporation.<sup>78</sup>

& Prov. Co., 131 Cal. xviii, 63 Pac. 74.

72. *Ford v. Chase*, 118 App. Div. 605, 103 N. Y. Supp. 30, *affirmed*, 189 N. Y. 504, 81 N. E. 1164.

73. **U. S.**—*Enright v. Heckscher*, 240 Fed. 863, 153 C. C. A. 549. **Ill.**—*Florsheim v. Illinois Trust & Sav. Bank*, 192 Ill. 382, 61 N. E. 491. **La.**—*Jackson Fire & Marine Ins. Co. v. Walle*, 105 La. 89, 29 So. 503. **Ore.**—*Hawkins v. Citizens' Inv. Co.*, 38 Ore. 544, 64 Pac. 320.

74. **U. S.**—*Finney v. Guy*, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. ed. 839; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. ed. 825; *Pollard v. Bailey*, 20 Wall. 520, 22 L. ed. 376. **Cal.**—*Miller v. Lane*, 160 Cal. 90, 116 Pac. 58; *Russell v. Pacific Ry. Co.*, 113 Cal. 258, 45 Pac. 323, 34 L. R. A. 747. **Ill.**—*Fowler v. Lamson*, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163. **Me.**—*Abbott v. Goodall*, 100 Me. 231, 60 Atl. 1030. **Mass.**—*Ripley v. Sampson*, 10 Pick. 371. **Minn.**—*Northwestern Trust Co. v. Bradbury*, 117 Minn. 83, 134 N. W. 513, Ann. Cas. 1913D, 69. **N. Y.**—*Stoddard v. Lum*, 159 N. Y. 265, 53 N. E. 1108, 70 Am. St. Rep. 541, 45 L. R. A. 551. **Pa.**—*Lane's Appeal*, 105 Pa. 49, 51 Am. Rep. 166. **R. I.**—*New England Commercial Bank & Newport Steam Factory*, 6 R. I. 154, 75 Am. Dec. 688.

[a] *Sequestration proceedings against*

the corporation constitute the only remedy available in some states. *Northwestern Trust Co. v. Bradbury*, 117 Minn. 83, 134 N. W. 513, Ann. Cas. 1913D, 69.

75. **Ark.**—*Jones v. Jarman*, 34 Ark. 323. **Minn.**—*Way v. Barney*, 116 Minn. 285, 133 N. W. 801, Ann. Cas. 1913A, 719, 38 L. R. A. (N. S.) 648; *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 31 Am. St. Rep. 626, 16 L. R. A. 281. **Wash.**—*Shuey v. Adair*, 24 Wash. 378, 64 Pac. 536.

**In equity**, see cases *supra*, this note, and also *infra*, IV, B, 1, c.

[a] **Common Law Action.**—"A general liability created by statute without a remedy, may be enforced by an appropriate common-law action." *Pollard v. Bailey*, 20 Wall. (U. S.) 520, 527, 22 L. ed. 376.

76. *Stanwood v. Sterling Metal Co.*, 107 Ill. App. 569.

77. *Crissey v. Morrill*, 125 Fed. 878, 60 C. C. A. 460 (construing the law of Kansas); *Whitman v. Citizens' Bank*, 110 Fed. 503, 49 C. C. A. 122 (applying the law of Kansas); *Warner v. Imbeau*, 63 Kan. 415, 65 Pac. 648. But see *Henley v. Stevenson*, 67 Kan. 4, 72 Pac. 518, decided under a later statute.

78. **Cal.**—*Miller v. Lane*, 160 Cal. 90, 116 Pac. 58. **Minn.**—*First Nat. Bank v. Gustin Minerva Con. Min. Co.*, 42 Minn. 327, 44 N. W. 198, 18 Am. St.



In the federal courts, the nature of the remedy, whether at law or in equity depends upon the nature of the remedy given by the statute of the state creating the liability.<sup>79</sup> The liability of the stockholder may be enforced although the corporation has been dissolved,<sup>80</sup> and survives the death of the stockholder.<sup>81</sup>

b. *Remedy at Law.*—In many states an action at law may be maintained to enforce a stockholder's statutory liability, either by reason of an express statutory designation of such a remedy, or because the nature of the liability created by statute is such as to render the stockholder directly liable to creditors in a manner which the legal remedy is amply able to enforce.<sup>82</sup> In other states under different statutes no

Rep. 510, 6 L. R. A. 676. **Ohio.**—Blair v. Newbegin, 65 Ohio St. 425, 62 N. E. 1040, 58 L. R. A. 644. **Vt.**—Murtey v. Allen, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779.

[a] The obligation of the stockholder is contractual and the method of its enforcement depends "not upon the law of the state where the contract is made, but upon that of the state where its enforcement is sought. There can be no vested right in the form of remedy. So that, when a stockholder subscribes to the capital stock of a corporation, he thereby assumes a contractual obligation with the incident that the creditor may pursue him in any jurisdiction where service may be had upon him, and thus necessarily consents to the maintenance of such form of action as the law where the enforcement is sought may permit." Blair v. Newbegin, 65 Ohio St. 425, 62 N. E. 1040, 58 L. R. A. 644.

As to joinder of causes, see *infra*, IV, B, 6.

79. Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. ed. 825. See Anglo-American Land Mtg. & Agency Co. v. Wood, 143 Fed. 683; National Park Bank v. Peavey, 64 Fed. 912, and the title "*Remedy.*"

80. Colo.—Kipp v. Miller, 47 Colo. 598, 108 Pac. 164, 135 Am. St. Rep. 236, under express statute. **Ga.**—Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626. **N. Y.**—Lyell Ave. Lumb. Co. v. Lighthouse, 137 App. Div. 422, 121 N. Y. Supp. 802. **Wis.**—Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335.

[a] Failure to pay a franchise tax, although working a forfeiture of the charter, does not affect the statutory liability of stockholders. Murphy v. Wheatley, 102 Md. 501, 63 Atl. 62.

81. Lininger v. Botsford, 32 Cal.

App. 386, 163 Pac. 63 (even where the liability of the corporation is in tort); Damiano v. Bunting, 28 Cal. App. Dec. 809.

82. **U. S.**—Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966 (applying the law of New York); Auer v. Lombard, 72 Fed. 209, 19 C. C. A. 72, construing the law of Colorado. **Ark.**—Lanigan v. North, 69 Ark. 62, 63 S. W. 62. **Cal.**—Williams v. Carver, 171 Cal. 658, 154 Pac. 472; Brown v. Merrill, 107 Cal. 446, 40 Pac. 557, 48 Am. St. Rep. 145. **Fla.**—Gibbs v. Davis, 27 Fla. 531, 8 So. 633. **Ga.**—Moore v. Ripley, 106 Ga. 556, 32 S. E. 647. **Ill.**—Golden v. Cervenka, 278 Ill. 409, 116 N. E. 273; Schalucky v. Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399; Hamilton v. Eisendrath, 185 Ill. App. 502, construing the law of Minnesota. **Ia.**—Calumet Paper Co. v. Stotts Inv. Co., 96 Iowa 147, 64 N. W. 782, 59 Am. St. Rep. 362. **Mass.**—American Spirits Mfg. Co. v. Eldridge, 209 Mass. 590, 95 N. E. 942. **N. Y.**—Lang v. Lutz, 180 N. Y. 254, 73 N. E. 24. **S. C.**—Hall & Co. v. Klinek, 25 S. C. 348, 60 Am. Rep. 505. **S. D.**—Union Nat. Bank v. Halley, 19 S. D. 474, 104 N. W. 213. **Tex.**—Stringfellow v. Patterson (Tex. Civ. App.), 192 S. W. 555.

[a] Where each stockholder is severally liable (1) for an amount equal to the amount of his stock (Flash v. Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966), or (2) double the amount of his stock (McCarthy v. Lavasche, 89 Ill. 270, 31 Am. Rep. 83), the action may be at law.

[b] The liability of a resident stockholder in a foreign corporation may be enforced in an action at law although the only remedy against stockholders in domestic corporations is in equity

legal remedy is available.<sup>83</sup> Actions for the full statutory liability under the national banking act may be maintained at law.<sup>84</sup>

c. *Remedy in Equity*.—In many states a creditor may resort to a court of equity to enforce the statutory liability of a stockholder for a corporate debt,<sup>85</sup> the remedy in equity being either exclusive,<sup>86</sup> or concurrent with the remedy at law.<sup>87</sup> Where the creditor is himself a stockholder, in many states he is regarded as a partner entitled to contribution, and he must bring his action in equity and not at law.<sup>88</sup>

A bill of discovery to ascertain the names of the stockholders and their addresses may be maintained.<sup>89</sup>

upon their unpaid subscriptions. *Aldrich v. Anchor Coal & Dev. Co.*, 24 Ore. 32, 32 Pac. 756, 41 Am. St. Rep. 831.

83. *Marshall v. Sherman*, 148 N. Y. 9, 21, 42 N. E. 419, 51 Am. St. Rep. 654, 34 L. R. A. 757; *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797.

Remedy in equity, see *infra*, IV, B, 1, c.

84. *United States v. Knox*, 102 U. S. 422, 26 L. ed. 216; *Houghton v. Hubbell*, 91 Fed. 453, 33 C. C. A. 574.

85. *U. S.*—*Irvine v. Elliott*, 203 Fed. 82 (applying the law of Ohio); *Alsop v. Conway*, 188 Fed. 568, 110 C. C. A. 366, applying the law of Kentucky. *Ohio*.—*Zieverink v. Kemper*, 50 Ohio St. 208, 34 N. E. 250; *Younglove v. Lime Co.*, 49 Ohio St. 663, 33 N. E. 234. *Wis.*—*Williams v. Meloy*, 97 Wis. 561, 73 N. W. 40.

[a] *Prevention of a multiplicity of actions* is not of itself a sufficient ground for equitable relief in this class of actions. *Miller v. Willett*, 71 N. J. Eq. 741, 65 Atl. 981. But see *Queenan v. Palmer*, 117 Ill. 619, 7 N. E. 613; *Blair v. Newbegin*, 65 Ohio St. 425, 62 N. E. 1040, 58 L. R. A. 644.

86. *U. S.*—*Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *Pollard v. Bailey*, 20 Wall. 520, 22 L. ed. 376. *Ala.*—*Friend v. Powers*, 93 Ala. 114, 9 So. 392. *Colo.*—*Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145. *Md.*—*Pittsburg Steel Co. v. Baltimore Equitable Soc.*, 113 Md. 77, 77 Atl. 255. *Mont.*—*Barth v. Pock*, 51 Mont. 418, 155 Pac. 282. *Neb.*—*German Nat. Bank v. Farmers' & M. Bank*, 54 Neb. 593, 74 N. W. 1086. *N. Y.*—*Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419, 51 Am. St. Rep. 654, 34 L. R. A. 757. *Ohio*.—*Barriek v. Gifford*, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798. *Vt.*—*Barton Nat. Bank v. Atkins*,

72 Vt. 33, 47 Atl. 176. *Wis.*—*Eau Claire Nat. Bank v. Benson*, 106 Wis. 624, 82 N. W. 604; *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797. *Wyo.*—*McLaughlin v. O'Neill*, 7 Wyo. 187, 51 Pac. 243.

[a] Where the liability under the statute is for a proportional amount of the debts of the corporation an accounting of the debts and stock is required and the remedy is peculiarly in equity. *Pollard v. Bailey*, 20 Wall. (U. S.) 520, 22 L. ed. 376; *McLaughlin v. O'Neill*, 7 Wyo. 187, 51 Pac. 243.

87. *U. S.*—*New York Life Ins. Co. v. Beard*, 80 Fed. 66. *Conn.*—*Lewisohn v. Stoddard*, 78 Conn. 575, 63 Atl. 621. *Del.*—*John W. Cooney Co. v. Arlington Hotel Co. (Del. Ch.)*, 101 Atl. 879. *Idaho*.—*McTamany v. Day*, 23 Idaho 95, 128 Pac. 563, stockholders in banks. *Miss.*—*Vick v. Lane*, 56 Miss. 681. *Mo.*—*Shields v. Hobart*, 172 Mo. 491, 72 S. W. 669, 95 Am. St. Rep. 529. *Ohio*.—*Blair v. Newbegin*, 65 Ohio St. 425, 62 N. E. 1040, 58 L. R. A. 644, the basis of equitable jurisdiction is the prevention of a multiplicity of suits.

[a] Where the creditor seeks to reach and apply property of the stockholder which could not be seized upon execution a suit in equity may be maintained. *American Spirits Mfg. Co. v. Eldridge*, 209 Mass. 590, 95 N. E. 942.

88. *Mass.*—*Potter v. Stevens Machine Co.*, 127 Mass. 592, 34 Am. Rep. 428; *Thayer v. Union Tool Co.*, 4 Gray 75. *Mich.*—*Shurlow v. Lewis*, 170 Mich. 493, 136 N. W. 484, 41 L. R. A. (N. S.) 975. *Miss.*—*Perkins v. Sanders*, 56 Miss. 733. *N. Y.*—*Bailey v. Baneker*, 3 Hill 188, 38 Am. Dec. 625. *Tenn.*—*Cocking v. Ward*, 48 S. W. 287.

89. *Middletown Bank v. Russ*, 3 Conn. 135, 8 Am. Dec. 164. See generally the title "*Discovery*."

**2. Effect of Amendment or Repeal of Statutes.** — Where the rights and obligations existing between creditors of a corporation and its stockholders are contractual in their nature, they are governed by the law in force at the time the cause of action accrued against the corporation<sup>90</sup> and cannot be injuriously affected by subsequent legislation.<sup>91</sup> In such case a repeal or modification of a statute affording a creditor a remedy against a stockholder will be effective provided it does not substantially diminish the value of the creditor's right or seriously affect its enforcement;<sup>92</sup> otherwise it will be unconstitutional and void.<sup>93</sup>

**3. Where and in What Courts Liability May Be Enforced.** — a. *In General.* — An action to enforce a stockholder's liability is regarded as an action on contract and may be instituted in a court having jurisdiction over contract actions.<sup>94</sup> Where the liability of stockholders is several in its nature, a court whose jurisdiction depends upon the amount in controversy,<sup>95</sup> can take jurisdiction over those defendants only as to which plaintiff demands judgment for an amount within the jurisdiction of the court.<sup>96</sup>

Federal courts have jurisdiction of this class of actions within the limits of the principles applicable to their general jurisdiction.<sup>97</sup>

**Discovery in actions to enforce liability for unpaid subscriptions,** see *supra*, IV, A, 1, c.

[a] **Foreign Corporation.** — A bill for discovery of the names and residences of stockholders of a foreign corporation may be maintained against its officers who reside in the state and have control of the corporate books and records. *Post v. Toledo, C. & St. L. R. Co.*, 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86.

90. *Henley v. Myers*, 76 Kan. 723, 93 Pac. 168, 173, 17 L. R. A. (N. S.) 779; *Lang v. Lutz*, 180 N. Y. 254, 73 N. E. 24.

[a] **Where the creditor's cause of action against the corporation is founded upon a tort which, however, benefited the tort-feasor's estate to the full extent of the damages sustained by the injured party, it will be treated as though it were contractual in the nature and protected by the general rule.** *Douglass v. Loftus*, 85 Kan. 720, 119 Pac. 74, Ann. Cas. 1913A, 378, L. R. A. 1915B, 797.

91. *Irvine v. Elliott*, 203 Fed. 82; *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331.

[a] **A statute imposing a penal liability may be changed at any time.** *Globe Pub. Co. v. State Bank*, 41 Neb. 175, 59 N. W. 683, 27 L. R. A. 854.

92. **U. S.** — *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct.

757, 30 L. ed. 825; *Irvine v. Elliott*, 203 Fed. 82. **Idaho.** — *Sparks v. Lower Payette Ditch Co.*, 3 Idaho 306, 29 Pac. 134. **N. Y.** — *Story v. Furman*, 25 N. Y. 214.

93. *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; *Webster v. Bowers*, 104 Fed. 627.

94. *Girbekian v. Costikyan*, 126 App. Div. 812, 111 N. Y. Supp. 243.

95. See generally 17 STANDARD PROC. 831.

96. *Myers v. Sierra Valley Stock & Agr. Assn.*, 122 Cal. 669, 55 Pac. 689; *Derby v. Stevens*, 64 Cal. 287, 30 Pac. 820. *Compare* *Alsop v. Conway*, 188 Fed. 568, 110 C. C. A. 366.

97. *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. ed. 587; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; *Atlantic Trust Co. v. Osgood*, 116 Fed. 1019; *Dexter v. Edmands*, 89 Fed. 467. See generally the title "**United States Courts.**"

[a] **Pendency of receivership proceedings in a state court does not prevent a federal court from acquiring jurisdiction of the action.** *Alsop v. Conway*, 188 Fed. 568, 110 C. C. A. 366.

[b] **Diversity of Citizenship.** — If the plaintiff creditors represent the necessary diversity of citizenship, the fact



b. *Liability Created by Foreign Statute.*—The general rule prevailing at the present time, is that the statutory liability of stockholders in foreign corporations, is contractual and transitory in its nature and the liability will be enforced by the state or federal courts of states in which the stockholder may reside<sup>88</sup> subject to the general

that certain other creditors, who are, in a sense represented by them are citizens of the same state as the defendants, does not prevent the federal court from taking jurisdiction. *Alsop v. Conway*, 188 Fed. 568, 110 C. C. A. 366.

98. **U. S.**—*Thomas v. Matthiessen*, 232 U. S. 221, 34 Sup. Ct. 312, 58 L. ed. 577 (construing the California statute); *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. ed. 619; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. ed. 587; *Whitman v. Citizens' Bank*, 110 Fed. 503, 49 C. C. A. 122 (liability under law of Kansas); *Fidelity Insurance Trust & Safe Deposit Co. v. Mechanics' Sav. Bank*, 97 Fed. 297, 38 C. C. A. 193, 56 L. R. A. 228; *Dexter v. Edmonds*, 89 Fed. 467; *Bank of North America v. Rindge*, 57 Fed. 279. **Ark.**—*Lanigan v. North*, 69 Ark. 62, 63 S. W. 62. **Cal.**—*Miller v. Lane*, 160 Cal. 90, 116 Pac. 58; *Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622. **Conn.**—*Paine v. Stewart*, 33 Conn. 516. **Del.**—*Love v. Pusey & J. Co.*, 3 Penne. 577, 52 Atl. 542. **Fla.**—*Flash, Lewis & Co. v. Conn.*, 16 Fla. 428, 26 Am. Rep. 721, *affirmed*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966. **Ill.**—*Bell v. Farwell*, 176 Ill. 489, 52 N. E. 346, 68 Am. St. Rep. 194, 42 L. R. A. 804. **Ia.**—*Latimer v. Citizens' State Bank*, 102 Iowa 162, 71 N. W. 225. **Kan.**—*Howell v. Manglesdorf*, 33 Kan. 194, 5 Pac. 759. **Ky.** *Williams' Exr. v. Chamberlain*, 123 Ky. 150, 94 S. W. 29. **Me.**—*Miller v. Spaulding*, 107 Me. 264, 78 Atl. 358; *Pulsifer v. Greene*, 96 Me. 438, 52 Atl. 921. **Mass.**—*Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349, 55 Am. St. Rep. 414. But see *Miller v. Aldrich*, 202 Mass. 109, 88 N. E. 441, 132 Am. St. Rep. 480; *Bank of North America v. Rindge*, 154 Mass. 203, 27 N. E. 1015, 26 Am. St. Rep. 240, 13 L. R. A. 56. **Mich.**—*Western*

*National Bank v. Lawrence*, 117 Mich. 669, 76 N. W. 105. **Minn.**—*First Nat. Bank v. Gustin Minerva Con. Min. Co.*, 42 Minn. 327, 44 N. W. 198, 18 Am. St. Rep. 510, 6 L. R. A. 676. **Mo.** *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132. **N. Y.**—*Shipman v. Treadwell*, 200 N. Y. 472, 93 N. E. 1104; *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725. *Compare Coulter Dry Goods Co. v. Rosenbaum*, 74 Misc. 579, 134 N. Y. Supp. 487. **Ohio.**—*Blair v. Newbegin*, 65 Ohio St. 425, 62 N. E. 1040, 58 L. R. A. 644; *Kulp v. Fleming*, 65 Ohio St. 321, 62 N. E. 334, 87 Am. St. Rep. 611. **Ore.** *Aldrich v. Anchor Coal & Dev. Co.*, 24 Ore. 32, 32 Pac. 756, 41 Am. St. Rep. 831. **Pa.**—*Aultman's Appeal*, 98 Pa. 505. **Tenn.**—*Sullivan v. Farnsworth*, 132 Tenn. 691, 179 S. W. 317. **Vt.** *King v. Cochran*, 76 Vt. 141, 56 Atl. 667, 104 Am. St. Rep. 922.

*Contra*, *Crippen v. Lighton*, 69 N. H. 540, 44 Atl. 538, 76 Am. St. Rep. 192, 46 L. R. A. 467. But see *Tompkins v. Blakey*, 70 N. H. 584, 49 Atl. 111.

[a] "The fundamental question is whether there is a substantive right originating in one state and a corresponding liability which follows the person against whom it is sought to be enforced into another state. Such a right, arising under the common law, is enforceable everywhere. Such a right, arising under a local statute, will be enforced ex comitate in another state, unless there is a good reason for refusing to enforce it. It will be enforced, not because of the existence of the statute, but because it is a right which the plaintiff legitimately acquired, and which still belongs to him. If the statute creating the right is against the policy of the law of the neighboring state, that is a sufficient reason for refusing to enforce the right there. In the neighboring state, in such a case, it will not be considered a right. If the enforcement of a statutory right in a neighboring state in the manner proposed will work injustice to its citizens, considerations of

limitations and exceptions to the enforcement of rights arising extra-territorially,<sup>99</sup> as where the liability is regarded as penal in its nature,<sup>1</sup> or where the statutory remedy is special and exclusive,<sup>2</sup> or its employment is essential to effectually protect the rights of all persons interested,<sup>3</sup> or where to enforce the liability would be in conflict with the public policy of the state.<sup>4</sup> Where, however, the stockholder's liability is regarded as secondary to that of the corporation and proportional to that of other stockholders, it will not, under the rule of many author-

comity do not require the recognition of it by the courts of that state. If the right by the terms of the statute creating it is to be enforced by prescribed proceedings within the state, the right is limited by the statute, and can only be enforced in accordance with the statute. If it is of such a kind that, with a due regard for the interests of the parties, a proper remedy can be given only in the jurisdiction where it is created, it will not be enforced elsewhere. But if there is a substantive right of a kind which is generally recognized, courts through comity ought to regard it, and enforce it as well when it arises under a statute of another state as when it arises at common law, unless there is some good reason for disregarding it." *Howarth v. Lombard*, 175 Mass. 570, 572, 56 N. E. 888, 49 L. R. A. 301. See 17 STANDARD PROC. 772.

[b] **Corporation Organized for Foreign Business.**—Where the corporation was organized with the expressed intention of doing business in the state in which the action is instituted, there can be no doubt that courts of that state have jurisdiction of the action. See *Pinney v. Nelson*, 183 U. S. 144, 22 Sup. Ct. 52, 46 L. ed. 125; *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 110 Pac. 942; *Peck v. Noe*, 154 Cal. 351, 97 Pac. 865.

[c] **The fact that contribution could not be enforced from non-resident stockholders** does not prevent the court from taking jurisdiction of the action. *Kisseberth v. Prescott*, 91 Fed. 611.

99. See 17 STANDARD PROC. 772. See also *Wharton's Conflict of Laws* (Parmelee's 3rd ed.), for a complete treatment of the principles governing the extraterritorial recognition of rights both common law and statutory.

1. See *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966; *Kulp v. Fleming*, 65 Ohio St. 321, 62 N. E.

334, 87 Am. St. Rep. 611. See 17 STANDARD PROC. 772.

[a] **A liability which continues until specified conditions are performed**, such as payment in full of all the capital stock of a corporation, is not regarded as of a penal character. *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966. *Kimball v. Davis*, 52 Mo. App. 194. *Compare Halsey v. McLean*, 12 Allen (Mass.) 438, 90 Am. Dec. 157.

[b] **A "double" statutory liability** is not penal in its character. *Paine v. Stewart*, 33 Conn. 516; *Kimball v. Davis*, 52 Mo. App. 194.

2. **U. S.**—*Middletown Nat. Bank v. Toledo, A. A. & N. M. Ry. Co.*, 197 U. S. 394, 25 Sup. Ct. 462, 49 L. ed. 803; *Finney v. Guy*, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. ed. 839; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. ed. 825. **Cal.**—*Miller v. Lane*, 160 Cal. 90, 116 Pac. 558; *Russell v. Pacific Ry. Co.*, 113 Cal. 258, 45 Pac. 323, 34 L. R. A. 747, construing the law of Illinois. See *Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622. **Ill.**—*Fowler v. Lamson*, 146 Ill. 472, 34 N. E. 932, 37 Am. St. Rep. 163; *Smith v. Kastor*, 195 Ill. App. 458. But see *Bell v. Farwell*, 176 Ill. 489, 52 N. E. 346, 68 Am. St. Rep. 194, 42 L. R. A. 804. **Mass.**—*Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301. **N. Y.**—*Shipman v. Treadwell*, 200 N. Y. 472, 93 N. E. 1104. **Pa.**—*Bates v. Day*, 198 Pa. 513, 48 Atl. 407, 82 Am. St. Rep. 811. **Wis.**—*May v. Black*, 77 Wis. 101, 45 N. W. 949. **Wyo.**—*McLaughlin v. O'Neill*, 7 Wyo. 187, 51 Pac. 243.

See 17 STANDARD PROC. 773.

3. See *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; also 17 STANDARD PROC. 775.

4. *Bell v. Farwell*, 176 Ill. 489, 52 N. E. 346, 68 Am. St. Rep. 194, 42 L. R. A. 804; *Childs v. Cleaves*, 95

ities, be enforced by the courts of a state other than that of the corporate domicile,<sup>5</sup> until after the exact extent of the liability of the stockholder has been ascertained and settled by the courts of the domicile of the corporation,<sup>6</sup> and the same rule is applicable where the stockholder's liability is made an asset of the corporation enforceable for the joint benefit of all the creditors.<sup>7</sup> The form of the remedy,<sup>8</sup> and the procedure employed,<sup>9</sup> where liability under a foreign statute is enforced, is that of the forum.

c. *Venue*.—The venue of the action is determined by the general principles and rules elsewhere treated.<sup>10</sup>

4. **Conditions Precedent.**—a. *In General.*—Notice to the stockholder, of the creditor's claim need not be given and a demand for payment need not be made upon him.<sup>11</sup> Sometimes, by statute, demand

Me. 498, 50 Atl. 714. See 17 STANDARD PROC. 774.

5. **U. S.**—Evans *v.* Nellis, 187 U. S. 271, 23 Sup. Ct. 74, 47 L. ed. 173; Irvine *v.* Elliott, 203 Fed. 82. **Ill.** Tuttle *v.* National Bank of Republic, 161 Ill. 497, 44 N. E. 984, 34 L. R. A. 750; Smith *v.* Kastor, 195 Ill. App. 458. **Mass.**—Clark *v.* Knowles, 187 Mass. 35, 72 N. E. 352, 105 Am. St. Rep. 376, 2 Ann. Cas. 26. **N. Y.**—Knickerbocker Trust Co. *v.* Iselin, 53 Misc. 80, 103 N. Y. Supp. 1108. **Pa.**—Bates *v.* Day, 198 Pa. 513, 48 Atl. 407, 82 Am. St. Rep. 811. **R. I.**—Miller *v.* Smith, 26 R. I. 146, 58 Atl. 634, 106 Am. St. Rep. 699, 66 L. R. A. 473. **Wis.** Eau Claire Nat. Bank *v.* Benson, 106 Wis. 624, 82 N. W. 604; Finney *v.* Guy, 106 Wis. 256, 82 N. W. 595, 49 L. R. A. 486. **Wyo.**—McLaughlin *v.* O'Neill, 7 Wyo. 187, 51 Pac. 243.

6. **U. S.**—Goss *v.* Carter, 156 Fed. 746, 84 C. C. A. 402. **Mass.**—Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301. **Mo.**—Pfaff *v.* Gruen, 92 Mo. App. 560, 69 S. W. 405.

7. Knickerbocker Trust Co. *v.* Iselin, 185 N. Y. 54, 77 N. E. 877, 113 Am. St. Rep. 863, construing the law of Maryland.

[a] Where a suit in equity by or in behalf of all the creditors and against the corporation and all the stockholders is the form of remedy, an action cannot be maintained in a state other than that of the domicile of the corporation. **U. S.**—Finney *v.* Guy, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. ed. 839. **Mass.**—Erickson *v.* Nesmith, 4 Allen 233. **Wis.**—Eau Claire Nat.

Bank *v.* Benson, 106 Wis. 624, 82 N. W. 604.

8. **Minn.**—First Nat. Bank *v.* Gustin Minerva Con. Min. Co., 42 Minn. 327, 44 N. W. 198, 18 Am. St. Rep. 510, 6 L. R. A. 676. **Ohio.**—Blair *v.* Newbegin, 65 Ohio St. 425, 62 N. E. 1040, 58 L. R. A. 644. **Vt.**—Murtey *v.* Allen, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779.

9. **Cal.**—Miller *v.* Lane, 160 Cal. 90, 116 Pac. 58; Russell *v.* Pacific Ry. Co., 113 Cal. 258, 45 Pac. 323, 34 L. R. A. 747. **Me.**—Drinkwater *v.* Portland M. Ry. Co., 18 Me. 35. **Mass.**—Clark *v.* Knowles, 187 Mass. 35, 72 N. E. 352, 105 Am. St. Rep. 376, 2 Ann. Cas. 26. **N. J.**—Johnson *v.* Tennessee Oil, etc. Co., 74 N. J. Eq. 32, 69 Atl. 788.

10. See the title "Venue."

[a] Where several stockholders are sued, the action may be instituted in the county of the residence of any one of them. **Ind.**—Carnahan *v.* Campbell, 59 N. E. 1054. **Md.**—Hopper *v.* Brodie, 130 Md. 443, 100 Atl. 644. **Ohio.**—Blair *v.* Newbegin, 65 Ohio St. 425, 62 N. E. 1040, 58 L. R. A. 644.

[b] If the action is brought by a receiver, it is regarded as ancillary to the receivership proceedings and may be maintained in the court of the county in which the receiver was appointed. White *v.* Harbeson, 169 Ky. 224, 183 S. W. 475, L. R. A. 1916D, 1129; Randall *v.* McClain, 94 Neb. 487, 143 N. W. 478; McCall *v.* Bowen, 91 Neb. 241, 135 N. W. 1014, 40 L. R. A. (N. S.) 781.

11. McVickar *v.* Jones, 70 Fed. 754; Barnes *v.* Arnold, 23 Misc. 197, 51 N. Y. Supp. 1109,



upon the corporation for payment of the debt,<sup>12</sup> and action instituted against the corporation within a specified time<sup>13</sup> is required. Under other statutes the liability created by statutes exists only when the corporation is insolvent,<sup>14</sup> or has been dissolved.<sup>15</sup> Where the receiver of an insolvent corporation is given authority to enforce the statutory liability of stockholders it is sometimes required that the liability of all stockholders shall be ascertained and determined in an action brought for that purpose before the individual liability of any stockholder can be enforced.<sup>16</sup>

The judgment obtained against the corporation need not be reversed.<sup>17</sup> A claim need not be presented to the estate of a deceased stockholder.<sup>18</sup> Any condition imposed by the law creating the liability, must of course be complied with before it can be enforced by an action in another state.<sup>19</sup>

b. *Exhausting Remedy Against Corporation.*—The prevailing rule is that before an action to enforce the statutory liability of stockholders can be maintained, a judgment must have been obtained by the creditor against the corporation, the party regarded as primarily liable,<sup>20</sup> and execution issued and returned unsatisfied,<sup>21</sup> unless the cor-

12. *Hicks v. Burns*, 38 N. H. 141; *Haynes v. Brown*, 36 N. H. 545.
13. *Adamson v. Davis*, 47 Mo. 268; *Graeber v. Ehrgott*, 182 App. Div. 377, 169 N. Y. Supp. 32; *Barnes v. Arnold*, 23 Misc. 197, 51 N. Y. Supp. 1109.
14. *Poston v. Hull*, 75 Ohio St. 502, 80 N. E. 11.
15. *Stoltz v. Scott*, 23 Idaho 104, 129 Pac. 340; *O'Kell v. Chama Valley Lands & Irr. Co.*, 181 Mo. App. 466, 168 S. W. 887.
16. *Evans v. Nellis*, 187 U. S. 271, 23 Sup. Ct. 74, 47 L. ed. 173; *Waller v. Hamer*, 65 Kan. 168, 69 Pac. 185.
17. *Douglass v. Loftus*, 85 Kan. 720, 119 Pac. 74, Ann. Cas. 1913A, 378, L. R. A. 1915B, 797.
18. III.—*Mortimer v. Potter*, 213 Ill. 178, 72 N. E. 817. Kan.—*Douglass v. Loftus*, 85 Kan. 720, 119 Pac. 74, Ann. Cas. 1913A, 378, L. R. A. 1915B, 797. Vt.—*Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.
- Compare, *Lewisohn v. Stoddard*, 78 Conn. 575, 63 Atl. 621.
- [a] Where the indebtedness was incurred after decedent's death, no claim need be presented. *Miller v. Katz*, 10 Cal. App. 576, 102 Pac. 946, where the liability arose after the testator's death.
19. *Middletown Nat. Bank v. Toledo, A. A. & N. M. Ry. Co.*, 197 U. S. 394, 25 Sup. Ct. 462, 49 L. ed. 803; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. ed. 825; *Miller v. Aldrich*, 202 Mass. 109, 88 N. E. 441, 132 Am. St. Rep. 480.
20. U. S.—*Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. ed. 825, applying the law of Rhode Island. Ga.—*Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626. Idaho.—*Weil v. Defenbach*, 31 Idaho 258, 170 Pac. 103. Ind.—*Ewing v. Stultz*, 9 Ind. App. 1, 36 N. E. 170. Kan.—*Thomas v. Remington Paper Co.*, 67 Kan. 599, 73 Pac. 909. Mass.—*Coyle v. Taunton Safe Deposit & Trust Co.*, 216 Mass. 156, 103 N. E. 288. Me.—*Flynn v. American Banking & Trust Co.*, 104 Me. 141, 69 Atl. 771, 129 Am. St. Rep. 378, 19 L. R. A. (N. S.) 428. Mich.—*Macomber v. Wright*, 108 Mich. 109, 65 N. W. 610. Neb.—*Talmage v. Minton-Woodward Co.*, 83 Neb. 29, 118 N. W. 1099. N. Y.—*Card v. Groesbeck*, 204 N. Y. 301, 97 N. E. 728; *Adams v. Slingerland*, 87 App. Div. 312, 84 N. Y. Supp. 323, 14 N. Y. Ann. Cas. 38. Ohio.—*Bronson v. Schneider*, 49 Ohio St. 438, 33 N. E. 233. R. I.—*Legg & Co. v. Dewing*, 27 R. I. 126, 60 Atl. 1066.
- Compare *supra*, IV, A, 3, b.
- [a] This rule requires a verdict determining the amount of the creditor's claim with exactness and certainty. *Card v. Groesbeck*, 204 N. Y. 301, 97 N. E. 728.
21. *Globe Pub. Co. v. State Bank*,

poration is insolvent,<sup>22</sup> has been declared a bankrupt,<sup>23</sup> has been dissolved,<sup>24</sup> or where the action is by a receiver for an insolvent or dissolved corporation,<sup>25</sup> or unless such proceedings, for some other reason, would be useless or impossible.<sup>26</sup> In some states, however, where the stockholder's liability is regarded as primary and absolute, no judgment against the corporation need be obtained prior to institution of the action against the stockholder.<sup>27</sup> The law of the corporate domicile governs in this matter where the action against the stockholder is in another state.<sup>28</sup>

c. *Exhausting Security*.—Though a statute requires the foreclosure of a mortgage before holding a debtor personally liable on a secured debt,<sup>29</sup> yet a stockholder may be sued on his statutory liability

41 Neb. 175, 59 N. W. 683, 27 L. R. A. 854; *Firestone Tire & Rubber Co. v. Agnew*, 194 N. Y. 165, 86 N. E. 1116, 24 L. R. A. (N. S.) 628, 16 Ann. Cas. 1150.

[a] A return in form "nulla bona" is sufficient. *Card v. Groesbeck*, 140 App. Div. 30, 124 N. Y. Supp. 372.

[b] Issuance of execution from a court not of record, and its return unsatisfied is sufficient. *Voight v. Dregge*, 97 Mich. 322, 56 N. W. 557; *Padros v. Swarzenbach*, 134 App. Div. 811, 119 N. Y. Supp. 589.

22. U. S.—*Irvine v. Elliott*, 203 Fed. 82, applying the law of Ohio. Ala. *Drennen v. Jenkins*, 180 Ala. 261, 60 So. 856. Ga.—*Harrell v. Blount*, 112 Ga. 711, 38 S. E. 56. Ia.—*Latimer v. Citizens' State Bank*, 102 Iowa 162, 71 N. W. 225. Kan.—*Stoecker v. Davidson*, 74 Kan. 214, 86 Pac. 136, 118 Am. St. Rep. 315. Me.—*Flynn v. American Banking & Trust Co.*, 104 Me. 141, 69 Atl. 771, 129 Am. St. Rep. 378, 19 L. R. A. (N. S.) 428. N. Y.—*Firestone Tire & Rubber Co. v. Agnew*, 194 N. Y. 165, 86 N. E. 1116, 24 L. R. A. (N. S.) 628, 16 Ann. Cas. 1150. Ohio.—*Barrick v. Gifford*, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798. R. I.—*Andrews v. O'Reilly*, 25 R. I. 231, 55 Atl. 688.

Compare *supra*, IV, A, 3, b, (II).

23. *Firestone Tire & Rubber Co. v. Agnew*, 194 N. Y. 165, 86 N. E. 1116, 24 L. R. A. (N. S.) 628, 16 Ann. Cas. 1150.

24. Ill.—*Standard Distilling & Distributing Co. v. Springfield Coal Min. & Tile Co.*, 239 Ill. 600, 88 N. E. 236. Kan.—*Dawson v. Sholly*, 4 Kan. App. 367, 45 Pac. 949. N. Y.—*Hardman v. Sage*, 124 N. Y. 25, 26 N. E. 354.

See *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17, construing the law of Kansas.

[a] A judgment of ouster need not have been rendered in order to make this rule applicable. *Briggs v. Penniman*, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454.

25. *Guilbert v. Kessinger*, 173 Mo. App. 680, 160 S. W. 17, applying the law of Kansas.

26. *United Glass Co. v. Vary*, 152 N. Y. 121, 46 N. E. 312.

27. U. S.—*Dolbear v. Foreign Mines Development Co.*, 196 Fed. 646, 116 C. C. A. 334, construing law of California. Cal.—*Eva v. Anderson*, 166 Cal. 420, 137 Pac. 16; *Sonoma Valley Bank v. Hill*, 59 Cal. 107. Fla.—*Gibbs v. Davis*, 27 Fla. 531, 8 So. 633. Ill. *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725. Miss.—*Pate v. Bank of Newton*, 116 Miss. 666, 77 So. 601. N. H.—*Connecticut River Sav. Bank v. Fiske*, 60 N. H. 363. N. D.—*Marshall-Wells Hdq. Co. v. New Era Coal Co.*, 13 N. D. 396, 100 N. W. 1084. S. C.—*Buist v. Williams*, 81 S. C. 495, 62 S. E. 859; *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

28. *Fourth Nat. Bank v. Franklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. ed. 825; *Patterson v. Lynde*, 112 Ill. 196.

[a] If a judgment at the corporation's domicile has been obtained no further judgment is necessary against it in the state where the action against the stockholder is begun. *Ferguson v. Sherman*, 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622.

29. See 19 STANDARD PROC. 891.

without a foreclosure of the corporation's mortgage securing the indebtedness.<sup>30</sup>

**5. Attachments.**—An action to enforce a statutory liability is regarded as based upon a contract and will sustain an attachment upon the property of the defendant.<sup>31</sup>

**6. Joinder and Splitting of Actions.**<sup>32</sup>—The stockholder's liability being contractual in its nature, is single even though he owns more than one share, and the cause of action cannot be split.<sup>33</sup> But a creditor, having separate claims against the corporation, may maintain successive actions against stockholders based upon his several claims.<sup>34</sup> What causes of action may be joined is determined by the general statutes and rules governing joinder in the state in which the action is brought.<sup>35</sup>

30. *Dolbear v. Foreign Mines Development Co.*, 196 Fed. 646, 116 C. C. A. 338; *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047; *Niles State Bank v. Jennings*, 22 Cal. App. 66, 133 Pac. 329.

31. Cal.—*Kennedy v. California Sav. Bank*, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163. Colo.—*Adams v. Clark*, 36 Colo. 65, 85 Pac. 642, 10 Ann. Cas. 774; *Toll v. Cobbey*, 22 Colo. App. 244, 124 Pac. 357. Ohio.—*Northern Nat. Bank v. Maumee Rolling Mill Co.*, 2 Ohio Dec. 67, 2 Ohio N. P. 260. Tex.—*Stringfellow v. Patterson* (Tex. Civ. App.), 192 S. W. 555.

[a] Where different amounts are demanded from different stockholders, in the complaint, the writ of attachment must conform to the complaint. *Kennedy v. California Sav. Bank*, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163.

[b] Where the debt of the corporation is secured by mortgage, an attachment will not issue, in some states. *Foreign Mines Dev. Co. v. Boyes*, 180 Fed. 594, applying the law of California.

32. See the titles "Joinder of Actions," "Successive Suits."

Joinder of parties, see *infra*, IV, B, 7.

33. *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314. Compare *Rogers v. Yoder*, 198 Mo. App. 27, 195 S. W. 50.

[a] The enforcement of the liability on a single share "would necessarily bar a subsequent action between the same parties to enforce a liability upon any other shares, under the familiar rule that one may not split his

cause of action." *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314, 320.

34. *Manley v. Park*, 68 Kan. 400, 75 Pac. 557, 66 L. R. A. 967, 1 Ann. Cas. 832.

Joinder of stockholders as defendants, see *infra*, IV, B, 7, b.

35. *Anglo-American Land Mtge. & Agency Co. v. Wood*, 143 Fed. 683.

For a treatment of these statutes and rules, see the title "Joinder of Actions."

[a] Liability for the balance due on the stock (1) may be joined with a cause of action for enforcement of a statutory or constitutional individual liability, under the general statute as to joinder, though one liability be tortious and the other contractual. *Fish v. Chase*, 114 Minn. 460, 131 N. W. 631; *Northwestern Railroader v. Prior*, 68 Minn. 95, 70 N. W. 869. See *U. S. National Park Bank v. Peavey*, 64 Fed. 912. Ohio.—*Barrick v. Gifford*, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798. Wis.—*Harrigan v. Gilchrist*, 121 Wis. 127, 239, 99 N. W. 909. (2) So also these causes of action may be joined in equity to avoid a multiplicity of suits (*New York Life Ins. Co. v. Beard*, 80 Fed. 66), or (3) for the purpose of marshaling the assets and adjusting the primary and secondary liability. *Warner v. Callender*, 20 Ohio St. 190.

[b] Two Causes of Statutory Liability.—(1) Statutory causes of action, one based on the insolvency of the corporation, and the other based on its dissolution, being both contractual, may be joined under a statute authorizing



**7. Parties.**—a. *In Suits in Equity.*—When the remedy employed is a suit in equity,<sup>36</sup> the suit should be brought for the benefit of all creditors who may come into the case.<sup>37</sup> Two or more creditors may join as plaintiffs or may be admitted into the case.<sup>38</sup> A creditor who is himself a stockholder,<sup>39</sup> or director,<sup>40</sup> of the corporation, may institute the action. A receiver cannot, in most states, maintain the action.<sup>41</sup>

All the stockholders may,<sup>42</sup> and under some statutes, must<sup>43</sup> be joined

joinder of actions on contract. *Anglo-American Land Mtge. & Agency Co. v. Wood*, 143 Fed. 683. (2) So a cause of action based on failure of the corporation to publish the required yearly notice of its debts, may be joined with one based on the unlawful distribution to stockholders, of the assets of an insolvent corporation. *Malm v. Stock*, 99 Neb. 374, 156 N. W. 656.

**Law governing remedy**, see *supra*, IV, B, 1, and also the title "Remedy."

36. See *supra*, IV, B, 1, c.

37. **U. S.**—*Terry v. Little*, 101 U. S. 216, 25 L. ed. 864; *Alsop v. Conway*, 188 Fed. 568, 110 C. C. A. 366. **Ark.** *Jones v. Jarman*, 34 Ark. 323. **Colo.** *Adams v. Clark*, 36 Colo. 65, 85 Pac. 642, 10 Ann. Cas. 774. **Ga.**—*John V. Farwell Co. v. Jackson Stores*, 137 Ga. 174, 73 S. E. 13. **Ill.**—*Golden v. Cervenska*, 278 Ill. 409, 116 N. E. 273. **Ind.**—*Hammond v. Cline*, 170 Ind. 452, 84 N. E. 827. **Md.**—*Murphy v. Wheatley*, 100 Md. 358, 59 Atl. 704. **Mass.** *First Nat. Bank of Barre v. Hingham Mfg. Co.*, 127 Mass. 563. **Minn.**—*Northwestern Trust Co. v. Bradbury*, 117 Minn. 83, 134 N. W. 513, Ann. Cas. 1913D, 69. **N. H.**—*Hadley v. Russell*, 40 N. H. 109. **N. Y.**—*Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419, 51 Am. St. Rep. 654, 34 L. R. A. 757. **Pa.**—*Bates v. Day*, 198 Pa. 513, 48 Atl. 407, 82 Am. St. Rep. 811. **R. I.**—*Miller v. Smith*, 26 R. I. 146, 58 Atl. 634, 106 Am. St. Rep. 699, 66 L. R. A. 473. **Wis.** *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315.

**Suing on behalf of others**, see generally 20 STANDARD PROC. 945.

38. *Dunn v. Bank of Union*, 74 W. Va. 594, 82 S. E. 758, L. R. A. 1915B, 168.

[a] **Rule Stated.**—"While it appears that plaintiffs are not jointly, but are separately, interested in the several items of indebtedness against the bank, they do have a sufficient in-

terest in common to warrant the maintenance of this proceeding. Having such interest in the questions at issue and the relief sought, they did not improperly join as plaintiffs. To the extent of the individual indebtedness severally claimed, they had the right alone, or jointly with other creditors, to demand payment out of the assets, the collection and appropriation thereof to the liquidation of the insolvent bank's debts, as sought by the two causes so heard together." *Dunn v. Bank of Union*, 74 W. Va. 594, 82 S. E. 758, L. R. A. 1915B, 168.

39. **Cal.**—*Knowles v. Sanderoock*, 107 Cal. 629, 40 Pac. 1047; *Brown v. Merrill*, 107 Cal. 446, 40 Pac. 557, 48 Am. St. Rep. 145. **Mich.**—*Shurlow v. Lewis*, 170 Mich. 493, 136 N. W. 484, 41 L. R. A. (N. S.) 975. **Minn.**—*Mendenhall v. Duluth Dry Goods Co.*, 72 Minn. 312, 75 N. W. 232.

40. *Weber v. Fickey*, 52 Md. 500; *Jannay v. Minneapolis Industrial Exposition*, 79 Minn. 488, 82 N. W. 984, 50 L. R. A. 273. Compare *McDonald v. Sheehan*, 129 N. Y. 200, 29 N. E. 299.

41. See *infra*, IV, C, 1.

42. *Overmyer v. Cannon*, 82 Ind. 457.

43. **U. S.**—*Goss v. Carter*, 156 Fed. 746, 84 C. C. A. 402. **Colo.**—*Adams v. Clark*, 36 Colo. 65, 85 Pac. 642, 10 Ann. Cas. 774. **Ga.**—*Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626. **Ill.**—*Golden v. Cervenska*, 278 Ill. 409, 116 N. E. 273. **Kan.**—*Waller v. Hamer*, 65 Kan. 168, 69 Pac. 185. **Me.**—*Abbott v. Goodall*, 100 Me. 231, 60 Atl. 1030. **Mass.** *Clark v. Knowles*, 187 Mass. 35, 72 N. E. 352, 105 Am. St. Rep. 376, 2 Am. St. Rep. 376, 2 Ann. Cas. 26 (construing the law of Colorado); *Moore v. Reynolds*, 109 Mass. 473. **Minn.**—*Hanson v. Davison*, 73 Minn. 454, 76 N. W. 254. **N. Y.**—*Graeber v. Ehrsgott*, 182 App. Div. 377, 169 N. Y. Supp. 32. **Ohio.**—*Kulp v. Fleming*, 65 Ohio St.

as defendants, except those who are insolvent,<sup>44</sup> or beyond the jurisdiction of the court,<sup>45</sup> though, under other statutes, only such stockholders as it is desired to hold need be made defendants.<sup>46</sup> The transferee of a stockholder need not be made a party where it claimed that the transfer was made fraudulently and that the transferor remained liable to creditors.<sup>47</sup> The personal representative,<sup>48</sup> or the heirs or devisees of a deceased stockholder,<sup>49</sup> may be sued. The corporation is, ordinarily, a proper,<sup>50</sup> and under some statutes, a necessary defendant,<sup>51</sup> though under other statutes it is not a necessary defendant.<sup>52</sup>

b. *In Actions at Law*.—Where the liability created by statute is several or joint and several, and may be enforced in an action at law,<sup>53</sup>

321, 62 N. E. 334, 87 Am. St. Rep. 611; *Younglove v. Lime Co.*, 49 Ohio St. 663, 33 N. E. 234. **R. I.**—*Miller v. Smith*, 26 R. I. 146, 58 Atl. 634, 106 Am. St. Rep. 699, 66 L. R. A. 473, construing the law of Colorado. **Wash.**—*New York Nat. Exchange Bank v. Metropolitan Sav. Bank*, 28 Wash. 553, 68 Pac. 905. **Wis.**—*Foster v. Posson*, 105 Wis. 99, 81 N. W. 123; *Gianella v. Bigelow*, 96 Wis. 185, 71 N. W. 111; *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797.

44. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626.

45. *Brobston v. Downing*, 95 Ga. 505, 22 S. E. 277; *Mahoney v. Bernhardt*, 27 Misc. 339, 58 N. Y. Supp. 748.

[a] **The joinder of all the stockholders of a foreign corporation resident within the state is proper.** *Pfaff v. Gruen*, 92 Mo. App. 560, 69 S. W. 405.

46. **U. S.**—*McVickar v. Jones*, 70 Fed. 754. **Ill.**—*Palmer v. Woods*, 149 Ill. 146, 35 N. E. 1122. **Ky.**—*Gamewell Fire-Alarm Tel. Co. v. Fire & Police Tel. Co.*, 116 Ky. 759, 76 S. W. 862. **Me.**—*Pulsifer v. Greene*, 96 Me. 438, 52 Atl. 921. **Minn.**—*Mendenhall v. Duluth Dry Goods Co.*, 72 Minn. 312, 75 N. W. 232. **Ore.**—*Brundage v. Monumental Silver Min. Co.*, 12 Ore. 322, 7 Pac. 314.

47. *Tiffany v. Giesen*, 96 Minn. 488, 105 N. W. 901.

48. **Cal.**—*Miller v. Katz*, 10 Cal. App. 576, 102 Pac. 946. **Conn.**—*Lewisohn v. Stoddard*, 78 Conn. 575, 63 Atl. 621. **N. Y.**—*Cochran v. Wiechers*, 119 N. Y. 399, 23 N. E. 803, 7 L. R. A. 553.

[a] **If the executor is made a defendant, the heirs and devisees need not be joined.** *Miller v. Katz*, 10 Cal. App. 576, 102 Pac. 946.

49. **U. S.**—*Matteson v. Dent*, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. ed. 571. **Kan.**—*Douglass v. Loftus*, 85 Kan. 720, 119 Pac. 74, Ann. Cas. 1913A, 378, L. R. A. 1915B, 797; *Cooper v. Ives*, 62 Kan. 395, 63 Pac. 434. **Vt.**—*Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

50. *German Nat. Bank v. Farmers' & M. Bank*, 54 Neb. 593, 74 N. W. 1086.

[a] **Receivers of an insolvent corporation are proper defendants.** *Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839.

51. **U. S.**—*State Nat. Bank v. Sayward*, 91 Fed. 443, 33 C. C. A. 564; *Irvine v. Elliott*, 203 Fed. 82, applying the law of Ohio. **Ark.**—*Jones v. Jarman*, 34 Ark. 323. **Ill.**—*Smith v. Kastor*, 195 Ill. App. 458. **Neb.**—*Holcomb v. Tierney*, 79 Neb. 660, 113 N. W. 204. But see *German Nat. Bank v. Farmers' & Merchants' Bank*, 54 Neb. 593, 74 N. W. 1086. **Ohio.**—*Kulp v. Fleming*, 65 Ohio St. 321, 62 N. E. 334, 87 Am. St. Rep. 611. **Pa.**—*Bates v. Day*, 198 Pa. 513, 48 Atl. 407, 82 Am. St. Rep. 811. **Wis.**—*Foster v. Posson*, 105 Wis. 99, 81 N. W. 123; *Coleman v. White*, 14 Wis. 700, 80 Am. Dec. 797.

52. **Colo.**—*Kipp v. Miller*, 47 Colo. 598, 108 Pac. 164, 135 Am. St. Rep. 236; *Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145. **Ga.**—*Moore v. Ripley*, 106 Ga. 556, 32 S. E. 647. **Mass.**—*American Spirits Mfg. Co. v. Eldridge*, 209 Mass. 590, 95 N. E. 942. **Neb.**—*German Nat. Bank v. Farmers' & M. Bank*, 54 Neb. 593, 74 N. W. 1086. **Ohio.**—*Blair v. Newbegin*, 65 Ohio St. 425, 62 N. E. 1040, 58 L. R. A. 644, applying the law of Kansas.

53. See *supra*, IV, B, 1, b.

the action may be maintained by any creditor against any stockholder.<sup>54</sup> If the liability is several, more than one stockholder cannot be made a defendant,<sup>55</sup> but if it is joint and several, as many stockholders may be joined as defendants as the plaintiff desires.<sup>56</sup> The corporation is not a necessary defendant.<sup>57</sup>

**8. Pleadings.**—a. *By Plaintiff.*<sup>58</sup>—The character and contents of plaintiff's pleading obviously depends somewhat upon whether the action is at law or in equity,<sup>59</sup> as well as upon the nature and extent of the liability as determined by the constitution, statute, or charter creating it and the conditions precedent to an action upon it.<sup>60</sup> Generally, however, it should allege definitely and with certainty, that the defendants are stockholders,<sup>61</sup> the amount of stock owned by them,<sup>62</sup> and, where the liability is proportional, the total amount of the stock of the corporation subscribed.<sup>63</sup> It must set forth the indebtedness of

**54. U. S.**—Flash *v.* Conn, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966. **Ga.** Branch *v.* Baker, 53 Ga. 502. **Ill.**—Hull *v.* Burtis, 90 Ill. 213. **Mass.**—Pope *v.* Leonard, 115 Mass. 286. **N. Y.**—Handy *v.* Draper, 8 N. Y. 334. **Pa.**—Mansfield Iron Works *v.* Wilcox, 52 Pa. 377. **S. D.**—Union Nat. Bank *v.* Halley, 19 S. D. 474, 104 N. W. 213.

**55. U. S.**—Tompkins *v.* Craig, 93 Fed. 885. **Kan.**—Abbey *v.* W. B. Grimes Dry Goods Co., 44 Kan. 415, 24 Pac. 426. **Miss.**—Vick *v.* Lane, 56 Miss. 681. **Mo.**—Perry *v.* Turner, 55 Mo. 418. **N. Y.**—Van Tuyl *v.* Kress, 172 App. Div. 563, 158 N. Y. Supp. 810.

**56. Cal.**—Greenleaf *v.* Jacks, 133 Cal. 506, 65 Pac. 1039. **Ga.**—Moore *v.* Ripley, 106 Ga. 556, 32 S. E. 647. **N. Y.** Mosler Safe Co. *v.* Guardian Trust Co., 208 N. Y. 524, 101 N. E. 786.

**57. Cal.**—Greenleaf *v.* Jacks, 133 Cal. 506, 65 Pac. 1039. **Fla.**—Gibbs *v.* Davis, 27 Fla. 531, 8 So. 633. **Ga.** Moore *v.* Ripley, 106 Ga. 556, 32 S. E. 647. **Minn.**—Nolan *v.* Hazen, 44 Minn. 478, 47 N. W. 155. **N. Y.**—Van Tuyl *v.* Schermann, 208 N. Y. 53, 101 N. E. 779.

[a] A receiver appointed for an insolvent corporation need not be joined. Lang *v.* Lutz, 180 N. Y. 254, 73 N. E. 24.

**58. Forms of complaint,** see 9 STANDARD PROC. 285; Newton Cotton Mills *v.* Springs, 56 S. C. 534, 35 S. E. 222.

**59.** See *supra*, IV, B, 1.

**60.** See *supra*, IV, B, 4.

**61.** Schiffer *v.* Trustees of Columbia College, 87 Fed. 166; McVickar *v.* Jones, 70 Fed. 754. See Robinson *v.*

Nashville Center Co-Op. Creamery Assn., 115 Minn. 43, 131 N. W. 856.

[a] "An allegation that the stock was duly issued and a certificate duly executed, and that the stock so issued stands upon the books in the name of the defendant, is not equivalent to the words of the statute creating liability of stockholders, or to an allegation that the defendant was an owner of a certain number of shares, or the averment that he was a shareholder." McVickar *v.* Jones, 70 Fed. 754.

**62.** Sherman *v.* Smith, 20 Ill. 350; Robinson *v.* Nashville Center Co-Op. Creamery Assn., 115 Minn. 43, 131 N. W. 856. But see Rowell *v.* Janvrin, 151 N. Y. 60, 45 N. E. 398, failure to allege the amount merely renders the complaint indefinite and uncertain.

[a] The manner in which the stock was acquired, need not be stated. Overmyer *v.* Cannon, 82 Ind. 457.

**63.** Thomas *v.* Wentworth Hotel Co., 158 Cal. 275, 110 Pac. 942; John A. Roebling's Sons Co. *v.* Butler, 112 Cal. 677, 45 Pac. 6; Bidwell *v.* Babcock, 87 Cal. 29, 25 Pac. 752; Hanson *v.* Pauson, 25 Cal. App. 169, 143 Pac. 73; San Francisco Commercial Agency *v.* Miller, 4 Cal. App. 291, 87 Pac. 630; Richardson *v.* Boot, 18 Colo. App. 140, 70 Pac. 454.

[a] An averment of the amount of the stock which has been "issued" is insufficient, since stock which has been subscribed may not as yet have been issued. San Francisco Commercial Agency *v.* Miller, 4 Cal. App. 291, 87 Pac. 630.

[b] An allegation of the amount of stock "outstanding," is sufficient,



the corporation to plaintiff,<sup>64</sup> though, according to some authorities this requirement is satisfied by the averment of a judgment against it.<sup>65</sup> The complaint should also allege the fact that the indebtedness was incurred while defendants were stockholders, where liability is conditioned upon it,<sup>66</sup> that they have failed to pay either partially or wholly, the amount due from them under the terms of the statute,<sup>67</sup> the reason why certain subscribers or stockholders are not joined as defendants,<sup>68</sup> the obtaining of a judgment against the corporation and the return of execution unsatisfied,<sup>69</sup> or an adequate reason for dispensing with this procedure,<sup>70</sup> such as the dissolution<sup>71</sup> or insolvency of the corporation.<sup>72</sup> Where the statute limits liability to particular classes of corporate debts, the debt alleged must appear to be one of the class prescribed.<sup>73</sup> But where the statute provides exemption in specified instances, the complaint need not negative the right to such exemption.<sup>74</sup> A demand on the stockholder,<sup>75</sup> service of process in the action in which

after judgment. *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 110 Pac. 942.

64. U. S.—*Foreign Mines Dev. Co. v. Boyes*, 180 Fed. 594. Cal.—*Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047. Mass.—*American Spirits Mfg. Co. v. Eldridge*, 209 Mass. 590, 95 N. E. 942, construing the law of Illinois. N. Y.—*Freeland v. McCullough*, 1 Denio 414, 43 Am. Dec. 685, indebtedness between plaintiff and defendant need not be averred.

[a] "The proper averment of a debt is against the corporation, not against the stockholder, and the showing that it was incurred while defendant was a stockholder fixes his statutory liability." *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047.

[b] The consideration for the debt, (1) need not be alleged (*Newton Cotton Mills v. Springs*, 56 S. C. 534, 35 S. E. 222), (2) even when the plaintiff is an assignee of the original creditor of the corporation. *Mendenhall v. Duluth Dry Goods Co.*, 72 Minn. 312, 75 N. W. 232.

65. *American Freehold Land-Mortgage Co. v. Woodworth*, 79 Fed. 951 (applying the law of Kansas); *McVickar v. Jones*, 70 Fed. 754.

66. *McVickar v. Jones*, 70 Fed. 754; *J. I. Case Plow Works v. Montgomery*, 115 Cal. 380, 47 Pac. 108; *Winona Wagon Co. v. Bull*, 108 Cal. 1, 40 Pac. 1077.

[a] An allegation that on a certain day a corporation executed its promissory note and that at that time defendant was a stockholder, is insufficient. "The indebtedness might be in-

curred at the time of giving a note, or even by giving the note, but if so such fact should appear." *J. I. Case Plow Works v. Montgomery*, 115 Cal. 380, 47 Pac. 108.

67. *American Spirits Mfg. Co. v. Eldridge*, 209 Mass. 590, 95 N. E. 942.

68. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626.

[a] The details surrounding the forfeiture of stock of defendants who are not joined, need not be stated. *Ford v. Chase*, 118 App. Div. 605, 103 N. Y. Supp. 30, affirmed, 189 N. Y. 504, 81 N. E. 1164.

Necessity for joining all stockholders as defendants, see *supra*, IV, B, 7.

69. See *supra*, IV, B, 4, b.

70. See *supra*, IV, B, 4, b.

71. *Krider v. Coley*, 7 Kan. App. 349, 51 Pac. 919.

[a] An averment that a corporation was dissolved following an averment that judgment was obtained against it and execution returned unsatisfied, may be treated as surplusage and not as a repugnancy. *Freeland v. McCullough*, 1 Denio (N. Y.) 414, 43 Am. Dec. 685.

72. *Hughes v. Hall*, 117 Md. 547, 83 Atl. 1023.

73. *Sherman v. Smith*, 20 Ill. 350; *Leighton v. Knapp*, 115 N. Y. Supp. 1040.

74. *Lazard Freres Et Cie v. Phetteplace*, 26 R. I. 568, 59 Atl. 931. And see *Rowell v. Janvrin*, 151 N. Y. 60, 45 N. E. 398.

75. *Newton Cotton Mills v. Springs*, 56 S. C. 534, 35 S. E. 222.

judgment was obtained against the corporation,<sup>76</sup> or the ownership of specific property by the stockholder,<sup>77</sup> need not be alleged. The right of a domestic,<sup>78</sup> or foreign receiver<sup>79</sup> to maintain the action must be made to appear from the pleading. The statute creating the liability need not be pleaded,<sup>80</sup> except where it is one of which the court cannot take judicial notice,<sup>81</sup> as is the case ordinarily of a special or private legislative act,<sup>82</sup> or the statute of another state.<sup>83</sup> It need not be expressly alleged that the liability under a foreign statute is contractual in its nature,<sup>84</sup> or that it can be enforced in the state without working an injustice to stockholders.<sup>85</sup>

b. *By Defendant.*—(1.) Generally. — The defendant's pleadings follow the general rules and principles governing such pleadings.<sup>86</sup>

76. *Douglass v. Loftus*, 85 Kan. 720, 119 Pac. 74, Ann. Cas. 1913A, 378, L. R. A. 1915B, 797. And see *Royal Trust Co. v. Harding*, 155 App. Div. 104, 140 N. Y. Supp. 9.

77. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626.

78. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626.

[a] The proceedings in which the receiver was appointed need not be set forth at length. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626.

[b] Authority from the creditors to the receiver, need not be averred. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626.

79. *Murtey v. Allen*, 71 Vt. 377, 45 Atl. 752, 76 Am. St. Rep. 779.

[a] The allegation that under plaintiff's appointment as liquidator of a bank "all the property, effects and choses in action to which the said bank was, or appeared to be, entitled came into plaintiff's custody or under its control," was held sufficient. *Royal Trust Co. v. Harding*, 155 App. Div. 104, 140 N. Y. Supp. 9.

80. *Rider v. Fritchey*, 49 Ohio St. 285, 30 N. E. 692, 15 L. R. A. 513. See the title "Statutes."

81. See *ENCY. OF EV.*, title "Judicial Notice."

82. *Middletown Bank v. Russ*, 3 Conn. 135, 8 Am. Dec. 164.

83. Cal.—*Peck v. Noee*, 154 Cal. 351, 97 Pac. 865. Mass.—*Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349, 55 Am. St. Rep. 414. N. J.—*Salt Lake City Nat. Bank v. Hendrickson*, 40 N. J. L. 52. N. Y.—*Southworth v. Morgan*, 205 N. Y. 293, 98 N. E. 490, 51 L. R. A. (N. S.) 56. Ore.—*Garetson Lumb. Co. v. Hinson*, 69 Ore. 605, 140 Pac. 633. Vt.—*Murtey v. Allen*, 71 Vt.

377, 45 Atl. 752, 76 Am. St. Rep. 779.

[a] If the statute is not pleaded it will be presumed that the law of the state of incorporation is the same as the law of the state in which the action is brought. *Peck v. Noee*, 154 Cal. 351, 97 Pac. 865; *Garetson Lumb. Co. v. Hinson*, 69 Ore. 605, 140 Pac. 633.

[b] That the liability imposed by the foreign statute is such that it can be enforced by remedies within the power of the courts of the state to give, must appear from the complaint. *Rice v. Merrimack Hosiery Co.*, 56 N. H. 114; *Marshall v. Sherman*, 148 N. Y. 9, 42 N. E. 419, 51 Am. St. Rep. 654, 34 L. R. A. 757.

When and how far the law of a sister state may be judicially noticed, see *ENCY. OF EV.* titles "Foreign Laws;" "Judicial Notice."

[c] The federal courts, unless acting on appeal from a state court which could not do so, will take judicial notice of the public laws of all the states. See "ENCY. OF EV." title "Foreign Laws" and also *Irvine v. Elliott*, 203 Fed. 82; *Wigton v. Bosler*, 102 Fed. 70.

84. *Bearse v. Mabie*, 198 Mass. 451, 84 N. E. 1015.

85. *Bearse v. Mabie*, 198 Mass. 451, 84 N. E. 1015.

86. See the titles "Answers;" "Bills and Answers;" "Confession and Avoidance;" "Denials;" and titles dealing with particular pleas and defenses.

[a] Foreign Statute.—Where the corporation of which defendants are stockholders is a foreign corporation and the law of the state of its domicile is not set forth in the complaint, defendants must plead it as an affirmative defense, if they rely upon it. *Peck v. Noee*, 154 Cal. 351, 97 Pac. 865.

If the action is at law, the general issue may be pleaded.<sup>87</sup> An answer that defendant sold the stock owned by him before plaintiff's debt was incurred need not state the details of the sale nor the name of the transferee.<sup>88</sup>

(II.) **Set-Off and Counterclaim.** — The stockholder cannot, under many authorities, set-off or counterclaim a debt owed to him by the corporation;<sup>89</sup> under other authorities however, this right is recognized.<sup>90</sup>

9. **Trial.** — a. *In General.* — Where the action is brought by a single creditor in behalf of all persons similarly situated, the plaintiff is not a trustee for other creditors, in a strict sense, and he has the right to control the action and may continue, compromise, abandon, or discontinue it, at his pleasure,<sup>91</sup> until a creditor similarly situated has been allowed to become a party to the action.<sup>92</sup> A creditor who is also a stockholder will not be allowed to conduct proceedings on behalf of all the creditors over their objections.<sup>93</sup>

What is the law of another state, is generally regarded as a question of fact by the authorities.<sup>94</sup>

87. *Elsbree v. Burt*, 24 R. I. 322, 53 Atl. 60.

88. *Dexter v. Edmands*, 89 Fed. 467.

89. **U. S.**—*Sawyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731; *Burget v. Robinson*, 113 Fed. 669, 51 C. C. A. 488; *Anglo-American Land, Mtg. & Agency Co. v. Lombard*, 132 Fed. 721, 68 C. C. A. 89; *Bausman v. Kiunear*, 79 Fed. 172, 24 C. C. A. 473; *Hamilton v. Simon*, 178 Fed. 130; *Hale v. Calder*, 113 Fed. 670. **Conn.**—*Ball Electric Light Co. v. Child*, 68 Conn. 522, 37 Atl. 391. **Ill.**—*Buchanan v. Meisser*, 105 Ill. 638. **Ia.**—*Boulton Carbon Co. v. Mills*, 78 Iowa 460, 43 N. W. 290, 5 L. R. A. 649. **Minn.**—*Helm v. Smith-Fee Co.*, 76 Minn. 328, 79 N. W. 313; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069. But see *Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.*, 80 Minn. 125, 83 N. W. 36.

See the title "Set-Off, Counterclaim and Recoupment."

90. **U. S.**—*Ramsden v. Keene Five Cent Sav. Bank*, 198 Fed. 807, 117 C. C. A. 449; *French v. Busch*, 189 Fed. 480; *Brown v. Trail*, 89 Fed. 641, applying the law of Kansas. **Fla.**—*Hood v. French*, 37 Fla. 117, 19 So. 165. **Kan.**—*Pierce v. Topeka Commercial Security Co.*, 60 Kan. 164, 55 Pac. 853; *Musgrave v. Glen Elder Assn.*, 5 Kan. App. 393, 49 Pac. 338. **Ky.**—*Barnes v. Scott*, 171 Ky. 115, 186 S. W. 904. **Me.**—*Appleton v. Turnbull*, 84 Me. 72, 24 Atl. 592, allowed by statute. **Md.**—*Cahill v. Original Big Gun Beneficial & Pleasure Assn.*, 94 Md. 353, 50 Atl. 1044, 89

Am. St. Rep. 434. **Mass.**—*Sargent v. Stetson*, 181 Mass. 371, 63 N. E. 929 (applying the law of Kansas); *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603, applying the law of Kansas. **Miss.**—*American Freehold Mtg. Co. v. Brower*, 32 So. 906. **Mo.**—*Washington Sav. Bank v. Butchers' & Drovers' Bank*, 130 Mo. 155, 31 S. W. 761. **N. Y.**—*Mosler Safe Co. v. Guardian Trust Co.*, 208 N. Y. 524, 101 N. E. 786.

91. *Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839; *Innes v. Lansing*, 7 Paige (N. Y.) 583. *Compare Atlas Bank v. Nahant Bank*, 23 Pick. (Mass.) 480. See 20 STANDARD PROC. 951.

92. *Brinekerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663. See 20 STANDARD PROC. 951.

[a] Other creditors "have the right to come in at any time, and as soon as they do they may take part in the management of the action." *Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 180, 51 N. E. 997, 46 L. R. A. 839.

[b] After a petition to be made a party has been filed by another creditor, the plaintiff cannot dismiss the action. *Belmont Nail Co. v. Columbia I. & S. Co.*, 46 Fed. 336.

93. *Maxwell v. Northern Trust Co.*, 70 Minn. 334, 73 N. W. 173.

94. *Hayward v. Sencenbaugh*, 141 Ill. App. 395; *Electric Welding Co. v. Prince*, 200 Mass. 386, 86 N. E. 947, 128 Am. St. Rep. 434. See 21 STANDARD PROC. 845.



b. *Effect of Judgment Against Corporation.*—Where a statutory liability is primary, a judgment against the corporation for the debt does not merge in it the right of action under the statute against stockholders.<sup>95</sup> A judgment against the corporation is in most states conclusive against a stockholder as to the validity and amount of the creditor's claim,<sup>96</sup> and as to these matters it can be impeached only for fraud, or want of jurisdiction.<sup>97</sup> However it does not prevent him from showing that indebtedness upon which it was founded was one upon which stockholders were not liable,<sup>98</sup> or that the judgment has been paid or discharged.<sup>99</sup> Nor does it prevent him from interposing any defense personal to himself,<sup>1</sup> as that he has discharged the liability,<sup>2</sup>

95. *Buttner v. Adams*, 236 Fed. 105, 149 C. C. A. 315.

96. **U. S.**—*Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. 867, 34 L. ed. 262; *American Nat. Bank v. Supplee*, 115 Fed. 657, 52 C. C. A. 293; *Dexter v. Edmonds*, 89 Fed. 467. **Ill.**—*Coalfield Co. v. Peck*, 98 Ill. 139; *Schertz v. First Nat. Bank*, 47 Ill. App. 124. **Ia.**—*Donworth v. Coolbaugh*, 5 Iowa 300. **Kan.**—*Douglass v. Loftus*, 85 Kan. 720, 119 Pac. 74, Ann. Cas. 1913A, 378, L. R. A. 1915B, 797; *Steffins v. Gurney*, 61 Kan. 292, 59 Pac. 725; *Ball v. Reese*, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638. **Me.**—*Barron v. Paine*, 83 Me. 312, 22 Atl. 218; *Milliken v. Whitehouse*, 49 Me. 527. **Mass.**—*Thayer v. New England Lith. Steam Print. Co.*, 108 Mass. 523; *Holyoke Bank v. Goodman Paper Mfg. Co.*, 9 Cush. 576. **Minn.**—*Greenfield v. Minnesota Min. & Dev. Co.*, 138 Minn. 446, 165 N. W. 274; *Holland v. Duluth Iron Min. & Dev. Co.*, 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480; *Oswald v. Minneapolis Times Co.*, 65 Minn. 249, 68 N. W. 15. **Mo.**—*Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514. **N. C.**—*Heggie v. People's Bldg. L. Assn.*, 107 N. C. 581, 12 S. E. 275. **Pa.**—*Wilson, McElroy & Co. v. Pittsburgh & Y. Coal Co.*, 43 Pa. 424. **Wis.**—*Merchants' Bank v. Chandler*, 19 Wis. 434.

See generally the title "*Res Judicata*."

[a] Not where the corporation was insolvent and had gone into liquidation before the judgment against it. *Schrader v. Manufacturer's Nat. Bank*, 133 U. S. 67, 10 Sup. Ct. 238, 33 L. ed. 564.

[b] A default judgment against the corporation falls within the general rule. *Mass.*—*Holyoke Bank v. Good-*

*man Paper Mfg. Co.*, 9 Cush. 576. **Minn.**—*Holland v. Duluth Iron Min. & Dev. Co.*, 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480. **Mo.**—*Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514. *Compare Sumner v. Marey*, 3 Woodb. & M. 105, 23 Fed. Cas. No. 13,609. See also 15 STANDARD PROC. 397.

[c] There is no distinction between cases based upon the stockholder's liability for an unpaid portion of his subscription and those based on a statutory liability. *Holland v. Duluth Iron Min. & Dev. Co.*, 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480. But see *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626. As to the former class of cases, see *supra*, IV, A, 9.

97. **U. S.**—*Ball v. Warrington*, 108 Fed. 472, 47 C. C. A. 447; *Warrington v. Ball*, 90 Fed. 464, 33 C. C. A. 609. **Kan.**—*Ball v. Reese*, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638. **Minn.**—*Hinckley v. Kettle River R. Co.*, 80 Minn. 32, 82 N. W. 1088. **Utah.**—*Wilson v. Kiesel*, 9 Utah 397, 35 Pac. 488.

See generally the title "*Res Judicata*," and 15 STANDARD PROC. 415, et seq.

[a] In sequestration proceedings, the judgment may be assailed for fraud. *Greenfield v. Minnesota Min. & Dev. Co.*, 138 Minn. 446, 165 N. W. 274.

98. *Ward v. Joslin*, 186 U. S. 142, 22 Sup. Ct. 807, 46 L. ed. 1093.

99. *Martin v. Wilson*, 120 Fed. 202, 58 C. C. A. 181.

1. **Conn.**—*Converse v. Aetna Nat. Bank*, 79 Conn. 163, 64 Atl. 341, 7 Ann. Cas. 75. **Ga.**—*Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626. **Minn.**—*Willis v. Mann*, 91 Minn. 494, 98 N. W. 341, 367.

2. *Hancock Nat. Bank v. Farnum*,

or has a valid set-off or counterclaim against it.<sup>3</sup>

**Minority Rule.** — In a few states, if the stockholder was not a party to the action in which it was rendered, the judgment is merely prima facie evidence of the validity and amount of the creditor's claim.<sup>4</sup>

**Foreign Judgment.** — Since full faith and credit must be given to a judgment rendered in another state,<sup>5</sup> its conclusiveness will be determined by the law of the state in which it was rendered,<sup>6</sup> and if it is there conclusive, it will be conclusive elsewhere,<sup>7</sup> in accordance with the general rules elsewhere treated.<sup>8</sup>

**10. Judgment.** — The form of the judgment will obviously depend largely upon whether the action be by a single creditor or on behalf of all of them and whether one or all of the stockholders be defendants.<sup>9</sup> It should be against each stockholder for the full amount for which he is severally liable,<sup>10</sup> but should provide for the adjustment and enforcement of the liability in accordance with the equities and the law governing its character and extent.<sup>11</sup>

176 U. S. 640, 20 Sup. Ct. 506, 44 L. ed. 619.

3. *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. ed. 619. See *supra*, IV, B, 8, b, (II).

4. *Wheatley v. Glover*, 125 Ga. 710, 54 S. E. 626. See *In re Warren's Estate*, 52 Mich. 557, 18 N. W. 356, at least prima facie if not conclusive evidence.

[a] In New York the judgment is neither conclusive nor sufficient to establish the indebtedness. *Assets Realization Co. v. Howard*, 211 N. Y. 430, 105 N. E. 680. See *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725; *Miller v. White*, 50 N. Y. 137, 13 Abb. Pr. (N. S.) 185.

[b] Judgment after dissolution of the corporation, being void, is not evidence. *Bonaffe v. Fowler*, 7 Paige (N. Y.) 576.

5. *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. ed. 619. See 15 STANDARD PROC. 645.

6. *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. ed. 619; *Dexter v. Edmonds*, 89 Fed. 467.

7. *Ball v. Warrington*, 108 Fed. 472, 47 C. C. A. 447; *Tompkins v. Blakey*, 70 N. H. 584, 49 Atl. 111.

[a] Whether the judgment is conclusive is to be determined by the laws of the state in which it was rendered. *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. ed. 619.

[b] The only defenses which can be interposed are those which could be interposed in an action in the state

in which it was rendered. *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. ed. 619. See 15 STANDARD PROC. 645, 662.

8. See 15 STANDARD PROC. 644.

9. See *supra*, IV, B, 7. See also the titles "Decrees;" "Judgments."

10. *Coyle v. Taunton Safe Deposit & Trust Co.*, 216 Mass. 156, 103 N. E. 288; *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069.

[a] A judgment in personam cannot be rendered against non-resident stockholders who were not served with process and did not voluntarily appear. *Irvine v. Elliott*, 203 Fed. 82.

[b] Interest may properly be allowed from the commencement of the action. *Ramsden v. Keene Five Cents Sav. Bank*, 198 Fed. 807, 117 C. C. A. 449; *Alsop v. Conway*, 188 Fed. 568, 110 C. C. A. 366.

11. *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069; *Blair v. Newbegin*, 65 Ohio St. 425, 62 N. E. 1040, 58 L. R. A. 644.

[a] If a plaintiff is also a stockholder the judgment may go against the full amount of his statutory liability and may declare the amount due from him thereunder to be a lien upon his interest in the entire judgment, and may require him to pay all assessments on the judgment in full until so much is paid that the court is satisfied that the amount due him as a judgment creditor is greater than the balance due from him as a stockholder. *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069.

C. **INSOLVENCY OR RECEIVERSHIP.**—1. **In General.**—The right to enforce the unpaid subscription liability of a stockholder is usually held to constitute a corporate asset and to vest in an assignee, trustee in bankruptcy or receiver of an insolvent corporation,<sup>12</sup> though there are some authorities which hold otherwise.<sup>13</sup> Existence of a remedy at law or in equity does not deprive a receiver of power to enforce the stockholders' liability in the insolvency proceedings.<sup>14</sup> The mere appointment of a receiver for an insolvent corporation does not prevent the maintenance of an action by a creditor against the stockholders;<sup>15</sup> but if the receiver is authorized and directed to enforce the stockholders' liability a creditor will not be allowed to sue the stockholder.<sup>16</sup>

The statutory liability of stockholders is not, in most states, regarded as an asset of the corporation and cannot be enforced by a receiver of the corporation,<sup>17</sup> and in such states the fact that the corporation's

12. **U. S.**—Potts *v.* Wallace, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. ed. 1135; Sanger *v.* Upton, 91 U. S. 56, 23 L. ed. 220. **Ala.**—Chamberlain *v.* Bromberg, 83 Ala. 576, 3 So. 434. **Cal.**—Kohler *v.* Agassiz, 99 Cal. 9, 33 Pac. 741. **Del.**—Du Pont *v.* Ball, 106 Atl. 39. **Ga.**—Chappell *v.* Lowe, 145 Ga. 717, 89 S. E. 777; Spratling *v.* Westbrook, 140 Ga. 625, 79 S. E. 536; Graves *v.* Denny, 15 Ga. App. 718, 84 S. E. 187. **Ill.**—Edwards *v.* Schillinger, 245 Ill. 231, 91 N. E. 1048, 137 Am. St. Rep. 308, 33 L. R. A. (N. S.) 895. **Ind.**—Marion Trust Co. *v.* Blish, 170 Ind. 686, 84 N. E. 814, 85 N. E. 344, 18 L. R. A. (N. S.) 347. **Ia.**—Johnson *v.* Morgan, 178 Iowa 577, 160 N. W. 2. **Minn.**—*In re* Minnehaha Driving Park Assn., 53 Minn. 423, 55 N. W. 598. **Md.**—Frank *v.* Morrison, 58 Md. 423. **Mo.**—Berry *v.* Rood, 168 Mo. 316, 67 S. W. 644. **Neb.**—Wyman *v.* Williams, 53 Neb. 670, 74 N. W. 48. **N. Y.**—Stoddard *v.* Lum, 159 N. Y. 265, 53 N. E. 1108, 70 Am. St. Rep. 541, 45 L. R. A. 551. **N. C.**—Worth *v.* Wharton, 122 N. C. 376, 29 S. E. 370. **Pa.**—Cook *v.* Carpenter, 212 Pa. 165, 61 Atl. 799, 108 Am. St. Rep. 854, 1 L. R. A. (N. S.) 900, 4 Ann. Cas. 723. **Ohio.**—Smith *v.* Johnson, 57 Ohio St. 486, 49 N. E. 693. **Tenn.**—Cartwright *v.* Dickinson, 88 Tenn. 476, 12 S. W. 1030, 17 Am. St. Rep. 910, 7 L. R. A. 706. **Tex.**—Mitchell *v.* Porter (Tex. Civ. App.), 194 S. W. 981.

Right of assignee or receiver to maintain action in a foreign state, see *infra*, IV, C, 2.

13. *In re* Jassoy Co., 178 Fed. 515,

101 C. C. A. 641; Smith *v.* Kastor, 195 Ill. App. 458.

14. Du Pont *v.* Ball (Del.), 106 Atl. 39.

15. **Ala.**—Lea *v.* Iron Belt Mercantile Co., 119 Ala. 271, 24 So. 28, a receiver to foreclose a corporate mortgage. **Ga.**—Graves *v.* Denny, 15 Ga. App. 718, 84 S. E. 187. **N. Y.**—Lyell Ave. Lumb. Co. *v.* Lighthouse, 137 App. Div. 422, 121 N. Y. Supp. 802. **N. C.**—Smathers *v.* Western Carolina Bank, 135 N. C. 410, 47 S. E. 893.

16. **Ga.**—Morgan *v.* Gibian, 115 Ga. 145, 41 S. E. 495. **Ind.**—Big Creek Stone Co. *v.* Seward, 144 Ind. 205, 42 N. E. 464, 43 N. E. 5. **Md.**—Castleman *v.* Templeman, 87 Md. 546, 40 Atl. 275, 67 Am. St. Rep. 363, 41 L. R. A. 367. **Minn.**—Merchants' Nat. Bank *v.* Northwestern Mfg. & Car Co., 48 Minn. 361, 51 N. W. 119. **S. D.**—South Bend Toy Mfg. Co. *v.* Pierre Fire & Marine Ins. Co., 4 S. D. 173, 56 N. W. 98. **Tex.**—Herf & Frerichs Chemical Co. *v.* Brewster, 54 Tex. Civ. App. 217, 117 S. W. 880. **Wash.**—Wilson *v.* Book, 13 Wash. 676, 43 Pac. 939.

[a] A creditor cannot maintain an action to enforce an assessment ordered to be paid to a receiver. Castleman *v.* Templeman, 87 Md. 546, 40 Atl. 275, 67 Am. St. Rep. 363, 41 L. R. A. 367.

[b] If the receiver refuses or neglects to collect the subscription he will be removed on the petition of creditors. Links *v.* Connecticut River Banking Co., 66 Conn. 277, 33 Atl. 1003.

17. **U. S.**—Alsop *v.* Conway, 188 Fed. 568, 110 C. C. A. 366 (applying



affairs are in the hands of a receiver does not prevent the maintenance of an action by creditors to enforce the statutory liability of stockholders.<sup>18</sup> Under some statutes, a receiver is given the right to institute the action,<sup>19</sup> and occasionally his right of action is exclusive of any right of action in the creditors of the corporation.<sup>20</sup> In some states it is customary to appoint receivers to collect the judgment for the statutory liability of stockholders.<sup>21</sup>

**2. Foreign Receivers.**—A receiver appointed by the courts of one state with power to enforce a stockholder's liability for an unpaid subscription can maintain an action for that purpose in another state, where the rights of domestic creditors are not prejudiced,<sup>22</sup> though in some states the right of a receiver appointed in another state to maintain the action, is denied.<sup>23</sup> A mere chancery receiver cannot ordinarily maintain the action,<sup>24</sup> but where the statutes of the state in

the law of Kentucky); *Republic Iron & Steel Co. v. Carlton*, 189 Fed. 126. **Colo.**—*Zang v. Wyant*, 25 Colo. 551, 56 Pac. 565, 71 Am. St. Rep. 145. **Del.** *Du Pont v. Ball*, 106 Atl. 39. **Ill.** *Golden v. Cervenka*, 278 Ill. 409, 116 N. E. 273. **Ind.**—*Runner v. Dwiggin*, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645. **Ky.**—*Tiger Shoe Mfg. Co.'s Trustee v. Shanklin*, 125 Ky. 715, 102 S. W. 295, 31 L. R. A. (N. S.) 365. **Md.**—*Cahill v. Original Big Gun Benef. & Pleasure Assn.*, 94 Md. 353, 50 Atl. 1044, 89 Am. St. Rep. 434. **N. Y.**—*Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839. **S. C.**—*Buist v. Williams*, 81 S. C. 495, 62 S. E. 859. **Utah.** *McLaughlin v. Kimball*, 20 Utah 254, 58 Pac. 685, 77 Am. St. Rep. 908.

*Compare Cushing v. Perot*, 175 Pa. 66, 34 Atl. 447, 52 Am. St. Rep. 835, 34 L. R. A. 737.

**18.** *Western Pac. R. Co. v. Godfrey*, 166 Cal. 346, 136 Pac. 284, Ann. Cas. 1915B, 825.

**19. U. S.**—*Henley v. Myers*, 215 U. S. 373, 30 Sup. Ct. 148, 54 L. ed. 240; *Irvine v. Elliott*, 203 Fed. 82, construing the law of Ohio. **Ga.**—*Walters v. Porter*, 3 Ga. App. 73, 59 S. E. 452. **Idaho.**—*McTamany v. Day*, 23 Idaho 95, 128 Pac. 563. **Kan.**—*Henley v. Myers*, 76 Kan. 723, 93 Pac. 168, 173, 17 L. R. A. (N. S.) 779. **Minn.**—*Northwestern Trust Co. v. Bradbury*, 117 Minn. 83, 134 N. W. 513, Ann. Cas. 1913D, 69. **Neb.**—*Rawson v. Taylor*, 69 Neb. 473, 95 N. W. 1033.

**Allegations as to receiver's right to sue**, see *supra*, IV, B, 8, a.

**20. Md.**—*Hughes v. Hall*, 117 Md. 547, 83 Atl. 1023. **Minn.**—*Anderson v.*

*Seymour*, 70 Minn. 358, 73 N. W. 171. **Pa.**—*Cushing v. Perot*, 175 Pa. 66, 34 Atl. 447, 52 Am. St. Rep. 835, 34 L. R. A. 737. **Vt.**—*Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176.

**21. U. S.**—*Irvine v. Elliott*, 203 Fed. 82, applying the law of Ohio. **Minn.** *Way v. Barney*, 116 Minn. 285, 133 N. W. 801, Ann. Cas. 1913A, 719, 38 L. R. A. (N. S.) 648. **Neb.**—*German Nat. Bank v. Farmers' & M. Bank*, 54 Neb. 593, 74 N. W. 1086. **Ohio.**—*Zieverink v. Kemper*, 50 Ohio St. 208, 34 N. E. 250.

**22. U. S.**—*Blackburn v. Irvine*, 205 Fed. 217, 123 C. C. A. 405. **Conn.**—*Fish v. Smith*, 73 Conn. 377, 47 Atl. 711, 84 Am. St. Rep. 161. **Me.**—*Childs v. Cleaves*, 95 Me. 498, 50 Atl. 714. **N. Y.** *Shipman v. Treadwell*, 200 N. Y. 472, 93 N. E. 1104; *Stoddard v. Lum*, 159 N. Y. 265, 53 N. E. 1108, 70 Am. St. Rep. 541, 45 L. R. A. 551; *Royal Trust Co. v. Harding*, 155 App. Div. 104, 140 N. Y. Supp. 9.

**23. Ia.**—*Wyman v. Eaton*, 107 Iowa 214, 77 N. W. 865, 70 Am. St. Rep. 193, 43 L. R. A. 695. **Md.**—*Castleman v. Templeman*, 87 Md. 546, 40 Atl. 275, 67 Am. St. Rep. 363, 41 L. R. A. 367. **Ohio.**—*Leman v. MacLennan*, 28 Ohio C. C. 137, *affirmed*, 75 Ohio St. 643, 80 N. E. 1129.

**24. Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. ed. 749, Ann. Cas. 1913D, 1292; *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. ed. 380; *Fidelity Trust & Safe Dep. Co. v. Areher*, 179 Fed. 32, 103 C. C. A. 16.**

[a] Under the doctrine of comity, some authorities hold that he may maintain the action. *Kirtley v. Holmes*,

which he was appointed confer upon a receiver the right to sue in other states,<sup>25</sup> or where he is regarded as a quasi assignee for creditors or as having the legal title to the claim against the stockholder,<sup>26</sup> he may maintain an action to enforce it.<sup>27</sup>

**D. ENFORCING CONTRIBUTION AMONG STOCKHOLDERS.**—Where a stockholder is entitled to contribution from other stockholders on account of the amount paid upon a judgment recovered by creditors, the right is commonly declared and enforced in the original action;<sup>28</sup> where this is not done a separate suit in equity to compel contribution may be maintained,<sup>29</sup> and the right may be enforced in any state in which stockholders reside.<sup>30</sup>

**E. COSTS AND EXPENSES.**—The general rules applicable to the imposition of costs apply to the class of actions here under consideration.<sup>31</sup> Where the action is by one creditor in behalf of all the creditors, the court may properly make an allowance to the plaintiff for his attorney

107 Fed. 1, 46 C. C. A. 102, 52 L. R. A. 738; *Hale v. Hardon*, 95 Fed. 747, 37 C. C. A. 240; *Childs v. Cleaves*, 95 Me. 498, 50 Atl. 714.

[b] The courts of the state in which the action is brought have exclusive power to determine whether the action shall be allowed to be maintained on the ground of comity. *Finney v. Guy*, 189 U. S. 335, 23 Sup. Ct. 558, 47 L. ed. 839.

[c] A receiver who could not maintain such an action in the courts of the state in which he was appointed cannot maintain the action in another state. *Hale v. Allinson*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. ed. 380.

25. **U. S.**—*Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. ed. 1163, upholding the Minnesota statute. **Del.**—*John W. Cooney Co. v. Arlington Hotel Co.* (Del. Ch.), 101 Atl. 879. **N. Y.**—*Shipman v. Treadwell*, 208 N. Y. 404, 102 N. E. 634.

26. **U. S.**—*Goss v. Carter*, 156 Fed. 746, 84 C. C. A. 402; *Irvine v. Baker*, 225 Fed. 834; *French v. Busch*, 189 Fe 480. **Mass.**—*Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301. **Tenn.**—*Van Tuyl v. Carpenter*, 135 Tenn. 629, 188 S. W. 234.

27. **U. S.**—*Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. ed. 749, Ann. Cas. 1913D, 1292; *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. ed. 1163 (applying the law of Minnesota); *Irvine v. Baker*, 225 Fed. 834 (applying the law of Ohio); *Irvine v. Elliott*, 203 Fed. 82 (applying the law of Ohio); *Hamilton*

*v. Simon*, 178 Fed. 130. **Mass.**—*Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301. **N. Y.**—*Shipman v. Treadwell*, 200 N. Y. 472, 93 N. E. 1104; *Wigton v. Kenney*, 51 App. Div. 215, 64 N. Y. Supp. 924. **Vt.** *King v. Cochran*, 76 Vt. 141, 56 Atl. 667, 104 Am. St. Rep. 922.

[a] The right of the receiver to sue is not based on comity and cannot be denied. *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. ed. 749, Ann. Cas. 1913D, 1292.

28. See *supra*, IV, A, 10.

29. **U. S.**—*Allen v. Fairbanks*, 45 Fed. 445. **Ill.**—*Singer v. Hutchinson*, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133; *Siegel v. Fish*, 129 Ill. App. 319. **Kan.**—*Merrill v. Prescott*, 67 Kan. 767, 74 Pac. 259. **Mass.**—*Putnam v. Misochi*, 189 Mass. 421, 75 N. E. 956, 109 Am. St. Rep. 648, 4 Ann. Cas. 733. **Neb.**—*Bennison v. McConnell*, 56 Neb. 46, 76 N. W. 412; *Van Pelt v. Gardner*, 54 Neb. 701, 75 N. W. 874. **Va.**—*Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751.

See generally the title "Contribution."

30. *Putnam v. Misochi*, 189 Mass. 421, 75 N. E. 956, 109 Am. St. Rep. 648, 4 Ann. Cas. 733. But see *Miller v. Smith*, 26 K. I. 146, 58 Atl. 634, 106 Am. St. Rep. 699, 66 L. R. A. 473.

31. See generally the title "Costs."

[a] Where the action is in equity, the award of costs is, under some statutes, left to the discretion of the court. *Torras v. Raeburn*, 108 Ga. 345, 33 S. E. 989.

fees payable out of the fund collected.<sup>32</sup> The fees and expenses of a receiver, by whom the action is maintained, cannot, however, be fixed and ordered paid in the action against the stockholders.<sup>33</sup>

**F. ASSESSMENT PROCEEDINGS AND THEIR EFFECT.**—Where the liability of a stockholder for the unpaid portion of his stock subscription is regarded as several and not joint and where the creditor is under no obligation to wind up the affairs of the corporation before collecting his debt,<sup>34</sup> no call or assessment need be made by the corporation before the action against the stockholder can be maintained to enforce this liability,<sup>35</sup> or, as is sometimes said, the mere institution of the action against the stockholders, under the direction of a court, is regarded as a sufficient call to meet the requirements of the rule.<sup>36</sup> But where the purpose and effect of the action is to wind up the affairs of an insolvent corporation, it is frequently held that the proportional liability of all the stockholders to all of the creditors must be ascertained and an assessment levied upon the stockholders by the corporation or by or under the direction of the court,<sup>37</sup> unless it

32. *Helm v. Smith-Fee Co.*, 79 Minn. 297, 82 N. W. 639.

33. *Berry v. Rood*, 209 Mo. 662, 108 S. W. 22. *Contra*, *Du Pont v. Ball* (Del.), 106 Atl. 39.

34. *Edwards v. Schillinger*, 245 Ill. 231, 91 N. E. 1048, 137 Am. St. Rep. 308, 33 L. R. A. (N. S.) 895.

35. **U. S.**—*Hatch v. Dana*, 101 U. S. 205, 25 L. ed. 885; *Kroegher v. Calivada Col. Co.*, 119 Fed. 641, 56 C. C. A. 257; *Dunn v. Howe*, 107 Fed. 849, 47 C. C. A. 13, action by assignee of an insolvent corporation. **Cal.**—*Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204; *Welch v. Sargent*, 127 Cal. 72, 59 Pac. 319. **Fla.**—*Knight & Wall Co. v. Tampa Sand Lime Brick Co.*, 55 Fla. 728, 46 So. 285. **Ga.**—*Graves v. Denny*, 15 Ga. App. 718, 84 S. E. 187. **Ill.**—*Edwards v. Schillinger*, 245 Ill. 231, 91 N. E. 1048, 137 Am. St. Rep. 308, 33 L. R. A. (N. S.) 895; *Woman's Temperance Bldg. Assn. v. Devore*, 160 Ill. App. 153. **Ind.**—*Carnahan v. Campbell*, 59 N. E. 1054. **Miss.**—*Scott v. Windham*, 73 Miss. 76, 16 So. 206. **Mo.**—*Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 153, 17 S. W. 644, 28 Am. St. Rep. 405. **Nev.**—*Thompson v. Reno Sav. Bank*, 19 Nev. 242, 9 Pac. 121, 3 Am. St. Rep. 883. **Wash.**—*Chilberg v. Siebenbaum*, 41 Wash. 663, 84 Pac. 598; *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415.

[a] Where an assignment for the benefit of creditors has been made no

call is necessary. *McKay v. Elwood*, 12 Wash. 579, 41 Pac. 919.

36. **Cal.**—*Daggett v. Southwest Packing Co.*, 155 Cal. 762, 103 Pac. 204. **Ga.**—*Allen v. Grant*, 122 Ga. 552, 50 S. E. 494. **Ind.**—*Carnahan v. Campbell*, 59 N. E. 1054.

37. **U. S.**—*Scovill v. Thayer*, 105 U. S. 143, 26 L. ed. 968; *Myers v. Seeley*, 17 Fed. Cas. No. 9,994. **Ala.**—*Semple v. Glenn*, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894. **Me.**—*Gilllin v. Sawyer*, 93 Me. 151, 44 Atl. 677. **N. Y.**—*Mann v. Pentz*, 3 N. Y. 415, 423. **Ohio.**—*Thomas v. Kalbfus*, 97 Ohio St. 232, 119 N. E. 412. **Ore.**—*Sargent v. Waterbury*, 83 Ore. 169, 161 Pac. 443, 163 Pac. 416. **Pa.**—*Lane's Appeal*, 105 Pa. 49, 51 Am. Rep. 166.

[a] **Rule Stated.**—“When insolvency and exhaustion of assets exist, the unpaid capital is not available to any one creditor in satisfaction of his debt, because then the whole amount of the unpaid capital is a trust fund which does not belong to the corporation, but to the whole body of its creditors. Hence, whether the proceeding originates in the name of one, or of several, or of all the creditors, the result is the same in each. The capital, when recovered, enures to the benefit of all, and must be distributed among all ratably. Before any recovery can be had in such proceedings, no matter of what particular form, there must be an assessment made by a competent authority. The necessity for an



clearly appears that the entire amount of the stockholder's indebtedness will be required to satisfy the liabilities of the corporation.<sup>38</sup> Where an assessment is necessary, a court of equity will require the making of a call by directors,<sup>39</sup> or the assessment may be levied by the court in which the affairs of the insolvent corporation are being settled,<sup>40</sup> either upon a petition by the receiver in the insolvency proceeding,<sup>41</sup> or in an independent suit.<sup>42</sup> The corporation is a necessary party to the suit.<sup>43</sup> Where the affairs of an insolvent corporation are being liquidated, no notice of the assessment proceedings need be given the stockholders,<sup>44</sup> and personal defenses which they may have will not be passed upon.<sup>45</sup> Since stockholders are represented by the corporation in such proceedings an assessment when levied is binding upon all stockholders as far as the question of the necessity for the assessment and its amount is concerned,<sup>46</sup> as well as the legal right

assessment arises from the consideration that only so much of the unpaid capital can be called in as is required for the payment of the unsatisfied debts. If the whole unpaid capital is not required the whole cannot be called. In order to ascertain how much is required there must be an account of debts, assets, and unpaid capital taken, and then a decree for an assessment of the amount due by each stockholder." *Lane's Appeal*, 105 Pa. 49, 65, 51 Am. Rep. 166.

38. *Potts v. Wallace*, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. ed. 1135; *Tiger Shoe Mfg. Co.'s Trustee v. Shanklin*, 125 Ky. 715, 102 S. W. 295, 31 L. R. A. (N. S.) 365.

39. *Germantown Passenger Ry. Co. v. Fittler*, 60 Pa. 124, 100 Am. Dec. 546.

40. *Rosoff v. Gilbert Transportation Co.*, 221 Fed. 972.

41. See *Wolcott v. Waldstein*, 86 N. J. Eq. 63, 97 Atl. 951.

42. *Wolcott v. Waldstein*, 86 N. J. Eq. 63, 97 Atl. 951.

43. *McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375.

44. *Spargo v. Converse*, 191 Fed. 823, 112 C. C. A. 337; *Irvine v. Baker*, 225 Fed. 834; *Rosoff v. Gilbert Transportation Co.*, 221 Fed. 972.

45. *In re Monarch Corporation*, 203 Fed. 664, 122 C. C. A. 60; *In re Munger Vehicle Tire Co.*, 163 Fed. 910, 94 C. C. A. 314; *Rosoff v. Gilbert Transportation Co.*, 221 Fed. 972.

46. U. S.—*Selig v. Hamilton*, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. ed. 1518,

*Ann. Cas.* 1917A, 104; *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. ed. 986; *Hale v. Hardon*, 95 Fed. 747, 37 C. C. A. 240; *Mottinger v. Hendricks*, 208 Fed. 824; *Irvine v. Elliott*, 203 Fed. 82, applying the statute law of Ohio. Ala.—*Semple v. Glenn*, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894. Del.—*John W. Cooney Co. v. Arlington Hotel Co.* (Del. Ch.), 101 Atl. 879. Ky.—*Calloway v. Glenn*, 105 Ky. 648, 49 S. W. 440. Md.—*Castleman v. Templeman*, 87 Md. 546, 40 Atl. 275, 67 Am. St. Rep. 363, 41 L. R. A. 367. Mass.—*Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301. Mich.—*Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 66 N. W. 1095, 62 Am. St. Rep. 693, 34 L. R. A. 694. Minn.—*Swing v. Red River Lumb. Co.*, 105 Minn. 336, 117 N. W. 442. N. J.—*McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375; *Gilson v. Appleby*, 79 N. J. Eq. 590, 81 Atl. 925; *Cumberland Lumb. Co. v. Clinton Hill Lumb. Mfg. Co.*, 57 N. J. Eq. 627, 42 Atl. 585. N. Y.—*Shipman v. Treadwell*, 208 N. Y. 404, 102 N. E. 634. Ohio.—*Swing v. Rose*, 75 Ohio St. 355, 79 N. E. 757. Pa.—*Kramer v. Hamsher*, 63 Pa. Super. 211. Tex.—*Rich v. Park* (Tex. Civ. App.), 177 S. W. 184. Vt.—*King v. Cochran*, 76 Vt. 141, 56 Atl. 667, 104 Am. St. Rep. 922. Wis.—*Parker v. Stoughton Mill Co.*, 91 Wis. 174, 64 N. W. 751, 51 Am. St. Rep. 881.

[a] Irregularities which do not constitute jurisdictional defects are not available to stockholders. *Irvine v. Baker*, 225 Fed. 834, applying the law of Ohio.

and authority to make it,<sup>47</sup> even though they are non-residents.<sup>48</sup> But in an action to enforce the assessment they may set up any defenses personal to themselves.<sup>49</sup> Such proceedings must be instituted in the courts of the domicile of the corporation.<sup>50</sup> If the stockholder appears, his liability, when ascertained, may be enforced in the same suit;<sup>51</sup> if he is not served and does not appear, the liability will be enforced in an ancillary suit.<sup>52</sup>

In a few states, statutes exist which regulate the procedure for the levying of an assessment.<sup>53</sup>

An assessment by a receiver or a designated state or by a federal officer, upon the stockholders of an insolvent bank, is sometimes authorized by statute.<sup>54</sup>

47. *Converse v. Ayer*, 197 Mass. 443, 84 N. E. 98.

48. *Ala.*—*Semple v. Glenn*, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894. *N. J.*—*McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375. *W. Va.*—*Swing v. Taylor*, 68 W. Va. 621, 70 S. E. 373.

49. *U. S.*—*Selig v. Hamilton*, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. ed. 1518, Ann. Cas. 1917A, 104; *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. ed. 749, Ann. Cas. 1913D, 1292; *Nottinger v. Hendricks*, 208 Fed. 824; *Irvine v. Elliott*, 203 Fed. 82. *Del.* *John W. Cooney Co. v. Arlington Hotel Co. (Del. Ch.)*, 101 Atl. 879. *Mich.* *Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 66 N. W. 1095, 62 Am. St. Rep. 693, 34 L. R. A. 694. *Minn.*—*Swing v. Red River Lumb. Co.*, 105 Minn. 336, 117 N. W. 442. *Neb.*—*Com. Mut. Fire Ins. Co. v. Hayden*, 60 Neb. 636, 83 N. W. 922, 83 Am. St. Rep. 545, *reversed*, 61 Neb. 454, 85 N. W. 443. *N. J.*—*McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375; *Gilson v. Appleby*, 79 N. J. Eq. 590, 81 Atl. 925. *Tex.*—*Rich v. Park (Tex. Civ. App.)*, 177 S. W. 184.

50. *N. J.*—*McDermott v. Woodhouse*, 87 N. J. Eq. 615, 101 Atl. 375. *Wash.*—*Pacific Coast Coal Co. v. Esary*, 85 Wash. 448, 148 Pac. 579. *Wyo.* *McLaughlin v. O'Neill*, 7 Wyo. 187, 51 Pac. 243.

51. *Irvine v. Baker*, 225 Fed. 834, applying the law of Ohio.

52. *Irvine v. Baker*, 225 Fed. 834, applying the law of Ohio.

53. See the statutes and *Hamilton v. Simon*, 178 Fed. 130, construing the Minnesota statute.

[a] A preliminary order fixing the amount of the assessment may be ob-

tained by a receiver under some statutes. *Straw & E. Mfg. Co. v. L. D. Kilbourne B. & S. Co.*, 80 Minn. 125, 83 N. W. 36.

[b] Notice to the stockholder of the proceedings may be given by publication. *Hale v. Calder*, 113 Fed. 670.

[c] Such Proceedings Are Summary and Informal.—(1) *Finch v. Le Sueur County Co-Op. C. Co.*, 132 Minn. 9, 155 N. W. 754. (2) Stockholders are not entitled to a jury trial. *Finch Van S. & M. v. Le Sueur County Co-Op. C. Co.*, 132 Minn. 9, 155 N. W. 754. (3) Evidence may be received by affidavit or otherwise. *Finch, Van S. & M. v. Le Sueur County Co-Op. C. Co.*, 132 Minn. 9, 155 N. W. 754.

[d] The order is binding upon all stockholders, (1) present or absent resident and non-resident. *Converse v. Spargo*, 184 Fed. 324 (construing the law of Minnesota); *Straw & E. Mfg. Co. v. L. D. Kilbourne B. & S. Co.*, 80 Minn. 125, 83 N. W. 36. (2) It is conclusive as to the insolvency of the corporation and the amount of the assessment (*Finch, Van S. & N. v. Le Sueur County Co-Op. C. Co.*, 132 Minn. 9, 155 N. W. 754), but (3) not as to other matters. *Finch, Van S. & M. v. Le Sueur County Co-Op. C. Co.*, 132 Minn. 9, 155 N. W. 754; *Straw & E. Mfg. Co. v. L. D. Kilbourne B. & S. Co.*, 80 Minn. 125, 83 N. W. 36.

54. *Ark.*—*Davis v. Branch*, 133 Ark. 417, 202 S. W. 705. *Cal.*—See *Williams v. Carver*, 171 Cal. 658, 154 Pac. 472. *Colo.*—*Kipp v. Miller*, 47 Colo. 598, 108 Pac. 164, 135 Am. St. Rep. 236. *Ia.* *Elson v. Wright*, 134 Iowa 634, 112 N. W. 105. *Mass.*—*Com. v. President, etc. of Cochituate Bk.*, 3 Allen 42. *Neb.* *German Nat. Bank v. Farmers' & Merchants' Bank*, 54 Neb. 593, 74 N.

## G. LIABILITY FOR CORPORATE ASSETS RECEIVED UPON DISTRIBUTION.

**1. In General.**—A creditor may maintain an action to recover from a stockholder assets of the corporation distributed by it while insolvent and before the claims of corporate creditors had been settled.<sup>55</sup> In some states the right to maintain such an action vests in a receiver of the corporate property and assets.<sup>56</sup> All the stockholders need not be made parties to the action,<sup>57</sup> though several stockholders may properly be joined in one action.<sup>58</sup> The corporation or its representative is a necessary party to the action.<sup>59</sup>

**2. Previous Judgment Against Corporation.**—Before the action can be maintained it is necessary for a judgment against the corporation to have been obtained and execution returned unsatisfied,<sup>60</sup> unless the fact of insolvency of the corporation or its dissolution clearly appears. The judgment rendered against the corporation is conclusive as to the validity and amount of the creditor's claim.<sup>61</sup>

**H. LIABILITY AS PARTNERS.**—The associates of a business which for some legal reason fails or ceases to become or remain a corporation may be liable to its creditors as partners,<sup>62</sup> and a creditor who has

W. 1086. **Ohio.**—*Zieverink v. Kemper*, 50 Ohio St. 208, 34 N. E. 250. **Wash.** *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113.

[a] **The comptroller of the currency** levies the assessment upon stockholders of national banks. *Christopher v. Norvell*, 201 U. S. 216, 26 Sup. Ct. 502, 50 L. ed. 732, 5 Ann. Cas. 740.

**55.** *Jahn v. Champagne Lumber Co.*, 157 Fed. 407; *Leighton v. Leighton Lea Assn.*, 122 N. Y. Supp. 139.

[a] **Recovery of dividends paid out of capital**, see note, L. R. A. 1917C, 397.

**56.** *Weil v. Defenbach*, 31 Idaho 258, 170 Pac. 103.

**57.** *Kimbrough v. Davies*, 104 Miss. 722, 61 So. 697; *Bartlett v. Drew*, 57 N. Y. 587.

[a] **Where a corporation improperly purchases back its own stock** all the stockholders selling the stock may be joined, in an action by the creditor. *First Nat. Bank v. Pearson*, 109 Miss. 638, 68 So. 921.

**58.** *Carlisle v. Ottley*, 143 Ga. 797, 85 S. E. 1010, Ann. Cas. 1917A, 573, L. R. A. 1917C, 393, the action may be maintained at the county of the residence of any defendant.

**59.** *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. ed. 577.

**60. U. S.**—*Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. ed. 577. **Ga.**—*Lamar v. Al-*

*lison*, 101 Ga. 270, 28 S. E. 686. **Ky.** *Hanger v. Apperson*, 168 Ky. 609, 182 S. W. 831. **Neb.**—*Wehn v. Fall*, 55 Neb. 547, 76 N. W. 13, 70 Am. St. Rep. 397.

[a] "A creditor of an insolvent corporation does not acquire any specific lien on its assets, and no sufficient reason is perceived for holding that he may proceed against one having possession of such assets without first reducing his claim to judgment. The reason for the rule which requires the creditors of an insolvent individual to obtain judgment on their claims before attempting to reach property transferred by him in fraud of their rights seems to be entirely applicable where the debtor is an insolvent corporation against which a suit may be maintained." *Wehn v. Fall*, 55 Neb. 547, 553, 76 N. W. 13, 70 Am. St. Rep. 397.

[b] **The fact that there are no corporate assets within the state** is insufficient to dispense with the necessity of obtaining judgment when it also appears that there are assets without the state. *Hanger v. Apperson*, 168 Ky. 609, 182 S. W. 831. See *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. ed. 577.

**61.** *Champagne Lumb. Co. v. Jahn*, 168 Fed. 510, 93 C. C. A. 532; *Montgomery v. Whitehead*, 40 Colo. 320, 90 Pac. 509, 11 L. R. A. (N. S.) 230.

**62. Ark.**—*Garnett v. Richardson*, 35



dealt with a corporation as such and extended it credit is not estopped from afterwards asserting that the stockholders are liable as partners.<sup>63</sup> An agreement to pay any indebtedness that may become due incident to the incorporation and organization of a business creates a joint and several liability to enforce which an action at law is the appropriate remedy.<sup>64</sup>

I. LIABILITY OF SOLE STOCKHOLDERS. — Where the entire stock of a corporation is in the ownership of a single stockholder, a court of equity will, where there is no remedy at law or where the legal remedy is inadequate, take jurisdiction to enforce and protect the rights of creditors.<sup>65</sup>

Ark. 144. **Mo.**—*Hyatt v. Van Riper*, 105 Mo. App. 664, 78 S. W. 1043. **Tenn.** *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 28 S. W. 668, 45 Am. St. Rep. 700, 26 L. R. A. 509.

Proceedings against partners, see the title "Partnership."

63. **Fla.**—*Charles v. Young*, 76 So. 869. **Ia.**—*Heuer v. Carmichael*, 82 Iowa 288, 47 N. W. 1034. **Ky.**—*Kruse v. Humpert*, 21 Ky. L. Rep. 985, 53 S. W. 657. **Tenn.**—See *Tennessee Automatic Lighting Co. v. Massey*, 56 S. W. 35.

64. *Robinson v. Nashville Center Co.-Op. Creamery Assn.*, 115 Minn. 43, 131 N. W. 856.

65. *Quaid v. Ratkowsky*, 183 App. Div. 428, 170 N. Y. Supp. 812.

[a] Where the sole stockholder orally guaranteed a mortgage of the corporation, equity would take jurisdiction of an action by the judgment creditor against him, there being no remedy at law because he did not sign the mortgage and because of the statute of frauds. *Quaid v. Ratkowsky*, 183 App. Div. 428, 170 N. Y. Supp. 812.

## STOCK LAWS. — See Railroads.

# STREET RAILROADS

By the Editorial Staff.

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## CROSS-REFERENCES:

Corporations;	Municipal Corporations;
Death by Wrongful Act;	Negligence;
Eminent Domain;	Notice;
Highways, Streets and Bridges;	Passengers;
Injuries to Persons and Property;	Public Service Corporations;
Master and Servant;	Railroads.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. LOCATION AND CONSTRUCTION.**—The procedure to be followed in obtaining the right to locate and construct a street railroad system is governed by the statutes of the various states.<sup>1</sup> Such matters are now, in many states, within the jurisdiction of public service commissions.<sup>2</sup> Location or construction of the system in accordance with the requirements of existing laws will be enforced by mandamus,<sup>3</sup> or by a suit in equity.<sup>4</sup> Contracts with a municipality in regard to the manner of construction will be enforced,<sup>5</sup> or damages awarded for their breach.<sup>6</sup> Interference with the lawful construction of a street railway will be enjoined.<sup>7</sup>

1. See the statutes.

2. See the title, "**Public Service Corporations**," and New York Cent. & H. R. R. Co. v. Auburn Interurban Elec. R. Co., 178 N. Y. 75, 70 N. E. 117; Syracuse L. S. & N. R. Co. v. Carrier, 149 App. Div. 411, 134 N. Y. Supp. 791.

[a] **Special commissions** are appointed by the courts in some states to determine the public necessity for the construction of a proposed street railroad. See *In re* Thirty-Fourth St. R. Co., 102 N. Y. 343, 7 N. E. 172; Matter of Kings County Elev. R. Co., 82 N. Y. 95; Matter of Public Service Commission, 159 App. Div. 306, 144 N. Y. Supp. 228.

[b] **Decisions of the commission** are reviewable by the courts. New York N. H. & H. R. Co. v. Stevens, 81 Conn. 16, 69 Atl. 1052; Paine v. Newton St. R. Co., 192 Mass. 90, 77 N. E. 1026, on questions of law. And see the title, "**Public Service Corporations**."

3. **Ala.**—State *ex rel.* Gadsden v. Alabama etc. R. Co., 172 Ala. 125, 55 So. 176, Ann. Cas. 1913D, 696. **Conn.** Hartford v. Hartford St. Ry. Co., 73 Conn. 327, 47 Atl. 330. **Mich.**—Detroit v. Ft. Wayne & E. Ry. Co., 90 Mich. 646, 51 N. W. 688. **Minn.**—State *ex rel.* St. Paul v. St. Paul City R. Co., 117 Minn. 316, 135 N. W. 976, Ann. Cas. 1913D, 139. **N. J.**—Wilbur v. Trenton Pass. R. Co., 57 N. J. L. 212, 31 Atl. 238. **Wis.**—State *ex rel.* Wis. Tel. Co. v. Janesville St. Ry. Co., 87 Wis. 72, 57 N. W. 970, 41 Am. St. Rep. 23, 22 L. R. A. 759.

4. Gardner v. Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340.

5. Chester & D. T. R. Co. v. Chester D. & P. R. Co., 217 Pa. 272, 66 Atl. 358.

6. Montooth v. Brownsville Ave. St. R. Co., 206 Pa. 338, 55 Atl. 1036.

7. Tarrytown, W. P. & M. Ry. Co. v. New York W. & C. Tr. Co., 47 App. Div. 642, 62 N. Y. Supp. 418.



**II. REGULATION AND CONTROL.**—A street railway company like other public service corporations, is subject to regulation and control by the legally constituted public authorities.<sup>8</sup> The performance of its public duties may be enforced by mandamus.<sup>9</sup> The extension of existing lines may also be compelled by mandamus where the legal duty to make the extension rests upon the company.<sup>10</sup>

**III. RAILROAD CROSSINGS.**—The crossing in a public street of a steam railroad or of another street railroad by a street railroad will not ordinarily be enjoined.<sup>11</sup> The determination of the place and mode of such crossings is a matter sometimes placed by statute within the jurisdiction of particular courts,<sup>12</sup> or of the various public service commissions.<sup>13</sup>

**IV. RIGHTS OF ABUTTING PROPERTY OWNERS.**—In some states, an abutting property owner may enjoin the unauthorized construction of a street railway upon a public street or highway,<sup>14</sup> or its construction in an unlawful manner;<sup>15</sup> in other states this remedy is

8. See generally the title, "Public Service Corporations."

9. *Potwin Place v. Topeka Ry. Co.*, 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312; *State v. Spokane St. Ry. Co.*, 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515. And see the titles, "Mandamus;" "Public Service Corporations;" "Railroads."

[a] The giving of transfers may be required. *Richmond R. & Elec. Co. v. Brown*, 97 Va. 26, 32 S. E. 775. But see *Newark v. North Jersey St. R. Co.*, 73 N. J. L. 265, 62 Atl. 1003; *People ex rel. Lehmaier v. Interurban St. R. Co.*, 177 N. Y. 296, 69 N. E. 596.

[b] The duty to pave and repair streets (1) may be enforced by mandamus. *State v. Jacksonville St. R. Co.*, 29 Fla. 590, 10 So. 590; *State v. New Orleans, C. & L. R. Co.*, 42 La. Ann. 550, 7 So. 606. (2) If the railway is powerless to do the act because of lack of funds, mandamus will not issue. *Benton Harbor v. St. Joseph & B. H. St. Ry. Co.*, 102 Mich. 386, 60 N. W. 758, 47 Am. St. Rep. 553, 26 L. R. A. 245.

10. *State ex rel. St. Paul v. St. Paul City R. Co.*, 122 Minn. 163, 142 N. W. 136.

11. *Ga.*—*Southern R. Co. v. Atlanta Ry. & P. Co.*, 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125. *Ind.*—*Pittsburgh, C. C. & St. L. R. Co. v. Muncie & P. T. Co.*, 174 Ind. 167, 91 N. E. 600; *South East & St. L. R. Co. v. Evansville & M. V. E. R. Co.*, 169 Ind. 339, 82 N. E. 765, 13 L. R. A. (N. S.) 916.

*Ky.*—*Louisville & N. R. Co. v. Bowling Green R. Co.*, 110 Ky. 788, 63 S. W. 4. *N. Y.*—*Brooklyn Central & J. R. Co. v. Brooklyn City R. Co.*, 33 Barb. 426.

12. *In re Atlantic Highlands, R. B. & L. B. Elec. R. Co.* (N. J. Eq.), 35 Atl. 387.

13. *Ill.*—*Chicago, P. & St. L. R. Co. v. Jacksonville R. & L. Co.*, 245 Ill. 155, 91 N. E. 1024. *Kan.*—*State v. Parsons St. R. & E. Co.*, 81 Kan. 430, 105 Pac. 704, 28 L. R. A. (N. S.) 1082. *Mich.*—*Jackson & S. Tr. Co. v. Railroad Commrs.*, 128 Mich. 164, 87 N. W. 133. *N. Y.*—*Olean St. Ry. Co. v. Pennsylvania R. Co.*, 75 App. Div. 412, 78 N. Y. Supp. 113. *Tex.*—*Galveston H. & S. A. R. Co. v. Houston Elec. Co.*, 57 Tex. Civ. App. 170, 122 S. W. 287. *Va.*—*Newport News & O. P. R. & E. Co. v. Hampton Roads etc. R. Co.*, 102 Va. 847, 47 S. E. 858.

See 21 STANDARD PROC. 909, note 7.

14. *N. Y.*—*Webb v. Forty-Second St. M. & St. N. A. R. Co.*, 52 Misc. 46, 102 N. Y. Supp. 762. *Pa.*—*Mory v. Oley Valley Ry. Co.*, 199 Pa. 152, 48 Atl. 971. *Wash.*—*Schwede v. Hemrich Bros. Brew. Co.*, 29 Wash. 21, 69 Pac. 362.

See 11 STANDARD PROC. 174, et seq.

15. *Cal.*—*City Store v. San Jose Los Gatos Interurban R. Co.*, 150 Cal. 277, 88 Pac. 977. *Kan.*—*Longnecker v. Wichita R. & L. Co.*, 88 Kan. 413, 102 Pac. 492. *N. Y.*—*Hanning v. Hudson Valley R. Co.*, 90 App. Div. 492, 85 N. Y. Supp. 1111. *Wis.*—*Younkin v. Milwaukee L. H. & T. Co.*, 120 Wis. 477, 98 N. W. 215.

denied.<sup>16</sup> The authorized construction of a street railway cannot, however, be enjoined even by an abutting property owner who suffers special injury and is entitled to recover compensation therefor.<sup>17</sup> For special injuries suffered by reason of the construction, operation or maintenance of a street railway an action for damages may be maintained.<sup>18</sup>

**V. ACTIONS FOR INJURIES FROM OPERATION.**—**A. IN GENERAL.**—Actions to recover for injuries due to the operation or maintenance of street railroads are governed by the general rules applicable to other essentially similar actions,<sup>19</sup> and in particular those arising out of the operation of railroads generally.<sup>20</sup>

**B. CONDITIONS PRECEDENT.**—Notice of the injury received and a demand or claim for reparation, must, under some statutes, be made upon a street railway company before the person injured is entitled to maintain an action for relief.<sup>21</sup>

**C. PLEADINGS.**—**1. Complaint.**—**a. In General.**—The complaint in actions for injuries arising out of the operation of street railroads must be framed in accordance with the rules governing other substantially similar actions.<sup>22</sup> Injuries to passengers<sup>23</sup> and employees<sup>24</sup> are treated elsewhere in this work. The discussion here is

[a] If the railroad is already constructed its operation will not be enjoined, but an action for damages may be maintained. *Pennsylvania Ry. Co. v. Montgomery County Pass. R. Co.*, 167 Pa. 62, 31 Atl. 468, 46 Am. St. Rep. 659, 27 L. R. A. 766.

16. *Doane v. Lake St. Elev. R. Co.*, 165 Ill. 510, 46 N. E. 520, 56 Am. St. Rep. 265, 36 L. R. A. 97; *Budd v. Camden Horse R. Co.*, 61 N. J. Eq. 543, 48 Atl. 1028, *affirmed*, 63 N. J. Eq. 804, 52 Atl. 1130.

17. *State v. Parsons St. R. & E. Co.*, 81 Kan. 430, 105 Pac. 704, 28 L. R. A. (N. S.) 1082; *Mangan v. Texas Transportation Co.*, 18 Tex. Civ. App. 478, 44 S. W. 998.

Action for damages for unlawful obstruction of highway, see 11 STANDARD PROC. 187.

18. *Ala.*—*Birmingham Ry. L. & P. Co. v. Long*, 7 Ala. App. 567, 61 So. 11. *Cal.*—*Reynolds v. Presidio & F. R. Co.*, 1 Cal. App. 229, 81 Pac. 1118. *Ill.* *Gibbons v. Southern Illinois Ry. & P. Co.*, 199 Ill. App. 154. *Miss.*—*Rosenbaum v. Meridian L. & Ry. Co.*, 38 So. 321.

19. See the titles "Injuries to Persons and Property;" "Master and Servant;" "Negligence."

Actions for injuries to passengers, see the title "Passengers."

20. See the titles "Freight Carriers;" "Passengers;" "Railroads."

21. See the statutes, and the following cases: *Coburn v. Connecticut Co.*, 84 Conn. 654, 81 Atl. 241; *Peck v. Fair Haven etc. R. Co.*, 77 Conn. 161, 58 Atl. 757; *Shalley v. Danbury etc. Ry. Co.*, 64 Conn. 381, 30 Atl. 135; *McMahon v. Lynn & B. R. Co.*, 191 Mass. 295, 77 N. E. 826; *Dobbins v. West End St. Ry. Co.*, 168 Mass. 556, 47 N. E. 428.

Notice as a condition precedent, see generally the title "Suits and Actions;" in actions against public corporations, see 11 STANDARD PROC. 199, 274; 20 STANDARD PROC. 92; in actions against railroads, see 22 STANDARD PROC. 177.

[a] Sufficiency of the Notice.—The notice given is sufficient if it conveys information as to the nature of the injuries received and the manner in which they were inflicted. *Delaney v. Waterbury & Milldale Tramway Co.*, 91 Conn. 177, 99 Atl. 503.

22. See the title "Railroads" and also the titles "Injuries to Persons and Property;" "Negligence."

23. See the title "Passengers."

24. See the title "Master and Servant," and also the title "Workmen's Compensation Act."

confined to actions for injuries to other persons or property. In such an action the facts alleged must show the right of the person to be at the place where he was injured, if negligence is the gist of the action,<sup>25</sup> the legal duty imposed upon the railway company under the circumstances,<sup>26</sup> the manner in which the defendant failed in the performance of that duty,<sup>27</sup> and that the injury was proximately caused by the breach of duty charged.<sup>28</sup> The facts should be alleged clearly and with certainty,<sup>29</sup> and legal conclusions must be avoided.<sup>30</sup> When the act causing the injury is alleged to have been that of a person other than the defendant railway company, it must appear that he was the company's servant or agent and acting within the scope of his employment.<sup>31</sup> Where the violation of a statute or ordinance is relied on the necessity for pleading it is governed by general rules elsewhere treated.<sup>32</sup>

25. *Ala.*—Birmingham Ry. L. & P. Co. v. Nicholas, 181 Ala. 491, 61 So. 361; Bessierre v. Alabama City G. & A. R. Co., 179 Ala. 317, 60 So. 82; Birmingham Ry. L. & P. Co. v. Fox, 174 Ala. 657, 56 So. 1013. *Ill.*—Riordan v. Chicago City Ry. Co., 178 Ill. App. 323. *Ind.*—Public Utilities Co. v. Handorf, 185 Ind. 254, 112 N. E. 775.

See 22 STANDARD PROC. 225.

[a] Where the person injured is alleged to have been on a public street it need not be further alleged what he was doing there at the time of injury. Birmingham Ry. L. & P. Co. v. Fox, 174 Ala. 657, 56 So. 1013.

Injury to licensees or trespassers, see 22 STANDARD PROC. 225; 13 STANDARD PROC. 356.

26. *Ala.*—Birmingham, E. & B. R. Co. v. Stagg, 196 Ala. 612, 72 So. 164; Mobile L. & R. Co. v. Portiss, 195 Ala. 320, 70 So. 136; Birmingham, E. & B. R. Co. v. Feast, 192 Ala. 410, 68 So. 294; Birmingham Ry. L. & P. Co. v. Ely, 183 Ala. 382, 62 So. 816. *D. C.*—Washington-Virginia Ry. Co. v. Himelright, 42 App. Cas. 532. *Ind.*—Indiana Union Tr. Co. v. Cauldwell, 59 Ind. App. 513, 107 N. E. 705. *Miss.*—Smith v. Gulfport & M. C. Tr. Co., 95 Miss. 190, 48 So. 295.

27. Washington-Virginia Ry. Co. v. Himelright, 42 App. Cas. (D. C.) 532; Evansville & S. I. Tr. Co. v. Williams, 183 Ind. 633, 109 N. E. 963.

Pleading negligence, see *infra*, V, C, 1, b.

28. *Ala.*—Birmingham, E. & B. R. Co. v. Stagg, 196 Ala. 612, 72 So. 164. *Colo.*—Philbin v. Denver City Tramway Co., 36 Colo. 331, 85 Pac. 630. *Ind.*

Indiana Union Tr. Co. v. Love, 180 Ind. 442, 99 N. E. 1005; Evansville & S. Tr. Co. v. Montgomery, 50 Ind. App. 528, 98 N. E. 731; Evansville & S. I. Tr. Co. v. Spiegel, 49 Ind. App. 412, 94 N. E. 718, 97 N. E. 949.

29. Birmingham Ry. L. & P. Co. v. Nicholas, 181 Ala. 491, 61 So. 361. See generally the titles "Certainty in Pleading;" "Declaration and Complaint."

[a] Alternative allegations should be avoided. Birmingham Ry. L. & P. Co. v. Nicholas, 181 Ala. 491, 61 So. 361.

[b] Averments by way of recital are insufficient. Evansville Elec. Ry. Co. v. Folz, 47 Ind. App. 58, 93 N. E. 866.

[c] Without Repugnancy. — Anniston Elec. & G. Co. v. Rosen, 159 Ala. 195, 48 So. 798, 133 Am. St. Rep. 32; Drolshagen v. Union Depot R. Co., 186 Mo. 258, 85 S. W. 344. See the title "Repugnancy."

30. Indiana Union Tr. Co. v. Love, 180 Ind. 442, 99 N. E. 1005. See the title "Conclusions of Law."

31. *Ind.*—Louisville & S. Ind. T. Co. v. Montgomery, 115 N. E. 673. *Mont.*—Flaherty v. Butte Elec. R. Co., 43 Mont. 141, 115 Pac. 40. *N. Y.*—Shea v. Sixth Ave. R. Co., 62 N. Y. 180, 20 Am. Rep. 480.

See the titles "Master and Servant;" "Principal and Agent."

[a] Name of the servant or agent need not be alleged. Anniston Elec. & G. Co. v. Rosen, 159 Ala. 195, 48 So. 798, 133 Am. St. Rep. 32. See also 21 STANDARD PROC. 557, note 12 [a]; 19 STANDARD PROC. 560, note 89 [b].

32. See the title "Statutes," and



b. *Alleging Negligence.*—As elsewhere shown,<sup>33</sup> it is in most states sufficient to plead negligence generally, by stating the act and characterizing it as negligent without setting out the particulars.<sup>34</sup> Thus it may properly be averred generally that the injury was caused by the negligence of the defendant in the manner in which the track was maintained,<sup>35</sup> in the manner in which the car was operated,<sup>36</sup> in running a car upon or against the plaintiff,<sup>37</sup> by the derailment of a car,<sup>38</sup> in failing to give warning signals of the approach of a car to a public crossing,<sup>39</sup> in starting a car while plaintiff was in a position of peril,<sup>40</sup> in failing to exercise proper care to avoid injuring plaintiff after discovery of his danger,<sup>41</sup> in so operating a car as to frighten an animal.<sup>42</sup> Negligence may, however, be alleged specifically, though

20 STANDARD PROC. 210; 22 STANDARD PROC. 193.

33. See the title "Negligence."

34. Ala.—Birmingham, E. & B. R. Co. v. Stagg, 196 Ala. 612, 72 So. 164; Birmingham Ry. L. & P. Co. v. Fox, 174 Ala. 657, 56 So. 1013. Cal.—Stein v. United Railroads of San Francisco, 159 Cal. 368, 113 Pac. 663. Ind.—Indianapolis Union R. Co. v. Waddington, 169 Ind. 448, 82 N. E. 1030. Miss. Smith v. Gulfport & M. C. Tr. Co., 95 Miss. 190, 48 So. 295. Pa.—Gettings v. Mahoning & S. Ry. & L. Co., 238 Pa. 170, 86 Atl. 80.

35. Ala.—Birmingham, E. & B. R. Co. v. Stagg, 196 Ala. 612, 72 So. 164; Birmingham Ry. L. & P. Co. v. Donaldson, 14 Ala. App. 160, 58 So. 596. Ind.—Citizens' St. Ry. Co. v. Marvil, 161 Ind. 506, 67 N. E. 921. Tex.—San Antonio Tr. Co. v. Cassanova (Tex. Civ. App.), 154 S. W. 1190.

[a] Where negligence in maintaining the street near the tracks is charged, it must be averred that defendant knew or should have known of the alleged defect. Asmus v. United Rys. of St. Louis, 160 Mo. App. 616, 140 S. W. 933. Compare 22 STANDARD PROC. 191.

36. Norfolk & Portsmouth Tr. Co. v. Rephan, 188 Fed. 276, 110 C. C. A. 254; Birmingham Ry. L. & P. Co. v. Bush, 175 Ala. 49, 56 So. 731; Birmingham Ry. & Elec. Co. v. Baker, 132 Ala. 507, 31 So. 318.

37. Ala.—Birmingham Ry. L. & P. Co. v. Bason, 191 Ala. 618, 68 So. 49; Birmingham Ry. L. & P. Co. v. Ely, 183 Ala. 382, 62 So. 816; Birmingham Ry. L. & P. Co. v. Norton, 7 Ala. App. 571, 61 So. 459. Ga.—Coward v. Savannah Elec. R. Co., 5 Ga. App. 664, 63 S. E. 804. Ill.—Chicago City Ry.

Co. v. Jennings, 157 Ill. 274, 41 N. E. 629. Ind.—Citizens' St. Ry. Co. v. Lowe, 12 Ind. App. 47, 39 N. E. 165.

[a] That a car could have been stopped, in the exercise of reasonable care, before striking plaintiff, without injury to the passengers need not be alleged. Wagner v. Metropolitan St. Ry. Co., 160 Mo. App. 334, 142 S. W. 463.

38. Kalver v. Metropolitan St. Ry. Co., 166 Mo. App. 198, 148 S. W. 130.

39. Indiana Union Tr. Co. v. Downey, 177 Ind. 599, 98 N. E. 634.

40. Piper v. Pueblo City Ry. Co., 4 Colo. App. 424, 36 Pac. 158; Louisville & S. Ind. T. Co. v. Montgomery (Ind.), 115 N. E. 673, allegation that motor-man "might" have discovered plaintiff's peril is equivalent to an allegation that he "could" or "should" have discovered it.

41. Ind.—Meyers v. Winona Interurban R. Co., 58 Ind. App. 516, 106 N. E. 377; Evansville & S. I. Tr. Co. v. Johnson, 54 Ind. App. 601, 97 N. E. 176. Ia.—Hutchinson Purity Ice Cream Co. v. Des Moines City Ry. Co., 172 Iowa 527, 154 N. W. 890. Ore.—Cerrano v. Portland Ry. L. & P. Co., 62 Ore. 421, 126 Pac. 37. Tex.—Galveston Elec. Co. v. Antonini (Tex. Civ. App.), 152 S. W. 841.

See 22 STANDARD PROC. 196.

42. Evansville & S. Tr. Co. v. Montgomery, 50 Ind. App. 528, 98 N. E. 731; Ft. Wayne & Wabash Valley Tr. Co. v. Miller, 48 Ind. App. 633, 96 N. E. 496 (after discovery of the danger which was threatened); Evansville Elec. Ry. Co. v. Folz, 47 Ind. App. 58, 93 N. E. 866; Citizens' St. Ry. Co. v. Damm, 25 Ind. App. 511, 58 N. E. 564; Ft. Scott Rapid Transit Ry. Co. v.

in such a case, the facts stated must be such as clearly establish that there was negligence on the part of the defendant.<sup>43</sup> Where contributory negligence appears from the statements of the complaint a cause of action may nevertheless be stated by additional allegations showing defendant's negligent failure to avail itself of the "last clear chance" to avoid the injury.<sup>44</sup>

c. *Contributory Negligence*.—As elsewhere shown,<sup>45</sup> want of contributory negligence need not be alleged by plaintiff in most states.<sup>46</sup>

d. *Wilful or Wanton Injury*.—Wilfulness or wantonness, where relied upon, must be made to appear from the complaint in accordance with the rules elsewhere stated.<sup>47</sup>

2. *Plea or Answer*.—The plea or answer in this class of cases follows the general rule elsewhere treated.<sup>48</sup> Contributory negligence is a matter of defense in most states, and must be pleaded specially;<sup>49</sup> it is no answer to a complaint charging wantonness or wilfulness on the part of the defendant,<sup>50</sup> or to a complaint based upon the doctrine of "last clear chance," unless it is also shown that plaintiff's negli-

Page, 10 Kan. App. 362, 59 Pac. 690. See 22 STANDARD PROC. 254.

43. *Merrill v. Sheffield Co.*, 169 Ala. 242, 53 So. 219; *Consumers' Elec. L. & St. R. Co. v. Pryor*, 44 Fla. 354, 32 So. 797. See the title "Negligence," and 22 STANDARD PROC. 186, et seq.

[a] Where several specific acts or omissions are alleged, a single averment of their negligent character is sufficient. *Averitt v. Metropolitan St. Ry. Co.*, 151 Mo. App. 265, 131 S. W. 752.

44. See *Delaney v. Waterbury & Mill-Dale Tramway Co.*, 91 Conn. 177, 99 Atl. 503, and 22 STANDARD PROC. 196.

45. See the title "Negligence."

46. *Ind.*—*Ft. Wayne & Wabash Valley Tr. Co. v. Miller*, 48 Ind. App. 633, 96 N. E. 496, since 1899. *Mo.*—*Wise v. St. Louis Transit Co.*, 198 Mo. 546, 95 S. W. 898. *Ohio.*—*Street R. R. v. Nolthenius*, 40 Ohio St. 376.

*Contra.*—*Riordan v. Chicago City Ry. Co.*, 178 Ill. App. 323.

47. See 13 STANDARD PROC. 354; 22 STANDARD PROC. 195; and also the following: *Ala.*—*Birmingham Ry. L. & P. Co. v. Nicholas*, 181 Ala. 491, 61 So. 361; *Birmingham R. L. & P. Co. v. Jaffee*, 154 Ala. 548, 45 So. 469. *Cal.*—*Taylor v. Pacific Electric R. Co.*, 172 Cal. 638, 158 Pac. 119. *Ind.*—*Ft. Wayne & Wabash Valley Tr. Co. v. Miller*, 48 Ind. App. 633, 96 N. E. 496.

[a] The particular acts constituting the willfulness or wantonness need not be set out. *Birmingham Ry. L. & P.*

*Co. v. Johnson*, 183 Ala. 352, 61 So. 79.

[b] *Duplicity*.—An allegation that an injury was wantonly and willfully inflicted is not bad for duplicity. *Birmingham Ry. L. & P. Co. v. Johnson*, 183 Ala. 352, 61 So. 79.

48. See 22 STANDARD PROC. 198; 20 STANDARD PROC. 316; 13 STANDARD PROC. 388; and the titles "Answers," "Confession and Avoidance," "Denials;" also titles dealing with particular kinds of pleas.

49. *Ala.*—*Birmingham Ry. L. & P. Co. v. Fox*, 174 Ala. 657, 56 So. 1013. *Ariz.*—*Warren Co. v. Whitt*, 19 Ariz. 104, 165 Pac. 1097. *Cal.*—*Starck v. Pacific Electric R. Co.*, 172 Cal. 277, 156 Pac. 51, L. R. A. 1916E, 58.

See 20 STANDARD PROC. 316.

[a] *Forms of answers pleading contributory negligence*, see *Benton v. Montgomery (Ala.)*, 75 So. 473; *Montgomery St. R. Co. v. Shanks*, 139 Ala. 489, 37 So. 166; *Southern Tr. Co. v. Wilson (Tex. Civ. App.)*, 187 S. W. 536; 20 STANDARD PROC. 318; 9 STANDARD PROC. 870.

[b] *If the facts alleged show negligence*, it need not be expressly averred that plaintiff acted negligently. *Birmingham Ry. L. & P. Co. v. Ayer*, 192 Ala. 593, 69 So. 56.

50. *Birmingham Ry. L. & P. Co. v. Bush*, 175 Ala. 49, 56 So. 731; *Highland Ave. & B. R. Co. v. Robbins*, 124 Ala. 113, 27 So. 422, 82 Am. St. Rep. 153; *Birmingham Ry. L. & P. Co. v. Demmins*, 3 Ala. App. 359, 57 So. 404.

gence continued after he became aware of his peril and until too late for defendant to avoid the injury.<sup>51</sup>

D. ISSUES AND PROOF.—Only such acts of negligence as are in issue under the pleadings can be relied upon for a recovery.<sup>52</sup> No evidence is admissible which is not relevant to the issues in the case.<sup>53</sup> It has been held that under the general issue the defendant's ownership and operation of the car causing the injury is not in issue.<sup>54</sup> Where the particulars of the alleged negligence are not specified, evidence of any specific act of negligence is admissible,<sup>55</sup> including negligence subsequent to plaintiff's contributory.<sup>56</sup> The proof must establish all the material allegations of the complaint.<sup>57</sup>

51. *Birmingham Ry., L. & P. Co. v. Aetna Acc. & L. Co.*, 184 Ala. 601, 64 So. 44; *Appel v. Selma St. & Suburban R. Co.*, 177 Ala. 457, 59 So. 164.

52. *Ind.*—*Fowler v. Ft. Wayne & Wabash Valley Tr. Co.*, 45 Ind. App. 441, 91 N. E. 47. *Mont.*—*Flaherty v. Butte Elec. R. Co.*, 40 Mont. 454, 107 Pac. 416, 135 Am. St. Rep. 630. *Tex.*—*Houston City St. R. Co. v. Farrell (Tex. Civ. App.)*, 27 S. W. 942.

See 20 STANDARD PROC. 319; 22 STANDARD PROC. 199.

[a] If specific acts of negligence are charged, there can be a recovery only upon proof of these specific acts. *Roscoe v. Metropolitan St. Ry. Co.*, 202 Mo. 576, 101 S. W. 32; *Redford v. Spokane St. Ry. Co.*, 9 Wash. 55, 36 Pac. 1085.

53. *Starck v. Pacific Electric R. Co.*, 172 Cal. 277, 156 Pac. 51, L. R. A. 1916E, 58; *Terre Haute Elec. Co. v. Roberts*, 174 Ind. 351, 91 N. E. 941.

[a] Where specific acts of negligence are charged evidence of other acts of negligence is inadmissible. *Coyle v. Third Ave. R. Co.*, 18 Misc. 9, 40 N. Y. Supp. 1131.

[b] Under an allegation that a car was improperly operated, failure to keep a lookout may be proved. *Ohio Valley Mills v. Louisville Ry. Co.*, 168 Ky. 758, 182 S. W. 955.

[c] An ordinance regulating the speed of cars is inadmissible to show negligence unless it is pleaded. *Putnam v. Detroit United Ry. Co.*, 164 Mich. 342, 129 N. W. 860. But see 20 STANDARD PROC. 210, et seq.

[d] Evidence that defendants' tracks had been constructed in the streets without authority is inadmissible unless want of authority is pleaded. *Huff v. St. Joseph Ry. L. H. & P. Co.*, 213 Mo. 495, 111 S. W. 1145.

54. *Brunhild v. Chicago Union Tr. Co.*, 239 Ill. 621, 88 N. E. 199; *Chicago Union Tr. Co. v. Jerka*, 227 Ill. 95, 81 N. E. 7.

55. *Ala.*—*Birmingham Ry. L. & P. Co. v. Bason*, 191 Ala. 618, 68 So. 49. *Ill.*—*Chicago General Ry. Co. v. Kriz*, 94 Ill. App. 277. *Mich.*—*Bush v. St. Joseph & B. H. St. R. Co.*, 113 Mich. 513, 71 N. W. 851.

See 20 STANDARD PROC. 319; 22 STANDARD PROC. 199, et seq.

56. *Ala.*—*Ross v. Brannon*, 73 So. 439; *Mobile Light & R. Co. v. Burch*, 12 Ala. App. 421, 68 So. 509. *Cal.*—*Langford v. San Diego Elec. R. Co.*, 174 Cal. 729, 164 Pac. 398. *Ind.*—*Indianapolis St. R. Co. v. Marschke*, 166 Ind. 490, 77 N. E. 945; *Union Tr. Co. v. Bowen*, 57 Ind. App. 661, 103 N. E. 1096. *Ia.*—*Powers v. Des Moines C. R. Co.*, 115 N. W. 494.

57. *Tierney v. Sampsell*, 172 Ill. App. 119; *Union Traction Co. v. Howard (Ind. App.)*, 87 N. E. 1103, 88 N. E. 967.

[a] Specific acts of negligence must be proved as pleaded. *Israel v. United Rys Co. of St. Louis*, 172 Mo. App. 656, 155 S. W. 1092. See 20 STANDARD PROC. 321.

[b] Where breach of a municipal ordinance is the basis of the action, the venue must be proved. *Foster v. East St. Louis & S. Ry. Co.*, 158 Ill. App. 478.

[c] All of several distinct and independent acts of negligence charged, need not be proved. *Waters v. Indianapolis Tr. & Ter. Co.*, 185 Ind. 526, 113 N. E. 289; *Indianapolis Tr. & Ter. Co. v. Springer*, 47 Ind. App. 35, 93 N. E. 707; *Ft. Worth & R. H. St. R. Co. v. Hawes*, 48 Tex. Civ. App. 487, 107 S. W. 556. See 20 STANDARD PROC. 321.

[d] If excessive speed in operating



E. **VARIANCE.**—The pleadings and proof must correspond in material particulars,<sup>58</sup> but immaterial variances will be harmless.<sup>59</sup>

F. **TRIAL.**—1. **Generally.**—The trial is governed by the rules applied in other similar cases.<sup>60</sup>

2. **Province of Judge and Jury.**<sup>61</sup>—a. *Negligence of Defendant.* (I.) **In General.**—If there is evidence reasonably tending to establish the negligence of defendant as charged in the complaint or from which reasonable minds might legitimately infer negligence, the question of defendant's negligence should be submitted to the jury;<sup>62</sup> but if the evidence is without conflict and warrants but one inference, the question of negligence is one of law for the judge.<sup>63</sup> The question as to

a car is the gravamen of the negligence charged the speed at which it is specifically charged that the car was being operated need not be proved. *Niehaus v. United Rys. Co. of St. Louis*, 165 Mo. App. 606, 148 S. W. 389. But see *Moore v. Metropolitan St. Ry. Co.* (Mo. App.), 180 S. W. 408.

58. *Birmingham R. L. & P. Co. v. Brown*, 152 Ala. 115, 44 So. 572; *Johnson v. Galesburg & K. Elec. Ry. Co.*, 193 Ill. App. 387. See *supra*, V, D, and the title "Variance and Failure of Proof."

59. **Ill.**—*Murphy v. Evanston Elec. R. Co.*, 235 Ill. 275, 85 N. E. 334; *Barker v. Danville Street Ry. & L. Co.*, 193 Ill. App. 639. **Mo.**—*Schafstette v. St. Louis & M. R. Co.*, 175 Mo. 142, 74 S. W. 826. **N. Y.**—*Roland v. International Ry. Co.*, 136 N. Y. Supp. 290. **Tex.**—*San Antonio Tr. Co. v. Court*, 31 Tex. Civ. App. 146, 71 S. W. 777.

60. See generally the titles "Railroads;" "Trial."

**Instructions**, see the titles "Instructions;" "Railroads;" and 13 **STANDARD PROC.** 394.

**Juries and jury trials**, see 16 **STANDARD PROC.** 836.

61. See generally the titles "Injuries to Persons and Property;" "Province of Judge and Jury;" "Railroads."

62. **U. S.**—*Norfolk & Portsmouth Tr. Co. v. Rephan*, 188 Fed. 276, 110 C. C. A. 254. **Ala.**—*Mobile Light & R. Co. v. Dooks*, 11 Ala. App. 595, 66 So. 824. **Ark.**—*Ward v. Ft. Smith L. & Tr. Co.*, 123 Ark. 648, 185 S. W. 1085. **Colo.**—*Denver City Tramway Co. v. Wright*, 47 Colo. 366, 107 Pac. 1074. **Ill.**—*Barker v. Danville St. Ry. & L. Co.*, 193 Ill. App. 639. **Ia.**—*Hutchinson Purity Ice Cream Co. v. Des Moines City Ry. Co.*, 172 Iowa 527, 154 N. W.

890. **Ky.**—*Louisville R. Co. v. Vessel's Admx.*, 159 Ky. 664, 167 S. W. 924. **La.**—*Boylan v. New Orleans Ry. & L. Co.*, 139 La. 185, 71 So. 360, Ann. Cas. 1918A, 287. **Mich.**—*Webster v. Detroit United Ry.*, 195 Mich. 660, 162 N. W. 275. **Miss.**—*Pascagoula St. Ry. & P. Co. v. McEachern*, 109 Miss. 380, 69 So. 185. **Mo.**—*Baldwin v. Harvey*, 191 Mo. App. 233, 177 S. W. 1087. **Neb.**—*De Noon v. Lincoln Tract Co.*, 97 Neb. 1, 149 N. W. 48. **Okla.**—*Chickasha St. R. Co. v. Marshall*, 43 Okla. 192, 141 Pac. 1172. **Tex.**—*San Antonio Tr. Co. v. Emerson* (Tex. Civ. App.), 152 S. W. 468.

See the titles "Negligence;" "Railroads."

[a] "In determining whether a plaintiff's proofs shows a prima facie cause of action, it is always necessary that they be construed as strongly in his favor as is reasonably possible." *McManigle v. Detroit United Ry.*, 193 Mich. 530, 160 N. W. 423.

[b] **Negligence in Injuring a Bicycle Rider.**—*South Chicago City Ry. Co. v. Kinnare*, 117 Ill. App. 1; *Rawitzer v. St. Paul City R. Co.*, 93 Minn. 84, 100 N. W. 664, 94 Minn. 494, 103 N. W. 499.

[c] **Negligence in Injuring a Child.** **Ill.**—*Devine v. Chicago City Ry. Co.*, 153 Ill. App. 382. **Mo.**—*Koenig v. Union Depot R. Co.*, 194 Mo. 564, 92 S. W. 497. **Ore.**—*Wallace v. Suburban Ry. Co.*, 26 Ore. 174, 37 Pac. 477, 25 L. R. A. 663. **Wash.**—*Mitchell v. Tacoma Ry. & M. Co.*, 9 Wash. 120, 37 Pac. 341.

63. **Mass.**—*Phillips v. Boston E. R. Co.*, 222 Mass. 221, 110 N. E. 268. **Mich.**—*Patterson v. Detroit United Ry.*, 187 Mich. 567, 153 N. W. 670. **N. Y.**—*Bardack v. Brooklyn Heights R. Co.*, 91 N. Y. Supp. 10. **Pa.**—*Moyer v. United*

what was the proximate cause of the injury is ordinarily for the jury.<sup>64</sup>

(II.) **Maintenance or Equipment of Car or Track.**—The negligence of defendant in the manner of constructing or maintaining its track,<sup>65</sup> in operating with a defective car or appliances,<sup>66</sup> in making or guarding excavations in a street, as a part of its construction work,<sup>67</sup> or in giving warnings of the existence of such excavations,<sup>68</sup> is a question for the jury if there is any evidence reasonably tending to establish its negligence in these particulars.

(III.) **Care of Motorman or Conductor.**—Ordinarily it is a question for the jury whether a motorman was negligent in failing to keep a lookout or to observe the person or animal injured,<sup>69</sup> or whether the person injured was seen,<sup>70</sup> or, in the exercise of ordinary care, should have been seen<sup>71</sup> in time to avoid the injury. Whether proper warnings of

Tr. Co., 221 Pa. 147, 70 Atl. 551.

See the titles "**Negligence**," "**Railroads**."

64. **Ala.**—Birmingham Ry. L. & P. Co. v. Norton, 7 Ala. App. 571, 61 So. 459. **Idaho.**—Pilmer v. Boise Tr. Co., 14 Idaho 327, 94 Pac. 432, 125 Am. St. Rep. 161, 15 L. R. A. (N. S.) 254. **Kan.**—Metropolitan St. R. Co. v. Fawcett, 76 Kan. 522, 92 Pac. 543. **Neb.**—Omaha St. Ry. Co. v. Larson, 70 Neb. 591, 97 N. W. 824. **Ore.**—Graves v. Portland Ry. L. & P. Co., 66 Ore. 232, 134 Pac. 1, Ann. Cas. 1915B, 500. **Wash.**—Gray v. Washington Water Power Co., 27 Wash. 713, 68 Pac. 360.

[a] **Whether the injury was the result of an unavoidable accident** is ordinarily a question for the jury. Cook v. Los Angeles & P. E. Ry. Co., 134 Cal. 279, 66 Pac. 306; Flaherty v. Butte Elec. R. Co., 43 Mont. 141, 115 Pac. 40.

65. **Ala.**—Birmingham, E. & B. R. Co. v. Stagg, 196 Ala. 612, 72 So. 164; Birmingham Ry. L. & P. Co. v. Donaldson, 14 Ala. App. 160, 68 So. 596. **Mich.**—Hibbler v. Detroit United R. Co., 172 Mich. 368, 137 N. W. 719. **Pa.**—Geiser v. Pittsburg Rys. Co., 223 Pa. 170, 72 Atl. 351. **Tex.**—San Antonio Tr. Co. v. Emerson (Tex. Civ. App.), 152 S. W. 468. **Wash.**—Gray v. Washington Power Co., 27 Wash. 713, 68 Pac. 360.

66. **Ill.**—Chicago City Ry. Co. v. Mager, 185 Ill. 336, 56 N. E. 1058. **Ind.**—Public Utilities Co. v. Handorf, 185 Ind. 254, 112 N. E. 775. **N. C.**—Smith v. Charlotte Elec. R. Co., 173 N. C. 489, 92 S. E. 382. **Wash.**—Sundstrom v. Puget Sound Tr. L. & P. Co., 90 Wash. 640, 156 Pac. 828.

[a] **Operation Without a Fender as Negligence.**—Louisville & S. I. Tr. Co. v. Short, 41 Ind. App. 570, 83 N. E. 265; Gross v. Omaha & C. B. St. R. Co., 96 Neb. 390, 147 N. W. 1121, L. R. A. 1915A, 742.

[b] **Whether fenders were of a proper kind or properly attached** is a question of fact. Waters v. Indianapolis Tr. & Ter. Co., 185 Ind. 526, 113 N. E. 289; Sundstrom v. Puget Sound Tr. L. & P. Co., 90 Wash. 640, 156 Pac. 828.

67. Norris v. Detroit United Ry., 193 Mich. 578, 160 N. W. 574; Fox v. Wharton, 64 N. J. L. 453, 45 Atl. 793.

68. Kearns v. Mobile L. & R. Co., 196 Ala. 99, 71 So. 993.

69. **Ky.**—Kentucky Tr. & Term. Co. v. Jenkins, 171 Ky. 539, 188 S. W. 645. **Mass.**—Murphy v. Worcester Consol. St. R. Co., 225 Mass. 264, 114 N. E. 205. **N. Y.**—Sciurba v. Metropolitan St. R. Co., 73 App. Div. 170, 76 N. Y. Supp. 772.

[a] **Whether the place at which the injury was inflicted was so habitually used by the public as to require a lookout to be kept for persons on the track**, is a question of fact. Rice v. Jefferson City Bridge & Tr. Co. (Mo. App.), 186 S. W. 568.

70. Birmingham R. L. & P. Co. v. Jones, 153 Ala. 157, 45 So. 177; Smith v. Salisbury & S. R. Co. 162 N. C. 29, 77 S. E. 966.

71. **Ky.**—Kentucky Tr. & T. Co. v. Downing, 152 Ky. 25, 153 S. W. 32. **Minn.**—Pickell v. St. Paul City R. Co., 120 Minn. 340, 139 N. W. 616. **Mo.**—Felver v. Central Elec. R. Co., 216 Mo. 195, 115 S. W. 980. **N. Y.**—Drusky v. Schenectady R. Co., 164 App. Div. 406,

the approach of the car were given,<sup>72</sup> and whether the failure to give such warnings constituted negligence,<sup>73</sup> whether proper diligence was exercised to avoid inflicting the injury after discovery of the peril,<sup>74</sup> whether the acts of a motorman, in an emergency and when confronted with a sudden danger were sufficient,<sup>75</sup> are also questions for the jury if there is any evidence reasonably tending to establish such negligence.

(IV.) **Speed of Car.**—Whether a street car was moving at an excessive rate of speed, in view of all the surrounding circumstances,<sup>76</sup> and, if so, whether this was the cause of the injury,<sup>77</sup> are usually questions for the jury.

(V.) **Frightening Animals.**—Whether reasonable care was exercised by those in charge of a street car in the presence of a horse which

149 N. Y. Supp. 762. **Tex.**—San Antonio St. Ry. Co. v. Caillouette, 79 Tex. 341, 15 S. W. 390.

72. **Ill.**—Potter v. O'Donnell, 199 Ill. 119, 64 N. E. 1026; Penrod v. East St. Louis Ry. Co., 197 Ill. App. 117; Johnson v. Galesburg & K. Elec. Ry. Co., 193 Ill. App. 387. **Ia.**—Eddy v. Cedar Rapids & M. C. Ry. Co., 98 Iowa 626, 67 N. W. 676. **Mich.**—Littlewood v. Detroit United Ry., 189 Mich. 388, 155 N. W. 698. **Mo.**—Martin v. United Rys. Co., 186 Mo. App. 576, 172 S. W. 406. **Tex.**—San Antonio Tr. Co. v. Kelleher, 48 Tex. Civ. App. 421, 107 S. W. 64.

73. **Ark.**—Pankey v. Little Rock R. & Elec. Co., 117 Ark. 337, 174 S. W. 1170. **Minn.**—Teal v. St. Paul City R. Co., 96 Minn. 379, 104 N. W. 945. **Mo.**—Peterson v. United Rys. Co., 183 Mo. App. 715, 168 S. W. 254.

74. **Ala.**—Mobile L. & R. Co. v. Porttiss, 195 Ala. 320, 70 So. 136; Appel v. Selma St. & Suburban R. Co., 177 Ala. 457, 59 So. 164. **Mich.**—Weitzel v. Detroit United Ry., 186 Mich. 7, 152 N. W. 931, 153 N. W. 831. **Mo.**—Waddell v. Metropolitan St. R. Co., 213 Mo. 8, 111 S. W. 542. **Mont.**—Singer v. Missoula St. R. Co., 47 Mont. 218, 131 Pac. 630. **Neb.**—Shapiro v. Omaha & C. B. St. R. Co., 100 Neb. 452, 160 N. W. 886.

[a] Negligence where a child was observed upon the track, see Sundstrom v. Puget Sound Tr. L. & P. Co., 90 Wash. 640, 156 Pac. 828.

75. Shapiro v. Omaha & C. B. St. R. Co., 100 Neb. 452, 160 N. W. 886.

76. **Ark.**—Ward v. Ft. Smith L. & Tr. Co., 123 Ark. 548, 185 S. W. 1085. **Ill.**—Razor v. Bloomington & N. Ry.

& L. Co., 190 Ill. App. 451; Tierney v. Sampsell, 172 Ill. App. 119. **Ia.**—Watson v. Boone Elec. Co., 163 Iowa 316, 144 N. W. 350. **Kan.**—Metropolitan St. R. Co. v. Summers, 75 Kan. 342, 89 Pac. 652. **Ky.**—Kentucky Traction & Term. Co. v. Jenkins, 171 Ky. 539, 188 S. W. 645. **Mich.**—Prince v. Detroit United Ry., 192 Mich. 194, 153 N. W. 861. **Minn.**—Larson v. Duluth St. R. Co., 127 Minn. 328, 149 N. W. 538. **Wash.**—Sundstrom v. Puget Sound Tr. L. & P. Co., 90 Wash. 640, 156 Pac. 828. **Wis.**—Scheuer v. Manitowoc & N. Tr. Co., 164 Wis. 333, 159 N. W. 901.

See 22 STANDARD PROC. 208.

[a] A speed of thirty miles per hour over a country highway crossing is not negligence per se. Indiana Union Tr. Co. v. Love, 180 Ind. 442, 99 N. E. 1005.

[b] Though the car was exceeding a speed ordinance it is for the jury to say whether this was negligence, in those states where violation of an ordinance is not negligence per se. Ward v. Ft. Smith L. & Tr. Co., 123 Ark. 548, 185 S. W. 1085.

[c] Whether the rate of speed was in excess of that permitted by an ordinance, is a question of fact. Criss v. United Rys. Co., 183 Mo. App. 392, 166 S. W. 834; Drusky v. Schenectady R. Co., 164 App. Div. 406, 149 N. Y. Supp. 762.

[d] Reasonableness of an ordinance fixing speed limit is a question for the court to pass upon. Metropolitan St. Ry. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49.

77. Niehaus v. United Rys. Co. of St. Louis, 165 Mo. App. 606, 148 S. W.



they knew or should have known was frightened by the presence or approach of the car,<sup>78</sup> is usually a question for the jury.

b. *Contributory Negligence.* — (I.) *In General.* — If the evidence is conflicting or different conclusions might reasonably be drawn from it, the question of plaintiff's contributory negligence is for the jury to determine;<sup>79</sup> otherwise a question for the judge is presented.<sup>80</sup> Even though contributory negligence is not pleaded as an affirmative defense,<sup>81</sup> if the evidence most favorable to the plaintiff indisputably convicts him of negligence which directly contributed to his injury, the court should direct a verdict for the defendant.<sup>82</sup> Whether the negligence of the plaintiff was the proximate cause of his injury is also for the jury to determine.<sup>83</sup>

(II.) *Looking and Listening.* — Whether a person injured was chargeable with contributory negligence in failing to look or listen for an approaching street car at a railway crossing,<sup>84</sup> or exercised reasonable care in looking and listening,<sup>85</sup> is a question for the jury.

389; *Dirigolano v. Jersey City H. & P. St. R. Co.*, 76 N. J. L. 505, 71 Atl. 257.

78. *Kan.*—*Dulin v. Metropolitan St. R. Co.*, 72 Kan. 676, 83 Pac. 821. *Mo.* *Oates v. Metropolitan St. Ry. Co.*, 168 Mo. 535, 68 S. W. 906, 58 L. R. A. 447. *Neb.*—*Gross v. Omaha & C. B. St. R. Co.*, 96 Neb. 390, 147 N. W. 1121, L. R. A. 1915A, 742.

[a] Whether a car should have been brought to a stop is a question for the jury. *Carger v. Macon R. & L. Co.*, 126 Ga. 626, 55 S. E. 914.

79. *Ala.*—*Birmingham Ry. L. & P. Co. v. Donaldson*, 14 Ala. App. 160, 68 So. 596. *Ark.*—*Little Rock Ry. & Elec. Co. v. Sledge*, 108 Ark. 95, 158 S. W. 1096, Ann. Cas. 1915B, 682. *Cal.*—*Patterson v. San Francisco & S. M. Elec. Ry. Co.*, 147 Cal. 178, 81 Pac. 531. *Ga.*—*Columbus R. Co. v. Berry*, 142 Ga. 670, 83 S. E. 509. *Ill.*—*Razor v. Bloomington & N. Ry. & L. Co.*, 190 Ill. App. 451. *Ind.*—*Indiana Union Tr. Co. v. Love*, 180 Ind. 442, 99 N. E. 1005. *Ia.*—*Carter v. Sioux City Service Co.*, 160 Iowa 73, 141 N. W. 26. *Md.* *Strauss v. United Rys. & Elec. Co.*, 101 Md. 497, 61 Atl. 137. *Mich.*—*Putnam v. Detroit United Ry. Co.*, 164 Mich. 342, 129 N. W. 860. *Minn.*—*Conrad Co. v. St. Paul City R. Co.*, 130 Minn. 128, 153 N. W. 256. *Mont.*—*Singer v. Misoula St. R. Co.*, 47 Mont. 218, 131 Pac. 630. *Neb.*—*Boles v. Lincoln Tract. Co.*, 98 Neb. 405, 153 N. W. 499. *N. Y.* *Roland v. International Ry. Co.*, 136 N. Y. Supp. 290. *Ore.*—*Graves v. Portland Ry. L. & P. Co.*, 66 Ore. 232, 134

*Pac.* 1, Ann. Cas. 1915B, 500. *Va.* *Reichenstein v. Virginia Ry. & P. Co.*, 115 Va. 862, 80 S. E. 564.

See the title "Negligence."

[a] Whether a person in a vehicle driven by another exercised due care is ordinarily a question for the jury. *Cal.* *Thompson v. Los Angeles & S. D. B. R. Co.*, 165 Cal. 748, 134 Pac. 709. *Minn.*—*Oddie v. Mendenhall*, 84 Minn. 58, 86 N. W. 881. *Okla.*—*Chickasha St. R. Co. v. Marshall*, 43 Okla. 192, 141 Pac. 1172.

[b] Whether the passing of a vehicle to the left of a street car upon a street undergoing repairs, constitutes negligence, is a question of fact. *Langford v. San Diego Elec. R. Co.*, 174 Cal. 729, 164 Pac. 398.

80. *Chicago & J. Elec. R. Co. v. Wanie*, 230 Ill. 530, 82 N. E. 821, 15 L. R. A. (N. S.) 1167; *Savage v. Public Service R. Co.*, 89 N. J. L. 555, 99 Atl. 383.

81. *Pleading contributory negligence*, see *supra*, V, C, 2.

82. *Case v. Jefferson City Bridge & Transit Co.* (Mo. App.), 189 S. W. 390.

83. *Driscoll v. Boston E. R. Co.*, 223 Mass. 533, 112 N. E. 219.

84. *Cal.*—*Starck v. Pacific Electric R. Co.*, 172 Cal. 277, 156 Pac. 51, L. R. A. 1916E, 58. *Ind.*—*Union Tr. Co. v. Howard* (Ind. App.), 87 N. E. 1103, 88 N. E. 967. *Mo.*—*Winn v. Metropolitan St. R. Co.*, 121 Mo. App. 623, 97 S. W. 547.

85. *Ark.*—*Karnopp v. Ft. Smith L. & T. Co.*, 119 Ark. 295, 178 S. W. 302. *Cal.*—*Hamlin v. Pacific Elec. R. Co.*,

**Failure To Keep Constant Lookout.**—A traveler is not chargeable with contributory negligence as a matter of law for passing along a street upon which a railway track is laid and not keeping a constant lookout to the rear,<sup>86</sup> and his negligence is ordinarily a question for the jury; but where only one inference could reasonably be drawn from the evidence the question becomes one for the judge to determine.<sup>87</sup>

**(III.) Crossing in Front of or Behind Car.**—The alleged negligent character of the act of a person in passing in front of a standing or approaching car,<sup>88</sup> or behind a standing car,<sup>89</sup> is for the jury to determine, unless the evidence is clear and undisputed and subject to but one construction.<sup>90</sup>

**(IV.) Of Children and Incompetents.**—Whether a child exercised such care as was reasonably to be expected of a person of his maturity, is usually a question for the jury to determine.<sup>91</sup> Whether a person laboring under a physical or mental disability was exercising due care at the time of receiving an injury is also more frequently a question for the jury.<sup>92</sup>

*c. Last Clear Chance.*—The question whether, although the person injured negligently placed himself in a position of peril, the injury

150 Cal. 776, 89 Pac. 1109. **Conn.** Fine v. Connecticut Co., 91 Conn. 327, 99 Atl. 700. **Ind.**—Louisville & S. I. Tr. Co. v. Lottich, 59 Ind. App. 426, 106 N. E. 903. **Mich.**—Richardson v. Detroit United Ry., 176 Mich. 160, 142 N. W. 369. **Mo.**—Shore v. Dunham (Mo. App.), 178 S. W. 900.

[a] **Whether a single look satisfies the duty** of exercising due care is a question for the jury. **Mo.**—Moloney v. United Rys. Co., 183 Mo. App. 292, 167 S. W. 471. **N. Y.**—Nowakowski v. New York & N. S. Tr. Co., 220 N. Y. 51, 114 N. E. 1042. **Wash.**—Niemyer v. Washington Water Power Co., 45 Wash. 170, 88 Pac. 103.

86. **Birmingham Ry. L. & P. Co. v. Vernon**, 197 Ala. 468, 73 So. 75.

87. **Mass.**—Lynch v. Boston E. R. Co., 224 Mass. 93, 112 N. E. 488. **Mo.** Guffey v. Harvey (Mo. App.), 179 S. W. 729. **Wis.**—Spence v. Milwaukee E. Ry. & L. Co., 163 Wis. 120, 157 N. W. 517.

88. **Cal.**—Simoneau v. Pacific Electric R. Co., 166 Cal. 264, 136 Pac. 544, 49 L. R. A. (N. S.) 737. **Ill.**—Barker v. Danville St. Ry. & L. Co., 193 Ill. App. 639; Chicago City Ry. Co. v. Wall, 93 Ill. App. 411. **Ia.**—Fisher v. Cedar Rapids & M. C. R. Co., 177 Iowa 406, 157 N. W. 860. **Mich.**—Prince v. Detroit United Ry., 192 Mich. 194, 158 N. W. 861. **Mo.**—Bruening v. Metropolitan St. R. Co., 181 Mo. App. 264,

168 S. W. 247. **Pa.**—Klingmann v. Pittsburgh Rys. Co., 252 Pa. 12, 97 Atl. 128. **Utah.**—Spiking v. Consolidated Ry. & P. Co., 33 Utah 313, 93 Pac. 838. **Wis.**—Canning v. Chicago & M. E. R. Co., 163 Wis. 448, 157 N. W. 532.

89. **Ill.**—Chicago City Ry. Co. v. O'Donnell, 208 Ill. 267, 70 N. E. 294, 477. **Mich.**—McManigle v. Detroit United Ry., 193 Mich. 530, 160 N. W. 423. **Neb.**—Stewart v. Omaha & C. B. St. R. Co., 83 Neb. 97, 118 N. W. 1106. **N. Y.**—Moneck v. Brooklyn Heights R. Co., 97 App. Div. 447, 90 N. Y. Supp. 818. **Pa.**—Wagner v. Philadelphia R. T. Co., 252 Pa. 354, 97 Atl. 471.

90. **Peterson v. Ocean Elec. R. Co.**, 161 App. Div. 720, 146 N. Y. Supp. 604; **Scates v. Rapid Transit Ry. Co.** (Tex. Civ. App.), 171 S. W. 503.

91. **Ill.**—Chicago City Ry. Co. v. Tuohy, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270. **Ind.**—Citizens' St. Ry. Co. v. Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778. **Mich.**—Weitzel v. Detroit United Ry., 186 Mich. 7, 152 N. W. 931, 153 N. W. 831. **Mo.** Hoagland v. Dunham (Mo. App.), 186 S. W. 1145. **N. Y.**—Nowakowski v. New York & N. S. Tr. Co., 220 N. Y. 51, 114 N. E. 1042.

92. **Ia.**—Long v. Ottumwa R. & L. Co., 162 Iowa 11, 142 N. W. 1008. **N. J.**—Buttelli v. Jersey City H. R. Co., 59 N. J. L. 302, 36 Atl. 700, person

would not have been inflicted except for the negligence of the defendant's employes after discovering his peril, is ordinarily for the jury.<sup>93</sup>

d. *Wilful or Wanton Injury*.—If the evidence is conflicting or reasonably subject to different inferences, the question whether the injury was inflicted through wilfulness or wantonness, is for the jury.<sup>94</sup>

slightly deaf. **N. Y.**—*Mills v. Brooklyn City R. Co.*, 10 Misc. 1, 30 N. Y. Supp. 532, *affirmed*, 151 N. Y. 629, 45 N. E. 1133, person seventy years old.

93. **Ala.**—*Ross v. Brannon*, 73 So. 439. **Cal.**—*Tucker v. United R. Co.*, 171 Cal. 702, 154 Pac. 835. **Conn.**—*Plant v. Connecticut Co.*, 87 Conn. 310, 87 Atl. 794. **Ind.**—*Waters v. Indianapolis Tr. & Ter. Co.*, 185 Ind. 526, 113 N. E.

289. **La.**—*Shield v. Johnson & Son Co.*, 132 La. 773, 61 So. 787, 47 L. R. A. (N. S.) 1080. **Mich.**—*King v. Grand Rapids R. Co.*, 176 Mich. 645, 143 N. W. 36. **Mo.**—*Ellis v. Metropolitan St. Ry. Co.*, 234 Mo. 657, 138 S. W. 23; *Rice v. Jefferson City Bridge & Tr. Co.*

(Mo. App.), 186 S. W. 568. **N. C.** *Ingle v. Asheville Power & L. Co.*, 172 N. C. 751, 90 S. E. 953. **Tex.**—*El Paso Elect. Ry. Co. v. Davidson* (Tex. Civ. App.), 162 S. W. 937.

[a] **Where Automobile Was Stalled Upon the Track.**—*Mead v. Central Pennsylvania Tr. Co.*, 63 Pa. Super. 76.

94. **Ala.**—*Birmingham Ry. L. & P. Co. v. Vernon*, 197 Ala. 468, 73 So. 75; *Birmingham Ry. L. & P. Co. v. Fuqua*, 174 Ala. 631, 56 So. 578. **Minn.**—*Langdon v. Minneapolis St. Ry. Co.*, 120 Minn. 6, 138 N. W. 790. **S. C.**—*Kirkland v. Augusta-Aiken Ry. & Elec. Corp.*, 97 S. C. 61, 81 S. E. 306.

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**STREETS.** — See **Highways, Streets and Bridges.**

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Vol. XXIV



# STRIKING OUT AND WITHDRAWAL

By the Editorial Staff.

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CROSS-REFERENCES:

Frivolous and Sham Pleadings; Pleas;  
Motions; Surplusage and Scandal.

Commissioner's authority to strike out pleading, see 16 STANDARD PROC. 704.

Striking out depositions, see 7 STANDARD PROC. 442.

Striking out interrogatories, see 7 STANDARD PROC. 595.

Striking out and withdrawal of evidence, see 12 ENCY. OF EV. 155, et seq.

Stricken and withdrawn pleadings as evidence of admissions, see 1 ENCY. OF EV. 441, 442.

Striking out plea in criminal cases, see 2 STANDARD PROC. 886.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. STRIKING OUT PLEADINGS OR PARTS THEREOF. — A.**

GENERALLY. — Courts have inherent power to strike out improper pleadings, or parts thereof,<sup>1</sup> and statutes frequently provide that sham and irrelevant answers and irrelevant and redundant matter inserted in a pleading may be stricken out on such terms as the court may, in its discretion, impose.<sup>2</sup>

There is a distinction between a demurrer and a motion to strike out,<sup>3</sup> though the motion is sometimes in effect a demurrer,<sup>4</sup> and may be treated as such.<sup>5</sup> Like a demurrer, it admits<sup>6</sup> for the purpose of

1. *Mt. Pleasant Cemetery Co. v. Erie R. Co.*, 74 N. J. L. 100, 65 Atl. 192; *Weidmann Silk Dyeing Co. v. East Jersey Water Co.*, 88 N. J. Eq. 397, 102 Atl. 858, 1056; *Stanbery v. Baker*, 55 N. J. Eq. 270, 37 Atl. 351.

2. See generally the statutes and the titles "Frivolous and Sham Pleadings;" "Surplusage and Scandal."

3. See 6 STANDARD PROC. 851.

[a] Where a single feature of a pleading is objected to, a motion to strike, not a demurrer is proper. *Hall v. O'Neil Turp. Co.*, 56 Fla. 324, 47 So. 609.

4. *Shohoney v. Quincy O. & K. C.*

*R. Co.*, 231 Mo. 131, 132 S. W. 1059; *Bank of Commerce v. Fuqua*, 11 Mont. 285, 293, 28 Pac. 291, 28 Am. St. Rep. 461, 14 L. R. A. 538.

5. See 6 STANDARD PROC. 852, and *Baker v. American Surety Co.*, 181 Iowa 634, 159 N. W. 1044. But see *infra*, I, D, 3.

Treating demurrer as a motion to strike, see 6 STANDARD PROC. 290 (note 97), 853.

6. *Ind.*—*Chicago & A. Ry. Co. v. Summers*, 113 Ind. 10, 14 N. E. 733, 3 Am. St. Rep. 616; *Faylor v. Brice*, 7 Ind. App. 551, 34 N. E. 833. *la.*—*Baker v. American Sur. Co.*, 181 Iowa 634, 159

the motion, the truth of all facts well pleaded, and has been held to search the record.<sup>7</sup>

B. WHO MAY PROCURE AND WHO MAY MAKE ORDERS STRIKING OUT. Pleadings or parts thereof may be stricken out on motion of an adverse party,<sup>8</sup> or even a co-party.<sup>9</sup> And some statutes provide the motion must be made by a party aggrieved.<sup>10</sup>

The court may strike out improper pleadings or parts thereof on its own motion.<sup>11</sup> But a court cannot strike a pleading from the files in vacation.<sup>12</sup>

A court commissioner has no power to strike out pleadings or parts thereof.<sup>13</sup>

C. WHAT PLEADINGS MAY BE STRICKEN OUT. —Any pleading or parts thereof may be stricken out.<sup>14</sup>

N. W. 1044. *Mont.*—Como Orchard Land Co. v. Markham, 54 Mont. 458, 171 Pac. 274. N. J.—Koeving v. West Orange, 89 N. J. L. 539, 99 Atl. 203; Crawford v. Winterbottom, 88 N. J. L. 588, 96 Atl. 497.

7. Paxon v. Talmage, 87 Mo. 13. *Contra*, Youngs v. Seely, 12 How. Pr. (N. Y.) 395; Smith v. Kibling, 97 Wis. 205, 72 N. W. 869.

8. See *infra*, this section.

Amendment of pleading by striking out portions of it by the pleader himself, see 1 STANDARD PROC. 903, note 83.

9. Stibbard v. Jay, 26 Misc. 260, 56 N. Y. Supp. 777.

10. See generally the statutes and the following cases: *Ia.*—Cate v. Gilman, 41 Iowa 530. N. Y.—McGarahan v. Sheridan, 106 App. Div. 532, 94 N. Y. Supp. 708; John D. Parks & Sons Co. v. National W. Druggists Assn., 30 App. Div. 508, 52 N. Y. Supp. 475; Conner v. Bryce, 170 N. Y. Supp. 94. *Okla.*—Berry v. Geiser Mfg. Co., 15 Okla. 364, 85 Pac. 699.

[a] The moving party (1) must be prejudiced. Berry v. Geiser Mfg. Co., 15 Okla. 364, 85 Pac. 699. (2) A defendant is aggrieved by evidentiary statements when he is required to admit, deny or ignore them. Brown v. Fish, 37 Misc. 367, 75 N. Y. Supp. 460; Conners v. Bryce, 170 N. Y. Supp. 94. (3) It is a sufficient grievance that a party is required to read ten folios of redundant matter to ascertain whether it be such as ought to incumber the record. Putnam v. De Forest, 8 How. Pr. (N. Y.) 146.

11. Haley v. Duquette, 13 Colo. App. 427, 59 Pac. 227 (pleading which is insulting to the court); Mt. Pleasant

Cem. Co. v. Erie R. Co., 74 N. J. L. 100, 65 Atl. 192, statute requiring notice does not apply.

[a] On ground plea is insufficient in matter of substance. Gainesville & D. E. Ry. Co. v. Austin, 127 Ga. 120, 56 S. E. 254.

[b] Otherwise as to irrelevant matter in pleading. Savage v. Challiss, 4 Kan. 319. See the title "Surplusage and Scandal."

12. See 16 STANDARD PROC. 612.

13. See 16 STANDARD PROC. 704.

14. See *infra*, this note.

Bill or Complaint.—See 10 STANDARD PROC. 274.

Demurrer.—See 18 STANDARD PROC. 871, note 27; 10 STANDARD PROC. 275. Compare Smith v. Brown, 6 How. Pr. (N. Y.) 383.

Answer.—See 10 STANDARD PROC. 277, note 81.

Pleas.—See 10 STANDARD PROC. 276.

Plea in Abatement.—See 1 STANDARD PROC. 66.

[a] Reply.—Putnam v. De Forest, 8 How. Pr. (N. Y.) 146. See 10 STANDARD PROC. 280.

[b] Counterclaim and Set-off.—Ky. Payne v. Vowels, 171 Ky. 377, 188 S. W. 413. N. J.—Kelley v. Faitoute Iron & S. Co., 87 N. J. L. 567, 94 Atl. 802. N. M.—Michelet v. Cole, 20 N. M. 357, 149 Pac. 310. See 10 STANDARD PROC. 279, frivolous counterclaim.

Cross-bill.—See 6 STANDARD PROC. 290.

Cross-complaint. — See 6 STANDARD PROC. 310.

Amended Pleading.—See *infra*, I, D. 5.

[c] Supplemental Pleading.—Braxton v. Liddon, 49 Fla. 280, 38 So. 717; Brooks v. Kager, 23 Kan. 114.



**D. STRIKING OUT ENTIRE PLEADINGS.—1. Grounds Generally.** It is proper to strike out an unauthorized pleading,<sup>15</sup> a pleading filed without leave of court, when leave is required,<sup>16</sup> a pleading filed by a stranger to the action,<sup>17</sup> a pleading consisting merely of averments or denials of conclusions of law,<sup>18</sup> an answer filed after entry of defendant's default,<sup>19</sup> an answer setting up issues already adjudicated on a demurrer to the petition,<sup>20</sup> and a plea or answer setting up a parol agreement inconsistent with the contract sued on.<sup>21</sup> Subsequent pleadings of a party which are mere repetitions of his previous pleadings may be stricken out.<sup>22</sup>

Multifariousness, according to some authorities, may be questioned by motion to strike.<sup>23</sup> But an entire pleading cannot be stricken out because of indefiniteness and uncertainty,<sup>24</sup> or of redundancy.<sup>25</sup> Nor ought a court to strike a pleading from the files for defects in the caption,<sup>26</sup> or for mere formal defects in the arrangement of the pleading,<sup>27</sup> without at least giving the party an opportunity to amend.<sup>28</sup>

15. See *infra*, this note.

[a] Where a reply is filed to an answer containing no counterclaim. *Breining v. Lippincott*, 129 Ark. 406, 196 S. W. 795.

[b] An answer in abatement filed with an answer in bar may be stricken. *State ex rel. Ruhlman v. Ruhlman*, 111 Ind. 17, 11 N. E. 793.

16. *Mathews v. Schuessler*, 201 Ill. App. 210. See 13 STANDARD PROC. 582, in insanity cases.

[a] Amendments Filed Without Leave.—Ga.—*Clark v. Ganson*, 144 Ga. 544, 87 S. E. 670. Ky.—*Brashears v. Letcher Co. Ct.* 22 Ky. L. Rep. 1763, 61 S. W. 285. Miss.—*National Mut. B. & L. Assn. v. Brahan*, 80 Miss. 407, 31 So. 840, 57 L. R. A. 793. See *Carlisle v. Sells-Floto Show Co.*, 180 Iowa 549, 163 N. W. 380, holding an amendment will not be stricken, because filed without leave, if leave might properly have been granted upon application.

[b] Supplemental pleading filed without leave. *Braxton v. Liddon*, 49 Fla. 280, 38 So. 717.

17. See 4 STANDARD PROC. 179.

18. See 5 STANDARD PROC. 226.

19. *Brayton v. Delaware*, 16 Iowa 44; *Mantle v. Casey*, 31 Mont. 408, 78 Pac. 591.

20. *Wing v. District Tp.*, 82 Iowa 632, 48 N. W. 977.

21. *Fralick v. Mercer*, 27 Idaho 360, 148 Pac. 906. See *J. I. Case Thresh.*

*Mach. Co. v. Hodges*, 16 Ga. App. 327, 85 S. E. 205.

22. *Western Assur. Co. v. Hall*, 120 Ala. 547, 24 So. 936, 74 Am. St. Rep. 48 (where surrejoinder is repetition of replication); *Farmers' Mut. Ins. Assn. v. Tankersley*, 13 Ala. App. 524, 69 So. 410, where the rejoinder was a mere copy of the plea; *West v. West*, 144 Mo. 119, 46 S. W. 139.

23. *Waldo v. Thweatt*, 64 Ark. 126, 40 S. W. 782. And see generally the title "Multifariousness."

24. *Computing Scales Co. v. Long*, 66 S. C. 379, 44 S. E. 963, 65 L. R. A. 294.

As to proper remedy, see 4 STANDARD PROC. 859.

25. See the title "Surplusage and Scandal."

26. *Butcher v. Bank of Brownsville*, 2 Kan. 70, 83 Am. Dec. 446, where word "petition" was omitted from caption.

[a] Where Party's Christian Name Is Designated by Initials.—*Taylor v. Insley*, 7 Colo. App. 175, 42 Pac. 1046.

[b] But omission to entitle a declaration of a particular term is ground for setting it aside. *Niblock v. Wright*, 2 How. Pr. (N. Y.) 251.

27. *Strauss v. Parker*, 9 How. Pr. (N. Y.) 342, where complaint was not numbered.

28. *Butcher v. Bank of Brownsville*, 2 Kan. 70, 83 Am. Dec. 446.

But a conclusion with a verification instead of to the country has been held ground for striking a plea.<sup>29</sup>

**Unconformity to Process.** — In some states a motion to strike out is a proper remedy where the declaration or complaint does not substantially conform to the process previously filed.<sup>30</sup>

**Frivolous and Sham Pleading.** — A sham<sup>31</sup> or frivolous<sup>32</sup> pleading may be stricken out. But an answer should not be stricken out at the trial on proof of the falsity of its averments.<sup>33</sup>

**Laches and Limitation of Actions.** — As a general rule the defense of the statute of limitation of actions cannot be raised by motion to strike out,<sup>34</sup> though the defense of laches may sometimes be raised in this manner.<sup>35</sup>

**Departure.** — A departure in pleading may be taken advantage of by motion to strike out.<sup>36</sup>

**Surplusage and Scandal.** — The right to strike out pleadings because of surplusage and scandalous matter is treated elsewhere in this work.<sup>37</sup>

**2. Tardy Pleadings.** — A pleading which has been filed too late, may be stricken out.<sup>38</sup> But it is error to strike out a pleading, filed on time, because of delay in serving it.<sup>39</sup>

**3. Because of Insufficiency of Pleading.** — Motions to strike out pleadings or parts thereof are ordinarily directed at defects of form,<sup>40</sup>

29. *Copperthwait v. Dummer*, 18 N. J. L. 258.

30. *Ala.*—*Stoddard & Co. v. Davis & Co.*, 50 Ala. 21 (there must be a radical variance such as a change of the form or cause of action or a change of parties); *Chapman v. Spence*, 22 Ala. 588. *Ill.*—*Spears v. Cleveland, C. C. & St. L. Ry. Co.*, 190 Ill. App. 616, variance between declaration and praecipe for summons is ground for striking out. *N. J.*—See *Bank of New Brunswick v. Arrowsmith*, 9 N. J. L. 284. *N. Y.*—*Campbell v. Wright*, 21 How. Pr. 9.

As to conformity of declaration with process, see 6 STANDARD PROC. 668; 7 STANDARD PROC. 119, note 14; 18 STANDARD PROC. 75.

31. See 10 STANDARD PROC. 291.

32. See 14 STANDARD PROC. 877; 10 STANDARD PROC. 282; 1 STANDARD PROC. 66.

In justice's court, see 18 STANDARD PROC. 44.

33. *Abbott v. Douglass*, 28 Cal. 295.

34. See 18 STANDARD PROC. 1044.

35. See 18 STANDARD PROC. 439, note 50.

36. See 7 STANDARD PROC. 141.

In justice's courts, see 18 STANDARD PROC. 172, note 98 [b].

Amendment stating new cause of action, see the title "New Cause of Action or Defense."

37. See the title "Surplusage and Scandal," and see 4 STANDARD PROC. 150, 179.

38. *Ala.*—*Hudson v. Wood*, 102 Ala. 631, 15 So. 356. *Cal.*—*Acock v. Halsey*, 90 Cal. 215, 27 Pac. 193; *Bowers v. Dickerson*, 18 Cal. 420; *Lunnum v. Morris*, 7 Cal. App. 710, 95 Pac. 907. *Kan.*—*Osgood v. Haverty*, *McCahon* 182, 1 Kan. 587. *Wis.*—*Pett v. Clark*, 5 Wis. 198.

See 4 STANDARD PROC. 179. But see *Hall v. Tiedeman*, 141 Ga. 602, 81 S. E. 868, holding it error to strike out the pleading.

[a] **Discretionary with court.** *Lunnum v. Morris*, 7 Cal. App. 710, 95 Pac. 907; *Bertagnolli Bros. v. Bertagnolli*, 23 Wyo. 228, 148 Pac. 374.

[b] **Amended pleading filed too late.** *Hoyer v. Good* (Iowa), 161 N. W. 691.

[c] **Too Late To Object at Trial.** *Abbott v. Douglass*, 28 Cal. 295.

[d] **Counterclaim.**—*Gilbert v. Adams*, 99 Iowa 519, 65 N. W. 883.

39. *Lybecker v. Murray*, 58 Cal. 186.

40. *Ark.*—*Alexander v. Foster*, 16

and as a general rule, are not a proper remedy by which to test the sufficiency of the cause of action or defense stated,<sup>41</sup> although if there is no semblance of a cause of action or defense in a pleading, and it is apparent on the face of the pleading that it is frivolous and irrelevant, a motion to strike is proper.<sup>42</sup> In some states, however, the sufficiency of a pleading may be taken advantage of by motion.<sup>43</sup> And statutes sometimes authorize the striking out of pleadings so de-

Ark. 660. **Ind.**—Chicago S. B. & N. I. Ry. Co. v. Dunnahoo (Ind. App.), 112 N. E. 552. **Ore.**—Brownell v. Salem Flouring Mills Co., 48 Ore. 525, 87 Pac. 770.

41. **U. S.**—Ware-Kramer Tobacco Co. v. American Tobacco Co., 178 Fed. 117. **Ala.**—Lusk v. Champion Register Co., 79 So. 16; Brooks v. Continental Ins. Co., 125 Ala. 615, 29 So. 13; Montgomery v. Stephens, 14 Ala. App. 274, 69 So. 970. **Cal.**—Pacific Factor Co. v. Adler, 90 Cal. 110, 27 Pac. 36, 25 Am. St. Rep. 102. **Ill.**—Weinberg v. Noonan, 193 Ill. 165, 61 N. E. 1022; Consol. Coal Co. v. Peers, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624; Bemis v. Homer, 145 Ill. 567, 33 N. E. 869. **Ind.**—Chicago, S. B. & N. I. Ry. Co. v. Dunnahoo (Ind. App.), 112 N. E. 552; Faylor v. Brice, 7 Ind. App. 551, 34 N. E. 833. **Ia.**—Wisconsin Lumb. Co. v. Greene & W. Tel. Co., 127 Iowa 350, 101 N. W. 742, 109 Am. St. Rep. 387, 69 L. R. A. 968. *Compare* Baker v. American Sur. Co., 181 Iowa 634, 159 N. W. 1044, treating motion as a demurrer. **Kan.**—Grand Lodge v. Troutman, 73 Kan. 35, 84 Pac. 567; Savage v. Challiss, 4 Kan. 319. **Ky.**—Combs v. Frick Co., 162 Ky. 42, 171 S. W. 999. **Neb.**—Hershiser v. Delone, 24 Neb. 380, 38 N. W. 863. **N. Y.**—Walter v. Fowler, 85 N. Y. 621; Bradley v. McCutcheon, 97 Misc. 412, 161 N. Y. Supp. 394. **N. D.**—Gjerstadengen v. Hartzell, 8 N. D. 424, 79 N. W. 872. **Okla.**—McNinch v. Northwest Thresher Co., 23 Okla. 386, 100 Pac. 524, 138 Am. St. Rep. 803. **Ore.**—The Victorian, 24 Ore. 121, 32 Pac. 1040, 41 Am. St. Rep. 838.

Attacking sufficiency of plea of limitation of actions, see 18 STANDARD PROC. 1062.

[a] But where an answer is not filed within the statutory period and the defendant is put on terms, the court may refuse to permit an insufficient answer to be filed, or strike it out for insufficiency after it is filed.

Combs v. Frick Co., 162 Ky. 42, 171 S. W. 999.

[b] A notice of defense may be tested by a motion to strike. White v. Bourquin, 204 Ill. App. 83.

42. **Ala.**—Lusk v. Champion Register Co., 79 So. 16. **Idaho.**—Cowen v. Harrington, 5 Idaho 329, 48 Pac. 1059. **Ind.**—Chicago S. B. & N. I. Ry. Co. v. Dunnahoo (Ind. App.), 112 N. E. 552. **Ore.**—The Victorian, 24 Ore. 121, 137, 32 Pac. 1040, 41 Am. St. Rep. 838. **W. Va.**—Shinn v. Shinn, 78 W. Va. 44, 88 S. E. 610, L. R. A. 1916E, 618, a plea which is so defective as not to raise a substantial defense will be stricken.

See the title "Frivolous and Sham Pleadings."

[a] If the facts averred are so palpably irrelevant that the pleading cannot by amendment be made germane to the controversy, it may be stricken out. Chicago, S. B. & N. I. R. Co. v. Dunnahoo (Ind. App.), 112 N. E. 552.

43. **Fla.**—Campbell v. A. L. Wilson Co., 77 So. 540; Miller v. Edwards, 77 So. 231, statute allows the remedy to test sufficiency of answers. **Ga.**—Walden v. Walden, 124 Ga. 145, 52 S. E. 323 ("good practice would require that the plaintiff should take advantage of the fatal defect in the defendant's plea either by demurrer or by a motion to strike made before verdict"); Simmons v. Newsome, 16 Ga. App. 459, 85 S. E. 632. **Mo.**—State ex rel. Southwest Nat. Bank v. Ellison, 266 Mo. 423, 181 S. W. 998 (it is well established in this state that a pleading stating no cause of action or defense is open to a motion to strike as well as to what is commonly called a "demurrer"); Howell v. Stewart, 54 Mo. 400. **N. H.**—See Folsom v. Brawn, 25 N. H. 114. **N. J.**—Second Workmen's B. & L. Assn. v. Wickers, 83 N. J. Eq. 397, 91 Atl. 897. See Cook v. Cook, 81 N. J. Eq. 223, 87 Atl. 120, while a motion to strike a plea does



fective or so framed as to prejudice, embarrass or delay a fair trial of the action.<sup>44</sup>

**4. For Want or Insufficiency of Signature, Verification and Affidavit.**—A pleading may be stricken out on the ground of want of signature,<sup>45</sup> or omission of or insufficiency of a verification when required,<sup>46</sup> as well as on the ground of omission of an affidavit of merits.<sup>47</sup>

**5. Amended Pleadings.**—An amendment pleading which is merely a substantial repetition of a pleading held to be defective, and does not cure its defects,<sup>48</sup> or which is incompatible with the terms on which leave was granted,<sup>49</sup> or was filed without leave where it was necessary,<sup>50</sup> may be stricken out. So also it is proper to strike out an amendment which sets up a new cause of action.<sup>51</sup>

**6. On Disobedience of Court Orders.**—For refusal to obey the orders of a court, the pleadings of a party plaintiff may be stricken out.<sup>52</sup> But the situation of the defendant is different from that of the

not lie unless it be sham, yet a motion to strike an insufficient plea may be considered as if the plea had been set down for argument.

**44.** See generally the statutes and *Harper v. Essex Co. Park Commission*, 73 N. J. L. 1, 62 Atl. 384; *Malberti v. United Electric Co.*, 69 N. J. L. 55, 54 Atl. 251.

**45.** *Bates v. Clark*, 95 U. S. 204, 24 L. ed. 471; *Bernier v. Bernier*, 72 Mich. 43, 40 N. W. 50. See 4 STANDARD PROC. 179, as to answers in equity.

**46. U. S.**—*Bates v. Clark*, 95 U. S. 204, 24 L. ed. 471. **Ark.**—*Allis v. Bender*, 14 Ark. 625. **Ga.**—*Roberts v. Le Master*, 16 Ga. App. 385, 85 S. E. 615. **Ill.**—*Furst v. W. T. Rawleigh Med. Co.*, 282 Ill. 366, 118 N. E. 763; *Spencer v. Aetna Indemnity Co.*, 231 Ill. 82, 83 N. E. 102; *People ex rel. Robinson v. Knight*, 189 Ill. App. 449. **Ind.**—*Milikan v. Sec. Trust Co.*, 118 N. E. 568; *Indianapolis, Peru & C. R. Co. v. Summers*, 28 Ind. 521. **Mo.**—*Hershiser v. Delone*, 24 Neb. 380, 38 N. W. 863. **Ore.**—*Clark v. Clark*, 81 Ore. 405, 159 Pac. 969.

See 1 STANDARD PROC. 66.

*Contra*, *Ashurst v. Arnold-Henegar-Doyle Co. (Ala.)*, 78 So. 386.

In justice's court, see 18 STANDARD PROC. 44.

[a] **Too Late To Object at Trial.** *Abbott v. Douglass*, 28 Cal. 295.

**47.** See 1 STANDARD PROC. 714, 707.

**48. Colo.**—*King v. Milner*, 167 Pac. 957; *Bush v. McMann*, 12 *Gen. App.* 504, 55 Pac. 956. **Ia.**—*Riley v. Board*

of Directors, 172 Iowa 77, 154 N. W. 293; *McKee v. Illinois Cent. Ry. Co.*, 121 Iowa 550, 97 N. W. 69; *Hamill, Ralston & Co. v. Phenicie*, 9 Iowa 525. See *Kinney v. Reed*, 145 N. W. 900. **Kan.**—*Grand Lodge v. Troutman*, 73 Kan. 35, 84 Pac. 567. **Neb.**—*Loghry v. Fillmore Co.*, 75 Neb. 158, 106 N. W. 170. **N. Y.**—*Sofianopoulo v. Standard Com. T. Co.*, 182 App. Div. 914, 169 N. Y. Supp. 222. **N. D.**—*Bergen Tp. v. Nelson Co.*, 33 N. D. 247, 156 N. W. 559. **Okla.**—*Long v. McFarlin*, 159 Pac. 653. **Wyo.**—*Columbia Sav. & L. Assn. v. Clause*, 13 Wyo. 166, 78 Pac. 708.

[a] But if there is a bona fide attempt to meet the objections, the motion will be denied. *Grand Lodge v. Troutman*, 73 Kan. 35, 84 Pac. 567.

**49. N. Y.**—*Palma v. North Hempstead*, 171 App. Div. 937, 156 N. Y. Supp. 469. **N. C.**—*Dockery v. Fairbanks-Morse & Co.*, 172 N. C. 529, 90 S. E. 501; *Crump v. Thomas*, 89 N. C. 241. **Okla.**—*Long v. McFarlin*, 159 Pac. 653.

**50.** See *supra*, I, D, 1, note 16.

**51.** See the title "New Cause of Action or Defense."

**52. Cal.**—*O'Neill v. Thomas Day Co.*, 152 Cal. 357, 92 Pac. 856, 14 Ann. Cas. 970. **Ky.**—*Conrad Schopp Fruit Co. v. Bondurant*, 134 Ky. 568, 121 S. W. 482. **N. Y.**—*Gross v. Clark*, 87 N. Y. 272, 1 Civ. Proc. 464. See *Shelp v. Morrison*, 13 Hun 110. **Ohio.**—*French v. Central Constr. Co.*, 76 Ohio St. 909,

plaintiff, as he is always in court under compulsion.<sup>53</sup> It is therefore held that a court has no power at law or in equity to strike out the answer of a defendant and render judgment against him for disobedience to a court order.<sup>54</sup> But some courts hold his answer may be

81 N. E. 751, 12 L. R. A. (N. S.) 669.

[a] **The reason** a plaintiff's pleading may be stricken is that he is always a voluntary actor, and it is manifestly just and proper that in asking the aid of a court, he should submit himself to all its legitimate orders. *O'Neill v. Thomas Day Co.*, 152 Cal. 357, 92 Pac. 856, 14 Ann. Cas. 970.

[b] **Where plaintiff refuses to answer** questions on taking of deposition, (1) complaint may be stricken. *O'Neill v. Thomas Day Co.*, 152 Cal. 357, 92 Pac. 856, 14 Ann. Cas. 970. (2) But refusal to answer on advice of counsel until the court rules on the questions, does not warrant striking the pleading. *Roberson v. Kilborn*, 40 Nev. 423, 165 Pac. 220.

**Striking out pleadings for failure to answer interrogatories**, see 7 STANDARD PROC. 596.

**On disobedience of order for physical examination**, see 21 STANDARD PROC. 360.

53. *O'Neill v. Thomas Day Co.*, 152 Cal. 357, 92 Pac. 856, 14 Ann. Cas. 970.

54. **U. S.**—*Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. ed. 215, *disapproving* *Walker v. Walker*, 82 N. Y. 260, and *Pickett v. Ferguson*, 45 Ark. 177, 55 Am. Rep. 545. **Cal.**—*O'Neill v. Thomas Day Co.*, 152 Cal. 357, 92 Pac. 856, 14 Ann. Cas. 970. See *Frazier v. Lynch*, 88 Cal. 621, 26 Pac. 344. **La.**—See *Hunter v. Blackman*, 32 La. Ann. 403. **Mo.**—See *Glover v. American Casualty Ins. & Sec. Co.*, 130 Mo. 173, 32 S. W. 302, holding the court abused its discretion. **Neb.**—*McNamara v. McNamara*, 86 Neb. 631, 126 N. W. 94, 27 L. R. A. (N. S.) 1062. **Eng.** See also *Maynard v. Pomfret*, 3 Atk. 468, 26 Eng. Reprint 1069.

[a] **Reason.**—The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is to convert the court into an instrument of wrong and oppres-

sion. Furthermore due process of law signifies a right to be heard in one's defense. *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. ed. 215. See also *O'Neill v. Thomas Day Co.*, 152 Cal. 357, 92 Pac. 856, 14 Ann. Cas. 970.

[b] **Rule in Equity.**—"There is no basis for the assertion that the courts of chancery in England claimed or exercised the power, after answer filed, to decree pro confesso on the merits against a defendant, merely because he persisted in disobedience to an order of the court, though the cases do show that the chancery courts commonly refused to hear a defendant in contempt when asking at their hands a favor. . . . The general rule is, that when a party is in contempt, he will not be allowed to oppose the relief sought by the plaintiff, by contradicting the allegations in his bill, or bringing forward any defense, or alleging new facts, neither will he be heard by affidavit, except it be made with a view of purging his contempt, but he may be heard to direct the attention of the court to any error or insufficiency in the plaintiff's own case as made by the bill. . . . Of course refusal to allow a party to move until he has answered, and when he was in default for not answering, cannot possibly be construed as supporting the contention that when a defendant had regularly answered his answer might be stricken from the files, and the case be decided as though no answer had ever been filed." (*Quoting Anon v. Lord, Gort. (Eng.) 77.*) *Hovey v. Elliott*, 167 U. S. 409, 423, 427, 428, 17 Sup. Ct. 841, 42 L. ed. 215.

[c] **For failure to pay alimony**, (1) answer in divorce suit cannot be stricken. *McMakin v. McMakin*, 68 Mo. App. 57; *McNamara v. McNamara*, 86 Neb. 631, 126 N. W. 94, 27 L. R. A. (N. S.) 1062, note. See *Larson v. Larson*, 9 S. D. 1, 67 N. W. 842. (2) *Contra*, *Zimmerman v. Zimmerman*, 7 Mont. 114, 14 Pac. 665 (where the defendant was a nonresident); *Walker v. Walker*, 82 N. Y. 260; *Quigley v. Quig-*

stricken out in equity.<sup>55</sup> Striking out an answer as mere punishment for disobedience of an order is a violation of the constitutional provision as to due process.<sup>56</sup> But the court has power to strike out an answer on disobedience of an order to give or produce evidence, because the defendant's refusal raises a presumption of the untruth of his answer.<sup>57</sup>

E. STRIKING OUT PARTS OF PLEADINGS.<sup>58</sup> — The power of the court to strike out parts of pleadings is a power that should be exercised with caution,<sup>59</sup> and it has been held that such motions should be discouraged except where the substantial rights of a party are affected.<sup>60</sup> The only advantage of moving to strike out the objectionable matter is to enable the party to know in advance whether he must be prepared to meet the averment and disprove it by evidence.<sup>61</sup> Sometimes portions of a pleading are stricken after verdict for the purpose of sustaining the verdict.<sup>62</sup>

It is proper to strike out frivolous and irrelevant matter in pleading,<sup>63</sup>

ley, 45 Hun 23. And (3) *compare* Peel v. Peel, 50 Iowa 521, query. However, if the power does exist, it can be exerted only in extreme cases when other punishment cannot be inflicted or will not enforce obedience. See also 7 STANDARD PROC. 829.

55. D. C.—Barney v. Barney, 6 D. C. 1. Mont.—Zimmerman v. Zimmerman, 7 Mont. 114, 14 Pac. 665, following the Walker case cited *infra*, this section. N. Y.—Walker v. Walker, 82 N. Y. 260; Quigley v. Quigley, 45 Hun 23; Brisbane v. Brisbane, 34 Hun 339; Grant v. Greene, 55 Misc. 383, 105 N. Y. Supp. 641. See Rice v. Ehele, 55 N. Y. 518, holding order erroneous because ex parte. N. C.—Beaufort Co. Lumb. Co. v. Cottingham, 168 N. C. 544, 84 S. E. 864.

[a] If unable to comply with an order, the answer of defendant cannot be stricken. Farrand v. Wiltner, 140 N. Y. Supp. 85.

On refusal to answer interrogatories, see 7 STANDARD PROC. 596.

56. Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. ed. 215.

57. Hammond Packing Co. v. Arkansas, 212 U. S. 322, 351, 29 Sup. Ct. 370, 53 L. ed. 530, *distinguishing* Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. ed. 215.

58. Striking out innuendo in libel and slander, see 18 STANDARD PROC. 910.

59. John D. Park & Sons Co. v. National W. Druggists' Assn., 30 App. Div. 508, 52 N. Y. Supp. 475.

60. Brachman v. Kuehnmuensch, 64 Wis. 249, 24 N. W. 902.

61. Specht v. Spangenberg, 70 Iowa 488, 30 N. W. 875.

[a] If the motion is overruled, and the party fails to disprove the averment, he may still insist it is irrelevant, and object to evidence offered in support of it. Specht v. Spangenberg, 70 Iowa 488, 30 N. W. 875.

62. Specht v. Pennsylvania R. Co., 7 Pa. Co. Ct. 54; Bates v. Cilley, 47 Vt. 1.

63. Ala.—Vandiver & Co. v. Waller, 143 Ala. 411, 39 So. 136; Brooks v. Continental Ins. Co., 125 Ala. 615, 29 So. 13. Ind. Ter.—Tuttle v. Moore, 3 Ind. Ter. 712, 64 S. W. 585. Ia.—McDowell v. Bowles, Billings & Kessler Grain Co., 177 Iowa 744, 157 N. W. 173; Bruner v. American Yeoman, 136 Iowa 612, 111 N. W. 977; *In re* McMurray, 107 Iowa 648, 78 N. W. 691. Ky.—Evening Post Co. v. Richardson, 113 Ky. 641, 68 S. W. 665.

See 8 STANDARD PROC. 82, and the title "Surplusage and Scandal."

[a] Motion is not favored by courts and only where the allegations can have no possible bearing on the subject matter of the action, will the motion be granted. Niles v. Yoakum, 179 App. Div. 75, 166 N. Y. Supp. 94; Stern v. Philipsborn, 169 App. Div. 781, 155 N. Y. Supp. 684.

[b] New matter in an answer which constitutes no defense may be stricken out, as it is frivolous. *State ex rel.* Davis v. Rogers, 79 Mo. 283; Phillips



immaterial allegations,<sup>64</sup> or redundant matter,<sup>65</sup> surplusage,<sup>66</sup> repugnant allegations,<sup>67</sup> as well as matter which is merely argumentative,<sup>68</sup> or evidentiary.<sup>69</sup> Allegations on information and belief where not permitted may be stricken out,<sup>70</sup> as may allegations which are mere conclusions of law,<sup>71</sup> allegations as to facts of which the court takes judicial notice,<sup>72</sup> and allegations as to elements of damage which are not recoverable.<sup>73</sup> A motion to strike out is sometimes regarded as a proper remedy where a special plea amounts to the general issue,<sup>74</sup> where a denial is included in a defense,<sup>75</sup> and where matters pleaded as a full defense constitute a partial defense only.<sup>76</sup> So also a denial of an allegation of a conclusion of law may be stricken out.<sup>77</sup> But matters of inducement should not be stricken out ordinarily.<sup>78</sup>

A misjoinder of cause of action in some states may be objected to by a motion to strike out,<sup>79</sup> as may a setting out of the same cause of action in several different ways.<sup>80</sup>

Where a pleading is duplicitous, a motion to strike out one of the charges or pleas is regarded as a proper remedy in some states.<sup>81</sup>

But material portions of a pleading cannot be stricken out.<sup>82</sup>

*v. Evans*, 38 Mo. 305. See *Smith v. Hedges*, 170 App. Div. 349, 155 N. Y. Supp. 934; *Perez v. Guanica Centrale*, 17 P. R. 927.

[c] **Irrelevant denials**, see *Clarkin v. New York*, 91 Misc. 98, 154 N. Y. Supp. 1019.

64. U. S.—*Harrison v. Tampa*, 247 Fed. 569. Cal.—*Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492. Fla.—*Co-operative Sanitary Baking Co. v. Shields*, 71 Fla. 110, 70 So. 934. Ia.—*Frazier v. Andrews*, 134 Iowa 621, 112 N. W. 92, 11 L. R. A. (N. S.) 593.

[a] **Immaterial Statements in an Indictment**.—*State v. Sterns*, 28 Kan. 154; *Com. v. Pray*, 13 Pick. (Mass.) 359.

[b] **Allegations in answer to immaterial matter in the petition** may be stricken. *Larson v. Central Nat. Fire Ins. Co.*, 98 Neb. 845, 154 N. W. 721; *Williams v. Ninemire*, 23 Wash. 393, 63 Pac. 534. *Contra*, *Brennan v. Griffiths*, 18 N. Y. Supp. 145, 46 N. Y. St. 16, denying relief as the plaintiff induced the defendant to answer by making the allegation.

65. See the article "**Surplusage and Scandal**."

66. See the title "**Surplusage and Scandal**." See also 12 STANDARD PROC. 659, in indictments.

67. *Socola v. Grant*, 15 Fed. 487; *Ryan v. Riddle*, 109 Mo. App. 115, 82 S. W. 1117. See *Capital Lumb. Co. v. Learned*, 36 Ore. 544, 59 Pac. 454,

78 Am. St. Rep. 792, and the title "**Repugnancy**."

But as to inconsistent defenses, see 10 STANDARD PROC. 272, notes 53, 54.

68. See 8 STANDARD PROC. 82.

69. See the title "**Surplusage and Scandal**."

70. See 12 STANDARD PROC. 900.

71. See 5 STANDARD PROC. 226.

72. See 16 STANDARD PROC. 600.

73. See 13 STANDARD PROC. 345.

74. See 7 STANDARD PROC. 106.

75. *Truax v. Rothschild*, 171 App. Div. 509, 157 N. Y. Supp. 634; *Clarkin v. New York*, 91 Misc. 98, 154 N. Y. Supp. 1019.

76. *Peck v. Parchen*, 52 Iowa 46, 2 N. W. 597.

77. *De St. Aubin v. Guenther*, 232 Fed. 411.

78. *Maisenhelder v. Crispell*, 105 App. Div. 219, 94 N. Y. Supp. 707; *McGarahan v. Sheridan*, 106 App. Div. 532, 94 N. Y. Supp. 708.

[a] **Matters of inducement** which are immaterial may be stricken out. *Argyropolis v. Barnes*, 28 Cal. App. 254, 151 Pac. 1156; *Casto v. Murray*, 47 Ore. 57, 81 Pac. 388, 883.

79. See 14 STANDARD PROC. 723.

80. See 14 STANDARD PROC. 724.

81. See 7 STANDARD PROC. 947.

[a] **In Indictments**.—*State v. Clement*, 80 N. J. L. 669, 77 Atl. 1067. But see the title "**Indictment and Information**," and 12 STANDARD PROC. 659, note 86.

82. Colo.—*Stewart v. Newton Lumb*.

Failure to prove an allegation is not ground for striking it out.<sup>83</sup>

A prayer for relief to which a party is not entitled may be stricken out, it has been held.<sup>84</sup>

F. PROCEEDINGS.—1. **Motion.**—a. *Generally.*—Unless the court acts of its own motion,<sup>85</sup> a party desiring a pleading or part thereof stricken, proceeds in the ordinary way by motion, which may be made orally,<sup>86</sup> except where it is required by statute or rule of court to be in writing.<sup>87</sup> The motion must conform to the general rules relating to motions,<sup>88</sup> and specify the grounds on which it is founded,<sup>89</sup> and must specifically point out the objectionable matter.<sup>90</sup> If the pleading contains proper as well as improper matter, the motion should generally be directed only to the allegations of improper matters.<sup>91</sup>

& Inv. Co., 165 Pac. 255. **Fla.**—Marsh v. Marsh, 68 Fla. 355, 67 So. 81. **Ind.**—Pittsburgh, C. C. & St. L. Ry. Co. v. Mahoney, 148 Ind. 196, 202, 46 N. E. 917, 47 N. E. 464, 62 Am. St. Rep. 503, 40 L. R. A. 101; Atkinson v. Wabash R. Co., 143 Ind. 501, 41 N. E. 947. **Mo.**—Crocker v. Mann, 3 Mo. 472, 26 Am. Dec. 684.

See 12 STANDARD PROC. 546, as to indictments.

[a] **The test of materiality** of the allegations is whether they tend to constitute a cause of action or defense. Atkinson v. Wabash R. Co., 143 Ind. 501, 41 N. E. 947.

83. Millhiser v. McAllister, 103 Ga. 798, 30 S. E. 661; Richmond & D. R. Co. v. Worley, 92 Ga. 84, 18 S. E. 361. Compare Scott v. Stockholders' Oil Co., 135 Fed. 892, holding a plea in abatement not supported with depositions taken in conformity with rules of court will be stricken.

84. Reagan v. Hadley, 57 Ind. 509; Board of Comrs. v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245. See State ex rel. Mitchell v. Smith, 14 Wis. 564, query. But see Smith v. Hilton, 50 Hun 236, 2 N. Y. Supp. 820.

[a] **The whole prayer should not be stricken out**, where some matter therein is proper. Sloanaker v. Howerton (Iowa), 166 N. W. 78.

85. See *supra*, I. B.

86. Randall v. Wadsworth, 130 Ala. 633, 31 So. 555 (such motions are usually oral); Sloan v. Farmers' & M. Bank, 20 Ga. App. 123, 92 S. E. 893; Blount v. Radford, 16 Ga. App. 95, 84 S. E. 591.

87. Crystal Ice Co. v. Morris, 160 Ind. 651, 67 N. E. 502; Paddock v.

Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254.

88. See the title "Motions."

[a] **Allegation that movant was aggrieved** by allegations objected to need not be made in notice of motion. Gadsden v. Catawba Power Co., 71 S. C. 340, 51 S. E. 121.

89. **Ind.**—Brinkmeyer v. Helbling, 57 Ind. 435. **Mo.**—Paddock v. Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254. **Neb.**—Hershiser v. Delone, 24 Neb. 380, 38 N. W. 863. **N. J.**—Westervelt v. Ackerson, 35 N. J. Eq. 43. **N. Y.**—Bowman v. Sheldon, 5 Sandf. 657.

*Contra*, Brooks v. Continental Ins. Co., 125 Ala. 615, 29 So. 13.

[a] **A ground is sufficiently specific** which states certain paragraphs are "incompetent, irrelevant, immaterial, and no defense." Reed v. Lane, 96 Iowa 454, 65 N. W. 380.

90. **U. S.**—McGorray v. O'Connor, 87 Fed. 586, 31 C. C. A. 114; Witherell v. Wiberg, 4 Sawy. 232, 30 Fed. Cas. No. 17,917. **Cal.**—People v. Empire G. & S. M. Co., 33 Cal. 171. **Ind.**—Crystal Ice Co. v. Morris, 160 Ind. 651, 67 N. E. 502. **Ia.**—Keairnes v. Durst, 110 Iowa 114, 81 N. W. 238. **Mo.**—State ex inf. Crow v. Fleming, 147 Mo. 1, 44 S. W. 758. **Neb.**—Chicago, B. & Q. R. Co. v. Spirk, 51 Neb. 167, 70 N. W. 926. **N. Y.**—Park v. Realty Adv. Co., 160 App. Div. 21, 144 N. Y. Supp. 907; Blake v. Eldred, 18 How. Pr. 240; Benedict v. Dake, 6 How. Pr. 352.

[a] **But a motion containing a general prayer of relief** may be considered as directed to the whole pleading. Blake v. Eldred, 18 How. Pr. (N. Y.) 240.

91. **Idaho.**—Valley Lumb. Co. v. Mc-

b. *When Made and Waived.*—A motion to strike out must be made at the proper time or the right to do so will be deemed waived.<sup>92</sup> As a general rule, a motion to strike out a pleading because of formal defects,<sup>93</sup> or to strike irrelevant and redundant matter from a pleading,<sup>94</sup> must be made before filing a pleading thereto raising issues of law or fact, and should not be filed simultaneously with a demurrer.<sup>95</sup> But scandal is an offense upon the court which may be corrected at any time.<sup>96</sup> A motion to strike which has been filed is not waived by the subsequent filing of a demurrer<sup>97</sup> or answer,<sup>98</sup> or by noticing the case for trial.<sup>99</sup>

Such motions should be brought to a hearing before the case is called for trial.<sup>1</sup>

c. *Notice.*—A motion to strike must be made on notice.<sup>2</sup>

d. *Hearing and Determination.*—Where the motion is grounded upon matters which may not appear from the pleadings or record, of which the court takes judicial notice, it may be supported and resisted

Gilvery, 16 Idaho 338, 101 Pac. 94. **Ind.**—Huffman v. State, 183 Ind. 698, 109 N. E. 401, 748. **Mo.**—Patterson v. Hollister, 32 Mo. 478.

[a] But if the scandalous matter predominates and is mingled with the other allegations so that its separation is extremely difficult, the motion may be directed to the whole pleading. Huffman v. State, 183 Ind. 698, 109 N. E. 401, 426, 748.

92. Stoddard & Co. v. Davis & Co., 50 Ala. 21; Savage v. Challiss, 4 Kan. 319.

[a] Obtaining order enlarging time to answer is waiver of right to strike out matter from the complaint. Bowman v. Sheldon, 5 Sandf. (N. Y.) 657; Best v. Clyde, 86 N. C. 4.

[b] After noticing the cause for trial, motion is too late. Esmond v. Van Benschoten, 5 How. Pr. (N. Y.) 44.

[c] Motion at trial comes too late. Augusta Ry. Co. v. Glover, 92 Ga. 132, 18 S. E. 406.

[d] Objection after verdict comes too late. Uzzell v. Horn, 71 S. C. 426, 51 S. E. 253.

93. Furst v. W. T. Rawleigh Med. Co., 282 Ill. 366, 118 N. E. 763.

94. **Ill.**—Howe v. Frazer, 17 Ill. App. 219. **Ia.**—Wisconsin Lumb. Co. v. Greene & W. Tel. Co., 127 Iowa 350, 101 N. W. 742, 109 Am. St. Rep. 387, 69 L. R. A. 968. **Kan.**—Savage v. Challiss, 4 Kan. 319. **Mo.**—Sheehan & Loler Transp. Co. v. Sims, 36 Mo. App. 224. **Mont.**—Collier v. Ervin, 3 Mont. 142. **N. Y.**—Williams v. Folsom, 57

Hun 128, 10 N. Y. Supp. 895; Bowman v. Sheldon, 5 Sandf. 657. **N. C.**—Best v. Clyde, 86 N. C. 4.

See generally the title "Surplusage and Scandal."

[a] Except where the pleading is amended after demurrer submitted. Wisconsin Lumb. Co. v. Greene & W. Tel. Co., 127 Iowa 350, 101 N. W. 742, 109 Am. St. Rep. 387, 69 L. R. A. 968.

[b] An application thereafter is addressed to the discretion of the court. Best v. Clyde, 86 N. C. 4.

95. See 6 STANDARD PROC. 868.

96. Best v. Clyde, 86 N. C. 4; Johnson v. Tucker, 2 Tenn. Ch. 244. See the title "Surplusage and Scandal."

97. Alexander v. Foster, 16 Ark. 660.

98. Allen v. Cooley, 60 S. C. 353, 370, 38 S. E. 622. But see Howard v. Shirley, 75 Mo. App. 150.

99. Morron v. Bryce, 162 App. Div. 466, 147 N. Y. Supp. 931.

1. Kahn v. Old Telegraph Min. Co., 2 Utah 174.

2. **Cal.**—Arata v. Tellurium G. & S. M. Co., 65 Cal. 340, 4 Pac. 195, 344; Abbott v. Douglass, 28 Cal. 295. **Mont.** Kipp v. Silverman, 25 Mont. 296, 64 Pac. 884. **N. J.**—Malberti v. United Electric Co., 69 N. J. L. 55, 54 Atl. 251. **N. Y.**—Rice v. Ehele, 55 N. Y. 518; New York Ice Co. v. Northwestern Ins. Co., 12 Abb. Pr. 74, 21 How. Pr. 234. **S. C.**—Standard Sew. Mach. Co. v. Henry, 43 S. C. 17, 20 S. E. 790. **Tex.**—Herndon v. Campbell, 86 Tex. 168, 23 S. W. 980.



by affidavits.<sup>3</sup> Such motions are addressed to the discretion of the court,<sup>4</sup> and in granting relief terms may be imposed.<sup>5</sup> If the motion is too broad in its scope it must be overruled though a narrower motion might have been granted.<sup>6</sup> The order is framed in accordance with general rules elsewhere treated.<sup>7</sup>

**2. Judgment by Default and Pleading Over.**—If the stricken pleading is a demurrer or answer, judgment by default may be rendered for want of pleading,<sup>8</sup> unless the court allows the party to plead over, as it seems it may do, especially where the motion is in effect a demurrer,<sup>9</sup> though, as a reason for holding that the sufficiency of a pleading cannot be attacked by motion to strike, it has been stated that this remedy would cut off the right of amendment.<sup>10</sup>

By filing a new pleading in place of the one stricken, a party waives any error in the court's ruling.<sup>11</sup>

**3. Appeal and Error.**—a. *Generally.*—A writ of error,<sup>12</sup> or an independent appeal,<sup>13</sup> cannot be taken from an order striking out, and

See 10 STANDARD PROC. 296, and generally the title "Motions."

3. See 7 STANDARD PROC. 297, and *Dimick v. Campbell*, 31 Cal. 238.

[a] An affidavit showing the time of serving the pleading objected to must accompany the motion. *Rogers v. Rathbone*, 1 Code Rep. N. S. (N. Y.) 404, 6 How. Pr. 66.

Affidavit of merits in resistance of motion to strike, see 1 STANDARD PROC. 660.

4. *Ala.*—*Western Union Tel. Co. v. Haley*, 143 Ala. 586, 39 So. 386. *Cal.* *Lybecker v. Murray*, 58 Cal. 186. *Conn.* *Whitney v. Cady*, 71 Conn. 166, 41 Atl. 550. *Kan.*—*Sramek v. Sklenar*, 73 Kan. 450, 85 Pac. 566. *Mass.*—*Gardner v. Webber*, 17 Pick. 407. *Minn.*—*Hawley v. Wilkenson*, 18 Minn. 525. *S. C.* *Mikell v. McCreery-Pressley Co.*, 105 S. C. 25, 89 S. E. 467.

5. *Blake v. Eldred*, 18 How. Pr. (N. Y.) 240.

6. *U. S.*—*Tomkins v. Paterson*, 239 Fed. 402. *Ga.*—*Carter v. Haralson*, 146 Ga. 282, 91 S. E. 88. *Ia.*—*Sloanaker v. Howerton*, 166 N. W. 78. *Neb.* *Smith v. Meyers*, 54 Neb. 1, 74 N. W. 277; *German Ins. Co. v. Stiner*, 2 Neb. Unof. 308, 96 N. W. 122.

7. See the title "Orders."

[a] Where the statute makes the order part of the judgment roll it is better practice to have incorporated in it all portions of the pleadings stricken out, unless they constitute whole paragraphs. *Overton v. Noyes* (Cal.), 170 Pac. 1110. See *Riego v. Foster*, 125 Cal. 178, 57 Pac. 896.

[b] Direction of service of amended pleading should be included in order where the pleading is materially reformed by striking out parts. *Dinkelspiel v. New York Evening J. Pub. Co.*, 42 Misc. 74, 85 N. Y. Supp. 570.

8. See 14 STANDARD PROC. 877; 10 STANDARD PROC. 295.

9. *Fla.*—*Miller v. Edwards*, 77 So. 231, under express statute. *Idaho.* *Union Stock Yards Nat. Bank v. Bolan*, 14 Idaho 87, 93 Pac. 508, 125 Am. St. Rep. 146. *Mo.*—*Mumford v. Keet*, 71 Mo. App. 535, where motion is in effect a demurrer. *N. Y.*—*Dinkelspiel v. New York Evening J. Pub. Co.*, 42 Misc. 74, 85 N. Y. Supp. 570. *Wash.* *Davis v. Ford*, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393.

See 10 STANDARD PROC. 302.

10. *Ala.*—*Huntsville Knitting Mills v. Butner*, 76 So. 54. *Ill.*—*Consol. Coal Co. v. Peers*, 166 Ill. 361, 46 N. E. 1105, 38 L. R. A. 624. *Ind.*—*Chicago, S. B. & N. I. R. Co. v. Dunnahoo* (Ind. App.), 112 N. E. 552.

11. *Mumford v. Keet*, 71 Mo. App. 535; *King v. Morris*, 74 N. J. L. 810, 68 Atl. 162, 14 L. R. A. (N. S.) 439. See 6 STANDARD PROC. 1005.

12. *King v. Morris*, 74 N. J. L. 810, 68 Atl. 162, 14 L. R. A. (N. S.) 439; *Brown v. Warden*, 44 N. J. L. 177.

13. See 2 STANDARD PROC. 172. *Contra*, *Fuller v. Claffin*, 93 U. S. 14, 23 L. ed. 785; *Bergen Tp. v. Nelson Co.*, 33 N. D. 247, 156 N. W. 559.

[a] But an order denying a motion to set aside an ex parte order striking

an appeal cannot be taken from a refusal to strike.<sup>14</sup> But such orders may be reviewed on appeal from the judgment.<sup>15</sup> In some jurisdictions, however, the trial court must, by motion for new trial, be first asked to review its order.<sup>16</sup>

b. *Exceptions and Record*.—Unless deemed excepted to by statute,<sup>17</sup> exceptions to the ruling on the motion must be taken and saved by bill of exceptions.<sup>18</sup> As a general rule a pleading which is stricken out is no longer part of the record,<sup>19</sup> and must be made a part thereof by a bill of exceptions,<sup>20</sup> or by order of the court that it shall be made so.<sup>21</sup> But in some states a pleading which has been stricken out is still a part of the judgment roll.<sup>22</sup> Unless otherwise provided by statute,<sup>23</sup> the notice of motion to strike out a pleading or a part

out an answer is appealable. *Rice v. Ehele*, 55 N. Y. 518, 524.

14. *Ia.*—*Specht v. Spangenberg*, 70 Iowa 488, 30 N. W. 875. *N. C.*—*Walters v. Starnes*, 118 N. C. 842, 24 S. E. 713. *Wis.*—*State ex rel. Green Bay & M. R. Co. v. Jennings*, 56 Wis. 113, 14 N. W. 28.

15. *Nevada C. & S. Canal Co. v. Kidd*, 43 Cal. 180; *Warren v. Stoddart*, 6 Idaho 692, 59 Pac. 540.

16. *Shohoney v. Quincy, O. & K. C. R. Co.*, 231 Mo. 131, 152, 132 S. W. 1059. See generally the title "New Trial."

[a] But where the motion is equivalent to a demurrer, a motion for new trial is not required. *Union Brew. Co. v. Ehlhardt*, 139 Mo. App. 129, 120 S. W. 1193.

17. *Cal.*—*Hawley v. Kocher*, 123 Cal. 77, 55 Pac. 696; *Davis v. Honey Lake W. Co.*, 98 Cal. 415, 33 Pac. 270. *Mont.*—*Bank of Commerce v. Fuqua*, 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461, 14 L. R. A. 588. *Utah.*—*Gregg v. Groesbeck*, 11 Utah 310, 40 Pac. 202, 32 L. R. A. 266.

[a] But a bill of exception is necessary to preserve exceptions deemed to have been taken, the order not being part of the judgment roll. *Hawley v. Kocher*, 123 Cal. 77, 55 Pac. 696. But compare *Warren v. Stoddart*, 6 Idaho 692, 59 Pac. 540.

18. *Ala.*—*Comrs. Court v. State ex rel. So. Ry. Co.*, 146 Ala. 439, 41 So. 463; *Spraggins v. State*, 139 Ala. 93, 102, 35 So. 1000. *Mo.*—*Shohoney v. Quincy, O. & K. C. R. Co.*, 231 Mo. 131, 153, 132 S. W. 1059. *Va.*—*Leary v. Briggs*, 114 Va. 411, 76 S. E. 907; *Offterdinger v. Ford*, 86 Va. 917, 12

S. E. 1; *White v. Toneray*, 9 Leigh (36 Va.) 347.

19. See also 10 STANDARD PROC. 295; 2 STANDARD PROC. 335.

20. *Ala.*—*Comrs. Court v. State ex rel. Southern Ry. Co.*, 146 Ala. 439, 41 So. 463. *Ind.*—*Tilden v. Louisville & Jeffersonville Ferry Co.*, 157 Ind. 532, 62 N. E. 31; *Dudley v. Pigg*, 149 Ind. 363, 48 N. E. 642. *Va.*—*Leary v. Briggs*, 114 Va. 411, 76 S. E. 907.

See 4 STANDARD PROC. 301.

21. *Tilden v. Louisville & Jeffersonville Ferry Co.*, 157 Ind. 532, 62 N. E. 31; *Leary v. Briggs*, 114 Va. 411, 76 S. E. 907; *Fry v. Leslie*, 87 Va. 269, 12 S. E. 671.

22. *Cal.*—*Davis v. Honey Lake W. Co.*, 98 Cal. 415, 33 Pac. 270; *Abbott v. Douglass*, 28 Cal. 295. *Colo.*—*Henry v. Montezuma Water & L. Co.*, 55 Colo. 182, 133 Pac. 747; *Pratt v. South Canon S. Co.*, 47 Colo. 478, 107 Pac. 1105, as a consequence of the statute making the motion and ruling a part of the record. *Ga.*—*Askew v. Singletary*, 11 Ga. App. 727, 76 S. E. 98. See *McCall v. Herring*, 116 Ga. 235, 42 S. E. 468. *Idaho.*—*Warren v. Stoddart*, 6 Idaho 692, 59 Pac. 540. *Utah.*—*Gregg v. Groesbeck*, 11 Utah 310, 40 Pac. 202, 32 L. R. A. 266.

23. See generally the statutes and *Cal.*—*Overton v. Noyes*, 170 Pac. 1110, statute makes the order part of the judgment roll. For cases before the statute, see *infra*, this section. *Colo.*—*Pratt v. South Canon S. Co.*, 47 Colo. 478, 107 Pac. 1105, the motion in writing and the ruling are made parts of the record. *Idaho.*—See *Warren v. Stoddart*, 6 Idaho 692, 59 Pac. 540. *Ind.*—*Crystal Ice Co. v. Morris*, 160 Ind. 651, 67 N. E. 502.

thereof,<sup>24</sup> the motion,<sup>25</sup> the affidavit accompanying it,<sup>26</sup> and the affidavit of service,<sup>27</sup> and the ruling on the motion,<sup>28</sup> are not parts of the judgment roll and, to be considered on appeal, must be brought in by bill of exceptions or statement of case,<sup>29</sup> or by an order of court making them a part of the record.<sup>30</sup> But when the proceedings are shown by the journal entry of the judgment it has been held a bill of exceptions is not necessary.<sup>31</sup>

c. *Review*.—The motion to strike being addressed to the court's discretion, the action of the court will be inquired into only to determine whether its discretion has been abused to the injury of the party.<sup>32</sup> If the action of the court, though error, was harmless, it will not be reversed.<sup>33</sup> Thus a refusal to strike out portions of a pleading is harmless error where no improper issues are submitted to the jury,<sup>34</sup> or where the complaining party is not embarrassed in the preparation of his defense.<sup>35</sup>

24. *Hawley v. Kocher*, 123 Cal. 77, 55 Pac. 696; *Morris v. Angle*, 42 Cal. 236; *Dimick v. Campbell*, 31 Cal. 238; *Swanson v. Groat*, 12 Idaho 148, 85 Pac. 384.

25. See 4 STANDARD PROC. 304; 2 STANDARD PROC. 335.

[a] But if motion is in effect a demurrer, it is (1) part of the judgment roll. *State ex rel. Southwest Nat. Bank v. Ellison*, 266 Mo. 423, 181 S. W. 998; *Shohoney v. Quincy O. & K. C. R. Co.*, 231 Mo. 131, 132 S. W. 1059; *Union Brew. Co. v. Ehlhardt*, 139 Mo. App. 129, 120 S. W. 1193; *Bick v. Dry*, 134 Mo. App. 589, 114 S. W. 1145; *Bank of Commerce v. Fuqua*, 11 Mont. 285, 293, 28 Pac. 291, 28 Am. St. Rep. 461, 14 L. R. A. 588. (2) The motion, even though it goes to the whole pleading, cannot be treated as a demurrer when it raises an issue of law on some collateral matter not on the face of the pleading. *Bick v. Dry*, 134 Mo. App. 589, 114 S. W. 1145.

26. *Dimick v. Campbell*, 31 Cal. 238.

27. *Dimick v. Campbell*, 31 Cal. 238.

28. *Hawley v. Kocher*, 123 Cal. 77, 55 Pac. 696; *Barber v. Mulford*, 117 Cal. 356, 49 Pac. 206; *National Bank v. Mulford*, 17 Cal. App. 551, 120 Pac. 446; *Crystal Ice Co. v. Morris*, 160 Ind. 651, 67 N. E. 502. Compare *Bick v. Dry*, 134 Mo. App. 589, 114 S. W. 1145, probably the ruling on the motion is part of the record when the motion is in effect a demurrer.

Statute has changed the rule in California and Indiana. See the statutes and *supra*, this section.

29. See cases in preceding notes.

30. *Crystal Ice Co. v. Morris*, 160 Ind. 651, 67 N. E. 502. Compare present statute.

31. *Tullis v. Shannon*, 3 Wash. 716, 29 Pac. 449. See also *Abbott v. Douglass*, 28 Cal. 295; *Gregg v. Groesbeck*, 11 Utah 310, 322, 40 Pac. 202, 32 L. R. A. 266. But compare *Hawley v. Kocher*, 123 Cal. 77, 55 Pac. 696.

[a] That the grounds of the motion are not stated is immaterial as the prevailing party is entitled to the benefit of any reason sufficient to sustain the action of the court. *Tullis v. Shannon*, 3 Wash. 716, 29 Pac. 449. See *Hawley v. Kocher*, 123 Cal. 77, 55 Pac. 696; *Dimick v. Campbell*, 31 Cal. 238.

32. *Haug v. Haugan*, 51 Minn. 558, 53 N. W. 874.

33. *Brachman v. Kuehnmueneh*, 64 Wis. 249, 24 N. W. 902, same evidence admissible.

Waiver of error by pleading over, see *supra*, I, F, 2.

34. *Ala.*—*Woodstock Iron Wks. v. Stockdale*, 143 Ala. 550, 39 So. 335; *Vandiver & Co. v. Waller*, 143 Ala. 411, 39 So. 136; *Davis v. Louisville & N. R. Co.*, 108 Ala. 660, 18 So. 687. *Ind.*—*Coddingtion v. Canaday*, 157 Ind. 243, 260, 61 N. E. 567; *Pittsburgh, C. C. & St. L. Ry. Co. v. Mahoney*, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 62 Am. St. Rep. 503, 40 L. R. A. 101. *Ia.*—*Jones v. Ford*, 154 Iowa 549, 134 N. W. 569, 38 L. R. A. (N. S.) 777; *Cate v. Gilman*, 41 Iowa 530.

35. *Williams v. Peninsular Groc. Co. (Fla.)*, 75 So. 517.



## II. WITHDRAWAL OF PLEADINGS.<sup>36</sup> — A. GENERALLY.

Upon a timely application,<sup>37</sup> and a proper showing,<sup>38</sup> a court may in its discretion allow the withdrawal of pleadings filed in a case,<sup>39</sup> upon such terms as it deems proper.<sup>40</sup> Leave of court is essential,<sup>41</sup> and in some states the consent of the opposite party is also required.<sup>42</sup>

As a general rule, at any time before submission to the jury, a party should be allowed to withdraw a cause of action or defense which he does not desire to maintain.<sup>43</sup> The court may allow withdrawal of demurrer or answer to enable a party to file a motion to strike out,<sup>44</sup> or to plead the bar of the statute of limitations.<sup>45</sup> So also it may

36. Withdrawal of bill of particulars, see 4 STANDARD PROC. 405.

Withdrawal of exceptions, see 4 STANDARD PROC. 184.

Withdrawal of claims in admiralty, see 1 STANDARD PROC. 504.

Withdrawal of pleas in criminal cases, see 2 STANDARD PROC. 885, 866, 876, 900, 906, 913, 920.

Withdrawal of motion, see 15 STANDARD PROC. 225.

Withdrawal of part of charge in an information, see 12 STANDARD PROC. 560.

37. *Gross v. Feehan*, 110 Iowa 163, 81 N. W. 235; *Boatmans' Sav. Inst. v. Forbes*, 52 Mo. 201, "at any time."

[a] After two years, withdrawal may be allowed. *Byington v. Stone*, 51 Iowa 317, 1 N. W. 647.

[b] A demurrer may be withdrawn (1) at any time before judgment on it is recorded, unless it is frivolous. *Call v. Ewing*, 1 Blackf. (Ind.) 301. And see 13 STANDARD PROC. 113. (2) But not afterwards. *Lane v. Morris*, 8 Ga. 468.

[c] After conclusion of the evidence, motion to withdraw answer and file a demurrer may be denied in discretion of the court. *Leeds v. Boyer*, 59 Ind. 289.

38. *Patterson v. Mercer*, 23 Ind. 16; *Rochester v. Dun*, 1 Bibb (Ky.) 412.

39. U. S.—*Bryan v. Louisville & N. R. Co.*, 244 Fed. 650, 157 C. C. A. 98. Ala.—*Southern Hdw. & Sup. Co. v. Block Bros.*, 163 Ala. 81, 50 So. 1036. Del.—*Steckel v. Barnes*, 5 Boyce 209, 91 Atl. 991. Ill.—*Charles H. Thompson Co. v. Burns*, 199 Ill. App. 418. Ind.—*Patterson v. Mercer*, 23 Ind. 16. Ia.—*Gross v. Feehan*, 110 Iowa 163, 81 N. W. 235. Mass.—*Beacon Motorcar Co. v. Shadman*, 226 Mass. 570, 116 N. E. 559. Neb.—*Atkins v. Gladwish*, 27

Neb. 841, 44 N. W. 37. R. I.—*Kazarian Bros. v. Providence-Wash. Ins. Co.*, 101 Atl. 221. Tenn.—*Lowe v. Morris*, 4 Sneed 69.

See 8 STANDARD PROC. 863; 6 STANDARD PROC. 940, note 47.

Withdrawal of demurrer to indictment, see 12 STANDARD PROC. 655.

Necessity of leaving copies on file, see 8 STANDARD PROC. 990, note 44.

[a] Action Equivalent to Withdrawal.—(1) Consenting to overruling of a demurrer is equivalent to its withdrawal. *Santa Rosa Bank v. Paxton*, 149 Cal. 195, 86 Pac. 193. (2) Standing on a demurrer filed with a reply after overruling the demurrer amounts to a withdrawal of the reply. *Henley v. Henley*, 93 Mo. 95, 5 S. W. 701. (3) Transfer of a cause to the equity court on motion of a party is equivalent to a withdrawal of his answer at law. *Harrel v. Howard*, 80 Ky. 51.

Withdrawal of plea in criminal case, see 2 STANDARD PROC. 876, 885.

40. *Atkins v. Gladwish*, 27 Neb. 841, 44 N. W. 37, where leave was granted on condition that plaintiff would not lose a term of court.

41. See 8 STANDARD PROC. 989, 863; 4 STANDARD PROC. 405.

[a] Leave to file an amended pleading includes the right to withdraw the original. *White v. Hampton*, 9 Iowa 181.

42. See 8 STANDARD PROC. 989, and 6 STANDARD PROC. 941.

43. *Maryland Casualty Co. v. Givens*, 177 Ky. 131, 197 S. W. 497; *Padgett v. Mays*, 11 Ky. Op. 24.

44. *Gross v. Feehan*, 110 Iowa 163, 81 N. W. 235; *Cohn v. Ottenheimer*, 13 Ore. 220, 10 Pac. 20. See *Patrick v. Patrick* (Del.), 102 Atl. 980.

45. See 18 STANDARD PROC. 1042.

Withdrawal of demurrer as prerequisite to plea, see 6 STANDARD PROC. 940.

allow the withdrawal of an answer to file a demurrer,<sup>46</sup> or to amend the answer,<sup>47</sup> the withdrawal of plea of not guilty to file disclaimer,<sup>48</sup> or of a plea in abatement to file an answer,<sup>49</sup> or the withdrawal of a replication to amend the bill.<sup>50</sup>

**B. WHO MAY WITHDRAW.**—A party may withdraw his pleading without acting through his attorney.<sup>51</sup> An attorney may withdraw the defendant's answer and appearance and suffer default when done to subserve the interests or to comply with the wishes of his client.<sup>52</sup> But the court cannot require the withdrawal of a demurrer.<sup>53</sup> Nor can a party require the withdrawal of his adversary's pleading.<sup>54</sup> And one of several co-parties cannot withdraw the joint answer to the prejudice of his co-parties.<sup>55</sup>

**C. EFFECT OF WITHDRAWAL.**—A withdrawal of a pleading removes it from consideration of the parties as though it had never been filed,<sup>56</sup> but the party is still entitled to notice of proceedings in the action.<sup>57</sup> The withdrawal, after demurrer overruled, of an answer filed with the demurrer, is not a confession of judgment.<sup>58</sup>

46. See 18 STANDARD PROC. 867; 8 STANDARD PROC. 863; 4 STANDARD PROC. 179.

47. See 4 STANDARD PROC. 179.

48. *Oliver v. Oliver*, 187 Ala. 340, 65 So. 373.

49. *Bryan v. Louisville & N. R. Co.*, 244 Fed. 650, 157 C. C. A. 98.

50. See 4 STANDARD PROC. 200.

51. *Reeder v. Lockwood*, 30 Misc. 531, 62 N. Y. Supp. 713.

52. *Nickells v. Nickells*, 5 N. D. 125, 64 N. W. 73, 57 Am. St. Rep. 540, 33 L. R. A. 515, note.

[a] But to retaliate for failure to pay counsel's fees an attorney cannot legally withdraw the answer and appearance of the defendant. *Nickells v. Nickells*, 5 N. D. 125, 64 N. W. 73, 57 Am. St. Rep. 540, 33 L. R. A. 515.

53. See 6 STANDARD PROC. 1005.

54. *Kaulbach v. Magnus*, 40 App. Div. 366, 57 N. Y. Supp. 985, where plaintiff claimed he did not intend to serve on one of several defendants.

55. *Reeder v. Lockwood*, 30 Misc. 531, 62 N. Y. Supp. 713.

56. *Wilson v. Derrwaldt*, 100 Ill. App. 396; *Southern Nat. Life Realty Corp. v. People's Bank*, 178 Ky. 80, 198 S. W. 543.

[a] All rulings on the pleading

pass out of the record with it. *Chappell v. Jasper Co. Oil & Gas. Co.*, 31 Ind. App. 170, 66 N. E. 515.

[b] Withdrawal of pleading to which demurrer has been sustained withdraws the demurrer also. *George v. Bischoff*, 68 Ill. 236.

[c] Withdrawal of answer admits material allegations in the declaration. *Price v. Page*, 24 Mo. 65. See *McClure v. Williams*, 65 Ill. 390; *Geringer v. Novak*, 117 Ill. App. 160.

[d] On withdrawal of a substituted petition, the original pleading stands and may be amended. *Thayer v. Smoky Hollow Coal Co.*, 129 Iowa 550, 105 N. W. 1024.

Withdrawal of demurrer and pleading over as a waiver of error, see 6 STANDARD PROC. 1005.

[e] The withdrawal of a count is nothing more than an amendment striking out such count. It is not a retraxit. *Southern Ry. Co. v. McEntire*, 169 Ala. 42, 53 So. 158. As to retraxit see the title "Dismissal, Discontinuance and Nonsuit."

57. *Watson v. Hinchman*, 41 Mich. 716, 3 N. W. 202.

58. *Frazier v. Todd*, 4 Tex. 461, the party is in the same position as if he had elected to stand on his demurrer.

**D. REFILING WITHDRAWN PLEADING.** — If a party relies on a pleading which he has withdrawn, he must refile it.<sup>59</sup> But if the allegations of the pleading were controverted before withdrawal, a second traverse is not necessary after it has been refiled.<sup>60</sup>

59. *Huntsville Knitting Mills v. Butner* (Ala.), 76 So. 54. See *South-ern Ry. Co. v. McEntire*, 169 Ala. 42, 53 So. 158.  
60. *Henderson v. McClain*, 102 Ky. 402, 43 S. W. 700, 39 L. R. A. 349.

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**STRUCK OR SPECIAL JURY.** — See **Juries and Jurors.**

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**SUBJECT OF ACTION.** — See **Joinder of Actions; Set-Off, Counter-claim and Recoupment; Suits and Actions.**

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# SUBPOENA

By the Editorial Staff.

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## CROSS-REFERENCES:

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For further references and cross-references, see the index to this  
work and the cross-references throughout this article.

**I. DEFINITION, CLASSIFICATION AND PURPOSE.**—Exclusive of its use in equity as a process to compel appearance and answer,<sup>1</sup> a subpoena is a judicial process<sup>2</sup> by which the attendance of a witness is required. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness,<sup>3</sup> and prescribing a penalty for disobedience.<sup>4</sup> Such subpoenas are of two general classes,<sup>5</sup> the subpoena ad testificandum which requires only that the witness appear and testify,<sup>6</sup> and the subpoena duces tecum which contains the added requirement that the witness produce certain books or papers.<sup>7</sup>

**II. POWER TO ISSUE.**—Courts, in cases pending before them,<sup>8</sup>

1. See 8 STANDARD PROC. 463.

2. *Lowther v. Lowther*, 115 App. Div. 307, 100 N. Y. Supp. 965; *Yorks v. Peck*, 31 Barb. (N. Y.) 350. See generally the title "Process."

[a] "Judicial" Writ.—(1) *Jackson v. Mobley*, 157 Ala. 408, 47 So. 590; *Horton v. State*, 112 Ga. 27, 37 S. E. 100. (2) "A subpoena . . . is a judicial writ, commanding the witness to appear at the trial, to testify for the plaintiff, or defendant, or 'to answer for his default thereon under the pains and penalties of the law in that behalf made and provided.'" *Leighton v. Twombly*, 9 N. H. 483.

3. *Scott v. Shields*, 8 Cal. App. 12, 96 Pac. 385, adopting the definition given by the Cal. Code Civ. Proc., §1985.

[a] "A process to cause a witness to appear and give testimony, commanding him to lay aside all pretences and excuses, and appear before a court or magistrate therein named, at a time therein mentioned, to testify for the party named, under a penalty therein mentioned." *Bouvier*, quoted with approval in *Alexander v. Harrison*, 2 Ind. App. 47, 28 N. E. 119; *Matter of Strauss*, 30 App. Div. 610, 52 N. Y. Supp. 392, 27 Civ. Proc. 291, 5 N. Y. Ann. Cas. 275.

[b] Its use for any other purpose is a perversion and abuse of the process of the court. *Dishaw v. Wadleigh*, 15 App. Div. 205, 44 N. Y. Supp. 207, 4 N. Y. Ann. Cas. 170.

**Subpoena in equity**, see 8 STANDARD PROC. 463.

4. *Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597.

5. *Matter of Strauss*, 30 App. Div. 610, 52 N. Y. Supp. 392, 27 Civ. Proc. 291, 5 N. Y. Ann. Cas. 275.

6. *Wharton*, Law of Ev. (3rd ed.), §377; *Greenleaf on Ev.*, §309. N. J. *Murray v. Elston*, 23 N. J. Eq. 212. N. Y.—*Matter of Strauss*, 30 App. Div. 610, 52 N. Y. Supp. 392, 27 Civ. Proc. 291, 5 N. Y. Ann. Cas. 275. Eng. *Amey v. Long*, 9 East 473, 103 Eng. Reprint 653.

7. *Idaho*.—*Murphy v. Russell*, 8 Idaho 133, 67 Pac. 421. Mass.—*Bull v. Loveland*, 10 Pick. 9, where it is said that "a subpoena duces tecum is a writ of compulsory obligation, . . . which will be enforced by proper process to compel the production of the paper when the witness has no lawful or reasonable excuse for withholding it." N. Y.—*Matter of Strauss*, 30 App. Div. 610, 52 N. Y. Supp. 392, 27 Civ. Proc. 291, 5 N. Y. Ann. Cas. 275.

[a] Only documentary evidence relevant to some issue of fact before the court can be brought in by subpoena duces tecum. U. S.—*Johnson Steel Street-Rail Co. v. North Branch Steel Co.*, 48 Fed. 191; *In re Shephard*, 3 Fed. 12, 18 Blatchf. 225. Cal.—*Peterson Bros. v. Mineral King Fruit Co.*, 140 Cal. 624, 74 Pac. 162. Ga.—*Ex parte Calhoun*, 87 Ga. 359, 13 S. E. 694. N. Y.—*Matter of Foster*, 139 App. Div. 769, 124 N. Y. Supp. 667, 675; *Averill v. Barber*, 63 Hun 630, 18 N. Y. Supp. 80, 44 N. Y. St. 540.

**Production of particular documents**, see 2 ENCY. OF EV. 111, et seq.

[a] **To Whom It May Issue.**—The subpoena duces tecum may be issued to any person to whom an ordinary subpoena may issue. See *United States v. Burr*, 2 Wheel. Cr. Cas. 573, 25 Fed. Cas. No. 14,692.

8. *Ex parte Moses*, 53 Fed. 346. See also cases cited in the following note.

and within their territorial jurisdiction,<sup>9</sup> have an inherent power to issue subpoenas.<sup>10</sup> And the power to thus summon witnesses extends to courts of inferior or limited jurisdiction,<sup>11</sup> and by statute to tribunals exercising quasi-judicial functions such as the Interstate Commerce Commission<sup>12</sup> and state boards and committees.<sup>13</sup> Courts may by subpoena compel the attendance of witnesses before arbitrators, masters in chancery, commissioners and other officers,<sup>14</sup> but unless

**Compelling attendance before notary or commissioner** to take deposition, see 7 STANDARD PROC. 300.

[a] **In the absence of statutory authority** a court (1) may not issue a subpoena, either to testify or produce a document, in aid of an action or proceeding pending before another tribunal (*Ex parte* Moses, 53 Fed. 346), and (2) a statutory grant of power to issue a subpoena in such a case does not carry with it power to issue a subpoena *duces tecum*. *Ex parte* Moses, 53 Fed. 346; *Matter of Strauss*, 30 App. Div. 610, 52 N. Y. Supp. 392, 27 Civ. Proc. 291, 5 N. Y. Ann. Cas. 275.

9. *Westfall v. Madison*, 62 Iowa 427, 17 N. W. 614; *State v. Huff*, 161 Mo. 459, 61 S. W. 900, 1104.

[a] **State process is limited to the state** and the court has no power to issue subpoenas to persons beyond the limits of the state. **Mo.**—*State v. Huff*, 161 Mo. 459, 61 S. W. 900, 1104; *State v. Butler*, 67 Mo. 69. **N. Y.**—*Matter of Strauss*, 30 App. Div. 610, 52 N. Y. Supp. 392, 27 Civ. Proc. 291, 5 N. Y. Ann. Cas. 275, where the court held that a justice of the supreme court had no power to issue a subpoena *duces tecum* to order the production of papers before a commissioner to take a deposition for an action pending in another state. **S. C.**—*State v. Murphy*, 48 S. C. 1, 25 S. E. 43.

[b] **The jurisdictional limits of a subpoena from a federal court** in civil cases is by act of March 2nd, 1873, limited to a distance of one hundred miles from the place where the court is situated. *Patapseo Ins. Co. v. Southgate*, 5 Pet. (U. S.) 604, 8 L. ed. 243; *Voss v. Luke*, 1 Cranch C. C. 331, 28 Fed. Cas. No. 17,014; *Russell v. Ashley*, Hempst. 546, 21 Fed. Cas. No. 12,150; *Johnson Steel Street Rail Co. v. North Branch Steel Co.*, 48 Fed. 191.

10. *Com. Title Ins. & Trust Co. v. Slack*, 18 Pa. Co. Ct. 593.

[a] **Power to issue subpoenas *duces tecum* inherent in courts.** *United States v. St. Louis Terminal R. Assn.*, 148 Fed. 486; *Beebe v. Equitable Mut. Life etc. Assn.*, 76 Iowa 129, 40 N. W. 122.

[b] **A court of equity has inherent power to issue a subpoena *duces tecum* in a proper case.** *United States v. Terminal R. Assn.*, 148 Fed. 486.

[c] **The fourth amendment to the Constitution against seizure and search** (1) does not affect the power of the court to issue a subpoena *duces tecum* in a proper case (*United States v. Terminal R. Assn.*, 148 Fed. 486), although (2) the subpoena may be so sweeping in its terms as to amount to an "unreasonable" search and thus come within the inhibition of that amendment. *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. ed. 652.

[d] **Power is not confined to parties to the suit**, but extends to third persons. *United States v. Terminal R. Assn.*, 148 Fed. 486.

11. *Chambers v. Oehler*, 107 Iowa 155, 77 N. W. 853.

[a] **Justices of the Peace.**—*Chambers v. Oehler*, 107 Iowa 155, 77 N. W. 853.

12. See 14 STANDARD PROC. 260.

[a] **Obedience to the subpoenas of the commerce commission** will be enforced by the United States courts. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. ed. 1047.

13. See 2 ENCY. OF EV. 103. See also *Steuer v. McConnell*, 10 Ohio Dec. 573, 8 Ohio N. P. 205; *Muhlhauser v. Morgan*, 10 Ohio Dec. (Reprint) 90; *Rhinehart v. State*, 121 Tenn. 420, 117 S. W. 508.

14. *In re Steward*, 29 Fed. 813.

[a] **Attendance of witness before patent commissioners** is obtained by process of the United States courts. *Ex parte* Moses, 53 Fed. 346.

[b] **Attendance Before Land Of-**



authorized by statute,<sup>15</sup> such officials may not themselves issue subpoenas.<sup>16</sup>

**III. ISSUANCE.**—During the progress of actions pending in court a subpoena is issued as of course without special allowance from the court,<sup>17</sup> and without any consideration of the materiality of the evidence to be adduced or of any other circumstance.<sup>18</sup> Where there is a clerk of court the subpoena is usually issued by him,<sup>19</sup> and in a proceeding in a court of record the process may, under some statutes, be issued by an attorney who signs it himself and tests it in the name of the judge of the court and of its clerk.<sup>20</sup> The prosecuting attorney

**fic.**—A state court will not by subpoena compel attendance of witnesses before the United States land office. *Boom v. De Haven*, 72 Cal. 280, 13 Pac. 694.

[c] **The commissioner of pensions** may by application to the United States courts obtain subpoenas for witnesses before officers authorized to take testimony in the investigation of pension claims. *In re Gross*, 78 Fed. 107. But see *In re McLean*, 37 Fed. 648.

[d] **Before Commissioners Appointed by Foreign Court.**—The courts of one state may, as a matter of comity, subpoena witnesses to appear before commissioners acting in the state but who were appointed by the courts of a sister state. *Boom v. De Haven*, 72 Cal. 280, 13 Pac. 694.

15. See the statutes and 2 ENCY. OF EV. 102, and also see the following note.

16. *Boom v. De Haven*, 72 Cal. 280, 13 Pac. 694; *Bryant v. Levy*, 52 La. Ann. 1649, 28 So. 191.

[a] **Arbitrators**, (1) have no power to subpoena witnesses (*Bryant v. Levy*, 52 La. Ann. 1649, 28 So. 191. See *Tobey v. Bristol*, 3 Story 800, 23 Fed. Cas. No. 14,065), unless (2) it is conferred by statute. *Thomasson v. Risk*, 11 Bush (Ky.) 619; *Wolfe v. Hyatt*, 76 Mo. 156.

[b] **Registers and receivers** of the public land office have no jurisdiction to issue subpoenas. *Boom v. De Haven*, 72 Cal. 280, 13 Pac. 694.

17. *Cal.*—*Scott v. Shields*, 8 Cal. App. 12, 96 Pac. 385. *Ia.*—*Chambers v. Oehler*, 107 Iowa 155, 77 N. W. 853. *N. Y.*—*Lowther v. Lowther*, 115 App. Div. 307, 100 N. Y. Supp. 965. *Pa.* *Com. Title Ins. & T. Co. v. Slack*, 18

*Pa. Co. Ct.* 593. *Tex.*—*Edmondson v. State*, 43 Tex. 230.

[a] **It is a matter of right** and does not rest in the discretion of the court. *Edmondson v. State*, 43 Tex. 230.

18. *United States v. Terminal R. Assn.*, 148 Fed. 486; *Barrus v. Phaneuf*, 166 Mass. 123, 44 N. E. 141, 32 L. R. A. 619.

19. *Cal.*—*Scott v. Shields*, 8 Cal. App. 12, 96 Pac. 385. *Fla.*—*Ex parte Nathan*, 50 So. 38. *Ga.*—*Horton v. State*, 112 Ga. 27, 37 S. E. 100. *La.* *Houston River Canal Co. v. Kopke*, 106 La. 609, 31 So. 156.

See 2 ENCY. OF EV. 102.

[a] **Payment or security for costs** cannot be exacted by the clerk before issuing subpoenas. *Houston River Canal Co. v. Kopke*, 106 La. 609, 31 So. 156.

[b] **Issuing Subpoena to Succeeding Terms.**—When a party directs a subpoena for a witness, it is the duty of the clerk to issue it to each succeeding term, until the order is countermanded or the suit disposed of. *Marsh v. The Branch Bank*, 10 Ala. 57.

[c] **In a criminal case** the clerk should issue subpoenas on behalf of the state only upon the order of the district attorney. *Com. v. Shell*, 1 Pa. Co. Ct. 41.

20. *Lowther v. Lowther*, 115 App. Div. 307, 100 N. Y. Supp. 965; *Yorks v. Peek*, 31 Barb. (N. Y.) 350.

[a] **Supplemental proceedings** do not come within the terms of the statute permitting an attorney to issue subpoenas and in such proceedings the subpoena must be issued under the hand of the judge. *Lowther v. Lowther*, 115 App. Div. 307, 100 N. Y. Supp. 965.

may, in some jurisdictions, issue subpoenas in criminal cases.<sup>21</sup> In proceedings not instituted in court the subpoena is issued under the hand of the judge, referee, arbitrator or other person requiring the attendance of the witness.<sup>22</sup>

**Subpoena Duces Tecum.** — Unless statutes provide to the contrary, an order of court is not necessary for the issuance of a subpoena duces tecum.<sup>23</sup> Where special leave is necessary, the application therefor should specify the books or papers whose production is desired;<sup>24</sup> and state facts disclosing the purpose for which the documents are required,<sup>25</sup> and to enable the court to determine whether the evidence which the documents will furnish is material and relevant to the issues in the case.<sup>26</sup> Such an application is largely addressed to the discretion of the court.<sup>27</sup>

**IV. FORM AND SUFFICIENCY.**<sup>28</sup> — The subpoena should be properly entitled in the proceeding in which the witness is called upon to testify.<sup>29</sup> It is directed to the prospective witness,<sup>30</sup> recites or specifies the cause in which it is issued,<sup>31</sup> and orders the witness to appear at a certain time and place<sup>32</sup> for the purpose of there testi-

21. See 2 ENCY. OF EV. 102.

22. *Lowther v. Lowther*, 115 App. Div. 307, 100 N. Y. Supp. 965.

[a] **By a United States commissioner** conducting a preliminary hearing. *United States v. Stern*, 177 Fed. 479.

**Compelling attendance to take deposition**, see 7 STANDARD PROC. 300.

23. *In re Lester*, 77 Ga. 143.

**On examination of party before trial**, see 7 STANDARD PROC. 571.

[a] **Where a special examiner is appointed by a federal court of one district to take testimony in another district**, the subpoena duces tecum issues from the clerk's office in the usual manner without an application to the latter court for an order directing it to issue. *Johnson Steel Street Rail Co. v. North Branch Steel Co.*, 48 Fed. 191.

24. *United States v. Terminal R. Assn.*, 154 Fed. 268.

25. *United States v. Terminal R. Assn.*, 154 Fed. 268; *Dancel v. Goodyear Shoe Mach. Co.*, 128 Fed. 753; *Tharp v. Page*, 66 Ark. 229, 50 S. W. 454.

26. **U. S.**—*United States v. Terminal R. Assn.*, 154 Fed. 268; *Dancel v. Goodyear Shoe Mach. Co.*, 128 Fed. 753; *United States v. Hunter*, 15 Fed. 712. **Ark.**—*Tharp v. Page*, 66 Ark. 229, 50 S. W. 454. **Ill.**—*Bentley v. People*, 107 Ill. App. 245.

[a] **The court, and not the party, must determine the materiality of the documents.** *Edison Electric Light Co. v. United States Electric L. Co.*, 44 Fed. 294; *Mitchell's Case*, 12 Abb. Pr. (N. Y.) 249.

27. *United States v. Burr*, 25 Fed. Cas. No. 14,692d.

28. **Forms**, see 9 STANDARD PROC. 1177.

29. **U. S.**—*United States v. Ralston*, 17 Fed. 895. **Pa.**—*Hartranft's Appeal*, 85 Pa. 433, 27 Am. Rep. 667. **Eng.**—*Doe v. Thomson*, 9 Dowl. 948.

30. **U. S.**—*Cummings v. Akron Cement etc. Co.*, 6 Blatchf. 509, 6 Fed. Cas. No. 3,473. **Ill.**—*Chicago & A. R. Co. v. Dunning*, 18 Ill. 494. **Mo.**—*Larimore v. Bobb*, 114 Mo. 446, 21 S. W. 922. **Pa.**—*Miller v. Scott*, 6 Phila. 484.

[a] **But the federal practice of directing the subpoena to the marshal, instead of to the witness as required by statute law, has been so acquiesced in by the bar as to establish it as firmly as if authorized by rule of court.** *Russell v. Ashley, Hempst.* 546, 21 Fed. Cas. No. 12,150.

31. *In re Haines*, 67 N. J. L. 442, 51 Atl. 929.

32. **Cal.**—*Keisker v. Ayres*, 46 Cal. 82. **N. J.**—*Murray v. Elston*, 23 N. J. Eq. 212. **N. Y.**—*People v. Van Wyck*, 2 Caines 333.

[a] **The proper tribunal before**

lying<sup>33</sup> under a penalty therein mentioned.<sup>34</sup>

The subpoena should be signed in conformity with the statutes,<sup>35</sup> and sealed where the law so requires.<sup>36</sup>

A subpoena duces tecum must specify with reasonable certainty the documents to be produced.<sup>37</sup> If issued out of the federal courts it should bear teste as other subpoenas for witnesses and should require the production of the papers in court and not before the judge.<sup>38</sup>

**V. SERVICE.**—Service of the subpoena must comply with local statutes.<sup>39</sup> Service may be made by an officer authorized by law to make service of process or papers,<sup>40</sup> and unless the statutes provide to the contrary,<sup>41</sup> by a private individual as well.<sup>42</sup> Service must be

which the witness must appear should be named. *State v. Butler*, 8 Yerg. (Tenn.) 83.

[b] But the place of holding court, being regulated by public act, need not be stated. *People v. Van Wyck*, 2 Caines (N. Y.) 333.

33. *Murray v. Elston*, 23 N. J. Eq. 212.

[a] An omission of a direction to testify (1) is fatal to the authority of the writ. Thus a subpoena duces tecum is not sufficient which merely commands the witness to appear and bring with him a book. *Murray v. Elston*, 23 N. J. Eq. 212. But that (2) no mandate to testify is necessary in such a subpoena see *Sherman v. Barrett*, 1 McMull. L. (S. C.) 147; *Evans v. Moseley*, 2 Dowl. (Eng.) 364.

34. *Ala.*—*Maclin v. Wilson*, 21 Ala. 670. *Cal.*—*Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597. *D. C.*—*In re Spencer*, MacArthur & M. 433. *Tex.* *McGehee v. State*, 4 Tex. App. 94.

35. *Horton v. State*, 112 Ga. 27, 37 S. E. 100.

[a] The clerk must sign it if the law so requires, otherwise it is invalid. *Horton v. State*, 112 Ga. 27, 37 S. E. 100.

36. *Waddell v. McGinty*, 2 Ch. Chamb. (Can.) 445.

37. *U. S.*—*Murray v. Louisiana*, 163 U. S. 101, 16 Sup. Ct. 990, 41 L. ed. 87; *United States v. Hunter*, 15 Fed. 712; *United States v. Babcock*, 3 Dill. 566, 24 Fed. Cas. No. 14,484. *Cal.* *Ex parte Jaynes*, 70 Cal. 638, 12 Pac. 117. *Mo.*—*State v. Davis*, 117 Mo. 614, 23 S. W. 759; *Ex parte Brown*, 72 Mo. 83, 37 Am. Dec. 426. *Pa.*—*American Car & F. Co. v. Alexandria Water Co.*, 221 Pa. 529, 70 Atl. 867, 128 Am. St. Rep. 749. *Tex.*—*Ex parte Gould*,

60 Tex. Cr. 442, 132 S. W. 364, 31 L. R. A. (N. S.) 835.

[a] A sufficient description is one which will inform the witness as to the papers or documents required. *In re Storrer*, 63 Fed. 564.

38. *Corbett v. Gibson*, 16 Blatchf. 334, 6 Fed. Cas. No. 3,221, should be tested in name of chief justice.

39. *In re Spencer*, MacArthur & M. (D. C.) 433. See the statutes, also *infra* this section and generally the title "Service of Process and Papers."

40. *D. C.*—*In re Spencer*, MacArthur & M. 433. *Ill.*—*Chicago & A. R. Co. v. Dunning*, 18 Ill. 494. *Mo.*—*Larimore v. Bobb*, 114 Mo. 446, 21 S. W. 922. *Pa.*—*Miller v. Scott*, 6 Phila. 484.

41. *Leary v. Meier*, 78 Ind. 393.

[a] In criminal cases under some statutes, service must be by an officer. See the statutes and *State v. Huff*, 161 Mo. 459, 61 S. W. 900, 1104.

42. *Ill.*—*Chicago & A. R. Co. v. Dunning*, 18 Ill. 494. *Mo.*—*Hannibal & N. L. P. R. & B. Co. v. Bowling*, 53 Mo. 311. *Ore.*—*Egan v. Finney*, 42 Ore. 599, 72 Pac. 133. *Pa.*—*Appeal of Axtell*, 3 Sad. 488, 6 Atl. 560; *Lyon v. Marshall*, 1 Pa. Co. Ct. 90. *Utah.* *Holt v. Nielson*, 37 Utah 566, 109 Pac. 470. *Vt.*—*Smith v. Wilbur*, 35 Vt. 133.

See 2 ENCY. OF EV. 106.

[a] Service by a party to the action. *Mo.*—*Larimore v. Bobb*, 114 Mo. 446, 21 S. W. 922. *Ore.*—*Egan v. Finney*, 42 Ore. 599, 72 Pac. 133. *Pa.* *Lyon v. Marshall*, 1 Pa. Co. Ct. 90.

[b] Federal process in civil cases (1) may be served by any person competent to make legal service thereof under the laws of the state in which the court is situated. *Cummings v. Akron Cement & Plaster Co.*, 6 Blatchf.



made within the territorial limits of the jurisdiction of the court,<sup>43</sup> and within the time prescribed by law.<sup>44</sup> The manner of serving a subpoena differs in the various jurisdictions.<sup>45</sup> Personal service by leaving a copy of the subpoena with the witness is ordinarily sufficient,<sup>46</sup> and is necessary,<sup>47</sup> unless the statute authorizes other modes of service.<sup>48</sup> Payment or tender of the witnesses' fees and expenses may be required by statute.<sup>49</sup>

**VI. RETURN.**<sup>50</sup> — The return on the writ should state facts<sup>51</sup> showing compliance with all the requirements of the statute in respect to service.<sup>52</sup> The names of the witnesses served, and those not served,<sup>53</sup> and where a statute requires that the return show the mode of service or the cause of failure to serve, a return of "not executed," or "not found" is insufficient.<sup>54</sup>

509, 6 Fed. Cas. No. 3,473. (2) In criminal cases the service is made by the marshal of the district in which the witness lives. *Voss v. Luke*, 1 Cranch C. C. 331, 28 Fed. Cas. No. 17,014.

43. *State v. Huff*, 161 Mo. 459, 61 S. W. 900, 1104.

[a] Service may be made in another county within the state. *Downey v. Fenn*, 124 N. Y. Supp. 876.

44. Ill.—*Hollister v. People*, 116 Ill. App. 338. N. Y.—*In re Depue*, 185 N. Y. 60, 77 N. E. 798. Pa.—*Scriber v. Reeves*, 1 Phila. 284.

[a] A reasonable opportunity to comply with the command of the writ should be given the witness. *Mich. McMillan v. Larned*, 41 Mich. 521, 2 N. W. 662. N. Y.—*Wilkie v. Chadwick*, 13 Wend. 49; *People ex rel. Slaughter v. Potter*, 6 N. Y. St. 753. Pa. Com. Title Ins. & T. Co. v. *Slack*, 18 Pa. Co. Ct. 593.

[b] A "reasonable" time depends upon the circumstance and the respective places of service and required attendance. *McMillan v. Larned*, 41 Mich. 521, 2 N. W. 662.

45. See the statutes and generally the title "Service of Process and Papers;" also 2 ENCY. OF EV. 106.

46. *Gould v. Tryon*, Walk. Ch. (Mich.) 339.

47. *Sefton v. Lundy*, 4 Ch. Chamb. (Can.) 33.

48. *Egan v. Finney*, 42 Ore. 599, 72 Pac. 133.

[a] Service by telegraph must be in strict accordance with the statute authorizing it; otherwise such service is invalid. *Egan v. Finney*, 42 Ore. 599, 72 Pac. 133.

[b] Reading over a telephone is not a sufficient service under a statute which requires that the subpoena be read to the witness. *Ex parte Terrell* (Tex.), 95 S. W. 536.

49. See the title "Witnesses."

50. See generally the title "Returns."

51. *State v. Baum*, 51 La. Ann. 1112, 26 So. 67.

52. *State v. Huff*, 161 Mo. 459, 61 S. W. 900, 1104; *Neyland v. State*, 13 Tex. App. 536.

[a] A return by a special deputy in his own name as such, is void. *State v. Huff*, 161 Mo. 459, 61 S. W. 900, 1104.

53. *Tooney v. State*, 5 Tex. App. 163.

54. *Neyland v. State*, 13 Tex. App. 536.

## SUBPOENA DUCES TECUM. — See Subpoena.

# SUBROGATION

By the Editorial Staff.

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### CROSS-REFERENCES:

Contribution;	Marshaling Assets;
Equity Jurisdiction and	Mortgages;
Procedure;	Principal and Surety.
Insurance;	

For forms, see 9 STANDARD PROC. 1179, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. NATURE OF THE RIGHT.**—Subrogation is the right which a surety,<sup>1</sup> endorser,<sup>2</sup> insurer,<sup>3</sup> or other party secondarily liable for a debt and who has paid the same, has, to be put in the place of the creditor in order to enforce the right of exoneration as against the

<p>1. See 21 STANDARD PROC. 591; 10 STANDARD PROC. 31.</p> <p>2. <b>U. S.</b>—<i>Bird v. Louisiana State Bank</i>, 93 U. S. 96, 23 L. ed. 818. <b>Ill.</b> <i>Dooley v. Lackey</i>, 55 Ill. App. 30. <b>Mass.</b></p>	<p><i>Parker v. Sanborn</i>, 7 Gray 191. <b>N. J.</b> <i>Young v. Vough</i>, 23 N. J. Eq. 325. <b>N. Y.</b>—<i>Cassebeer v. Kalbfleisch</i>, 11 Hun 119.</p> <p>3. See 20 STANDARD PROC. 901; 14 STANDARD PROC. 104.</p>
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principal debtor or of contribution against others who are liable in the same rank with himself.<sup>4</sup> The doctrine is of civil law origin<sup>5</sup> from whence it was adopted into courts of equity.<sup>6</sup> It is a remedy administered on principles of equity,<sup>7</sup> and being allowed by the courts only when necessary to the ends of justice,<sup>8</sup> it will not be enforced where to do so would work an injustice to those having an equal equity.<sup>9</sup>

## II. MANNER OF ESTABLISHING AND ENFORCING RIGHT.

### A. JURISDICTION. — Equity, independently of statutory author-

4. **Ark.**—*Talbot v. Wilkins*, 31 Ark. 411. **Cal.**—See also *Brown v. Rouse*, 125 Cal. 645, 58 Pac. 267. **Ill.**—*Fuller v. John S. Davis' Sons Co.*, 184 Ill. 505, 56 N. E. 791; *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146; *Bishop v. O'Conner*, 69 Ill. 431. **Ia.**—*Baker v. American Surety Co.*, 181 Iowa 634, 159 N. W. 1044.

[a] **The substitute is put in the place of and has the same rights as the party to whose rights he is subrogated.** *Brown v. Rouse*, 125 Cal. 645, 58 Pac. 267; *Ohio Life Ins. & Tr. Co. v. Winn*, 4 Md. Ch. 253.

5. *Baker v. American Surety Co.*, 181 Iowa 634, 159 N. W. 1044.

6. **Mo.**—*Furnold v. Missouri Bank*, 44 Mo. 336. **N. J.**—*Shinn v. Budd*, 14 N. J. Eq. 234. **Pa.**—*Springer's Admr. v. Springer*, 43 Pa. 518.

See 8 STANDARD PROC. 441.

7. **U. S.**—*Memphis & L. R. Ry. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. ed. 595. **Ala.**—*Watts v. Eufaula Nat. Bank*, 76 Ala. 474. **Ark.**—*Belleclair Planting Co. v. Hall*, 125 Ark. 203, 188 S. W. 574. **Cal.**—*Finnell v. Finnell*, 159 Cal. 535, 114 Pac. 820. **Del.**—*Miller v. Stout*, 5 Del. Ch. 259. **Ill.**—*Devine v. Harkness*, 117 Ill. 145, 7 N. E. 52. **Ind.**—*Spaulding v. Harvey*, 129 Ind. 106, 28 N. E. 323, 28 Am. St. Rep. 176, 13 L. R. A. 619; *Michigan City v. Marwick* (Ind. App.), 116 N. E. 434. **Ia.**—*Baker v. American Surety Co.*, 181 Iowa 634, 159 N. W. 1044. **Kan.**—*Olson v. Peterson*, 88 Kan. 350, 128 Pac. 191. **Ky.**—*Flannery v. Utley*, 8 Ky. L. Rep. 776, 3 S. W. 412, 9 Ky. L. Rep. 581, 5 S. W. 878. **Mass.**—*Amory v. Lowell*, 1 Allen 504. **Minn.**—*Stewart v. Parcher*, 91 Minn. 517, 98 N. W. 650. **Miss.**—*Doty v. Enterprise Timber Co.*, 114 Miss. 872, 75 So. 602. **Mo.**—*Furnold v. Bank of Missouri*, 44 Mo. 336. **N. Y.**—*Wells v. Salina*, 71 Hun 559, 25 N. Y. Supp.

134. **N. C.**—*Liles v. Rogers*, 113 N. C. 197, 18 S. E. 104, 37 Am. St. Rep. 627. **Pa.**—*Budd v. Oliver*, 148 Pa. 194, 23 Atl. 1105; *Brown v. McCullough*, 60 Pa. Super. 98. **Tenn.**—*Harlan v. Sweeny*, 1 Lea 682. **Vt.**—*Chandler v. Dyer*, 37 Vt. 345. **W. Va.**—*McNeil v. Miller*, 29 W. Va. 480, 2 S. E. 335.

[a] **Not Founded on Contract.**—The right of subrogation is a creation of equity and independent of any contractual relations between the parties. **Ind.**—*Spaulding v. Harvey*, 129 Ind. 106, 28 N. E. 323, 28 Am. St. Rep. 176, 13 L. R. A. 619. **Kan.**—*Olson v. Peterson*, 88 Kan. 350, 128 Pac. 191. **Neb.**—*Aultman, Miller & Co. v. Bishop*, 53 Neb. 545, 74 N. W. 55. But see *Lutes v. Warren*, 146 Ga. 641, 92 S. E. 58; *Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204.

[b] **In the United States** the principles of subrogation have been more widely applied than in England. *Baker v. American Surety Co.*, 181 Iowa 634, 159 N. W. 1044.

8. **Ind.**—*Edinburg A. L. Mtg. Co. v. Latham*, 88 Ind. 88; *Michigan City v. Marwick* (Ind. App.), 116 N. E. 434. **Ia.**—*Baker v. American Surety Co.*, 181 Iowa 634, 159 N. W. 1044. **Neb.**—*Aultman, Miller & Co. v. Bishop*, 53 Neb. 545, 74 N. W. 55; *South Omaha Nat. Bank v. Wright*, 45 Neb. 23, 63 N. W. 126.

9. **Ark.**—*Belleclair Planting Co. v. Hall*, 125 Ark. 203, 18 S. W. 574. **Ia.**—*Baker v. American Surety Co.*, 181 Iowa 634, 159 N. W. 1044. **Pa.**—*Budd v. Oliver*, 148 Pa. 194, 23 Atl. 1105; *Brown v. McCullough*, 60 Pa. Super. 98.

[a] **The equities of the one seeking subrogation must be greater than those of the party against whom subrogation is sought.** The doctrine never interferes with equal or superior rights of others. *Baker v. American Surety Co.*, 181 Iowa 634, 159 N. W. 1044; *Vaughan*



ity,<sup>10</sup> has the power to establish and enforce subrogation,<sup>11</sup> the doctrine being originally, and, in some states, even now, one exclusively of equity cognizance.<sup>12</sup> Of recent years, however, courts of law have exercised jurisdiction over subrogation,<sup>13</sup> particularly under the codes,<sup>14</sup> and the power has been conferred upon law courts in particular cases, by statute.<sup>15</sup>

A probate court has power to subrogate,<sup>16</sup> except in states where the subject is cognizable alone in courts having equitable jurisdiction.<sup>17</sup>

A justice of the peace has no jurisdiction over matters of subrogation.<sup>18</sup>

**B. FORM OF REMEDY.**—As we have seen, subrogation is enforceable in equity,<sup>19</sup> or, in some states, in proceedings at law.<sup>20</sup> Under the codes it may be enforced by an ordinary civil action.<sup>21</sup> But the right will not be adjudicated in an action for breach of warranty,<sup>22</sup> nor in ejectment,<sup>23</sup> nor in an action to try title.<sup>24</sup> The rules regulating the procedure in equity are the same as in case of any other suit<sup>25</sup> in

*v. Jeffreys*, 119 N. C. 135, 26 S. E. 94.

10. *Finnell v. Finnell*, 159 Cal. 535, 114 Pac. 820. See *supra*, I.

11. **Ala.**—*Smith v. Harrison*, 33 Ala. 706. **Ark.**—*Hicks v. Hicks*, 122 Ark. 612, 184 S. W. 416. **Cal.**—*Allen v. Phelps*, 4 Cal. 256. **Del.**—*Miller v. Stout*, 5 Del. Ch. 259. **Mass.**—*Fitcher v. Griffiths*, 216 Mass. 174, 103 N. E. 471. **Miss.**—*Evans v. Robertson*, 54 Miss. 683. **Mo.**—*Miller v. Woodward*, 8 Mo. 169. **Va.**—*McIlvane v. Big Stony Lumb. Co.*, 105 Va. 613, 54 S. E. 473. **W. Va.**—*Gooch v. Gooch*, 70 W. Va. 38, 73 S. E. 56, 27 L. R. A. (N. S.) 930.

See 8 STANDARD PROC. 441.

[a] **Adequacy of legal remedy** as affecting equity jurisdiction, see *Michigan City v. Marwick* (Ind. App.), 116 N. E. 434.

12. **U. S.**—See *Illinois Surety Co. v. United States*, 226 Fed. 665, 141 C. C. A. 421. **Miss.**—*Doty v. Enterprise Timber Co.*, 114 Miss. 872, 75 So. 602. **Mo.**—*Furnold v. Bank of Missouri*, 44 Mo. 336; *Peck v. Fillingham's Estate*, 199 Mo. App. 277, 202 S. W. 465; *Petty v. Tucker*, 166 Mo. App. 98, 148 S. W. 142. **Pa.**—*Packer v. Vandervender*, 13 Pa. Co. Ct. 31. **R. I.**—*Moore v. Watson*, 20 R. I. 495, 40 Atl. 345. **Vt.**—*Wilder's Exrx. v. Wilder*, 75 Vt. 178, 53 Atl. 1072.

13. **Ia.**—*Baker v. American Surety Co.*, 181 Iowa 634, 159 N. W. 1044. **Me.**—*Rollins v. Taber*, 25 Me. 144.

**Mass.**—*Granite Nat. Bank v. Fitch*, 145 Mass. 567, 14 N. E. 650, 1 Am. St. Rep. 484. **N. H.**—*Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207. **N. Y.**—*Dunlop v. James*, 174 N. Y. 411, 67 N. E. 60; *De Brauwere v. De Brauwere*, 69 Misc. 472, 126 N. Y. Supp. 221; *Wern v. Brooklyn Union Coal Co.*, 138 N. Y. Supp. 1094.

14. *Calvert v. Peebles*, 82 N. C. 334. See also *Toronto Bank v. Hunter*, 4 Bosw. (N. Y.) 646.

15. *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653; *Martindale v. Brock*, 41 Md. 571.

[a] **Power to Subrogate Surety.** *Hull v. Myers*, 90 Ga. 674, 16 S. E. 653; *Martindale v. Brock*, 41 Md. 571.

16. *McNeill's Admr. v. McNeill's Creditors*, 36 Ala. 109, 76 Am. Dec. 320.

17. *Peck v. Fillingham's Estate*, 199 Mo. App. 277, 202 S. W. 465; *Wilder's Exrx. v. Wilder*, 75 Vt. 178, 53 Atl. 1072.

18. See 17 STANDARD PROC. 968.

19. See *supra*, II, A.

20. See *supra*, II, A.

21. *Calvert v. Peebles*, 82 N. C. 334.

22. *Tilgman Lumber Co. v. Matheson*, 88 S. C. 432, 70 S. E. 1033.

23. *Meyer v. Mintonye*, 106 Ill. 414.

24. *Allison v. Pattison*, 96 Ala. 159, 11 So. 194.

25. See generally the title "Equity Jurisdiction and Procedure," cross-references thereunder, and the follow-

equity, or equitable defense.<sup>26</sup>

A summary proceeding by rule to show cause is available to enforce subrogation where the right thereto has been established.<sup>27</sup>

C. PARTIES.<sup>28</sup>—The rules in respect to parties in equity<sup>29</sup> require all persons whose rights are or may be affected by a proceeding for subrogation to be made parties.<sup>30</sup> The creditor to whose rights one seeks to be subrogated,<sup>31</sup> is a necessary party, but a creditor whose interests in the case have been disposed of entirely and who will not be affected one way or another by the decree prayed for need not be joined.<sup>32</sup>

ing cases: **Ga.**—*Lutes v. Warren*, 146 Ga. 641, 92 S. E. 58. **Ind.**—*Michigan City v. Marwick* (Ind. App.), 116 N. E. 434. **Pa.**—*Mosier's Appeal*, 56 Pa. 76, 93 Am. Dec. 783.

26. See generally the title "Equity Jurisdiction and Procedure," cross-references thereunder, and the following cases: **Cal.**—*Finnell v. Finnell*, 159 Cal. 535, 114 Pac. 820. **Ill.**—*Ball v. Callahan*, 95 Ill. App. 615. **Me.**—*Hemeway v. Cunningham*, 113 Me. 559, 92 Atl. 897. **Mont.**—*Potter v. Lohse*, 31 Mont. 91, 77 Pac. 419.

27. *Packer v. Vandervender*, 13 Pa. Co. Ct. 31; *Croft v. Moore*, 9 Watts (Pa.) 451.

28. Intervention to assert rights acquired by subrogation, see 14 STANDARD PROC. 307.

Necessary parties in action against loan association, see 18 STANDARD PROC. 1102.

29. See 20 STANDARD PROC. 880.

30. **Ala.**—*Singleton v. U. S. Fidelity & Guar. Co.*, 195 Ala. 506, 70 So. 169; *Wilkerson v. Sellers & Orum Co.*, 161 Ala. 529, 49 So. 874. **Ark.**—*Dyer v. Jacoway*, 76 Ark. 171, 88 S. W. 901; *Bond v. Montgomery*, 56 Ark. 563, 20 S. W. 526, 35 Am. St. Rep. 119. **Ga.**—*Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204. **Ind.**—*Citizens' St. R. Co. v. Robbins*, 144 Ind. 671, 42 N. E. 916, 43 N. E. 649; *Rush's Admr. v. State*, 20 Ind. 432; *Michigan City v. Marwick* (Ind. App.), 116 N. E. 434, 119 N. E. 154. **Ky.**—*Guill's Admr. v. Corinth Deposit Bank*, 24 Ky. L. Rep. 482, 68 S. W. 870. **Miss.**—*Doty v. Enterprise Timber Co.*, 114 Miss. 872, 75 So. 602. **N. J.**—*Schneider v. Schmidt* (N. J. Ch.), 70 Atl. 688. **N. C.**—*Brinson v. Thomas*, 55 N. C. 414. **Pa.**—*Evans v. Duncan*, 4 Watts 24. **S. D.**—*Muller v. Flavin*, 13 S. D. 595, 83 N. W. 687.

[a] Thus where a citizen's committee engaged an accountant to audit the books of a city, and the amount due for such auditing was in controversy, the members of the committee were necessary parties in a suit to recover the contract price by the accountant, as subrogee, against the city. *Michigan City v. Marwick* (Ind. App.), 119 N. E. 154.

[b] Sureties.—In order to enforce equitable subrogation against a surety he must be made a party to the cause. *Cunningham v. Macon & B. R. Co.*, 156 U. S. 400, 15 Sup. Ct. 361, 39 L. ed. 471.

[c] Devisees and legatees having an interest in the estate sought to be charged should be made parties. *Dyer v. Jacoway*, 76 Ark. 171, 88 S. W. 901; *Fridenburg v. Wilson*, 20 Fla. 359.

31. **Ark.**—*Harris v. Watson*, 56 Ark. 574, 20 S. W. 529; *Bond v. Montgomery*, 56 Ark. 563, 20 S. W. 526, 35 Am. St. Rep. 119. **Miss.**—*Doty v. Enterprise Timber Co.*, 114 Miss. 872, 75 So. 602. **Neb.**—*Aultman, Miller & Co. v. Bishop*, 53 Neb. 545, 74 N. W. 55.

32. *Hill v. Ritchie*, 90 Vt. 318, 98 Atl. 497, L. R. A. 1917A, 731. See *Neptune v. Tyler*, 15 Ind. App. 132, 41 N. E. 965.

[a] The holder of a lien note, discharged upon payment by the plaintiff under an agreement with the debtor that he is to have a new security upon the property, is not a necessary party in a suit brought to establish the priority of the plaintiff's lien by subrogation over a second lien on the property existing at the time of the payment of the note. *Hill v. Ritchie*, 90 Vt. 318, 98 Atl. 497, L. R. A. 1917A, 731.

[b] A judgment creditor whose judgment has been satisfied by the

**Co-sureties** may join in a bill in equity to enforce subrogation arising from the suretyship relation.<sup>33</sup>

**D. PLEADING.**<sup>34</sup>—The particular facts upon which a claim for subrogation is founded should be stated in the appropriate pleading, whether advanced by the plaintiff,<sup>35</sup> or defendant,<sup>36</sup> and the enforcement of the right demanded.<sup>37</sup> But it has been held that when it is apparent that a party is entitled to subrogation, equity will grant it, even though he has not asked for it.<sup>38</sup> The petition or other pleading asking subrogation need not anticipate defenses,<sup>39</sup> and insolvency of the debtor need not be alleged.<sup>40</sup>

**E. JUDGMENT AND REVIEW.**<sup>41</sup>—The general rules relating to judgments and decrees apply to proceedings to enforce the right of subrogation.<sup>42</sup> As a general rule the amount recoverable by the subrogee is limited to the sum which will reimburse him for what he actually expends in discharging the original obligation;<sup>43</sup> nor is he entitled to a personal judgment when the original creditor's equity is limited to

subrogee not a necessary party. *Friedenburgh v. Wilson*, 20 Fla. 359.

**33.** *Kleiser v. Scott*, 6 Dana (Ky.) 137.

**34. Statute of limitations as bar to rights of**, see 18 STANDARD PROC. 1030, note 47 [a].

**35.** Ala.—*Watts v. Eufaula Nat. Bank*, 76 Ala. 474. Ark.—*Bond v. Montgomery*, 56 Ark. 563, 20 S. W. 526, 35 Am. St. Rep. 119. Ga.—*Lutes v. Warren*, 146 Ga. 641, 92 S. E. 58. Ind.—*Lilly v. Dunn*, 96 Ind. 220; *Michigan City v. Marwick* (Ind. App.), 116 N. E. 434, 119 N. E. 154. Ia.—*Richards v. Cowles*, 105 Iowa 734, 75 N. W. 648. Mo.—*Clark v. First Nat. Bk.*, 57 Mo. App. 277. Pa.—*Forest Oil Co.'s Appeal*, 118 Pa. 138, 12 Atl. 442, 4 Am. St. Rep. 584; *Mosier's Appeal*, 56 Pa. 76, 93 Am. Dec. 783. Tex.—*Wilkin v. Owens & Bros.*, 102 Tex. 197, 114 S. W. 104, 115 S. W. 1174, 117 S. W. 425, 132 Am. St. Rep. 867; *Bludworth v. Dudley* (Tex. Civ. App.), 173 S. W. 561; *Sherk v. First Nat. Bank* (Tex. Civ. App.), 152 S. W. 832.

[a] **Appropriation of money paid by the subrogee**, to the use of the creditors, to whose rights he seeks to be subrogated, should be alleged. *Bond v. Montgomery*, 56 Ark. 563, 20 S. W. 525, 35 Am. St. Rep. 119; *Federal Union Surety Co. v. Blue Ridge Marble Co.*, 142 Ga. 353, 82 S. E. 1076.

**36.** Idaho.—*Smith v. Faris-Kesl Const. Co.*, 27 Idaho 407, 150 Pac. 25. Ill.—*Ball v. Callahan*, 95 Ill. App. 615.

Me.—*Hemenway v. Cunningham*, 113 Me. 559, 92 Atl. 897. Minn.—*Barton v. Moore*, 45 Minn. 98, 47 N. W. 460.

**37.** *Bludworth v. Dudley* (Tex. Civ. App.), 173 S. W. 561; *Sherk v. First Nat. Bank* (Tex. Civ. App.), 152 S. W. 832.

**38. Ill.**—*Montague & Co. v. Aygarn*, 164 Ill. App. 596. Miss.—*Berry v. Bullock*, 81 Miss. 463, 33 So. 410. Va. *Bankers' Loan & Investment Co. v. Hornish*, 94 Va. 608, 27 S. E. 459.

**39.** *Olson v. Peterson*, 88 Kan. 350, 128 Pac. 191; *Richards v. Yoder*, 10 Neb. 429, 6 N. W. 629.

**40.** *Spaulding v. Harvey*, 129 Ind. 106, 28 N. E. 323, 28 Am. St. Rep. 176, 13 L. R. A. 619.

**41. On payment of joint judgment**, see 5 STANDARD PROC. 500.

**Execution on judgment paid by party subrogated to rights of judgment-creditor**, see 15 STANDARD PROC. 735.

**On failure of title of purchaser at execution sale**, see 16 STANDARD PROC. 222.

**42.** See the titles "Decrees;" "Judgments," and the following cases: *Perkins v. Scott*, 7 Ky. L. Rep. 608; *McLean v. Tompkins*, 18 Abb. Pr. (N. Y.) 24; *De Forest v. Peck*, 84 Hun 299, 32 N. Y. Supp. 413.

**43. Ga.**—*Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204. Ind.—*Michigan City v. Marwick* (Ind. App.), 119 N. E. 154. Tex.—*Cleveland v. Carr* (Tex. Civ. App.), 40 S. W. 406.



a judgment in rem;<sup>44</sup> but when there is merely a purchase of the debt, an exchange of creditors, not the discharge of a legal obligation, such as the purchase of a vendor's lien,<sup>45</sup> the right acquired is measured not by what is paid, but by what might be recovered by the original creditor.<sup>46</sup> As a rule, the subrogee is also entitled to interest from the time of payment by him.<sup>47</sup> The general rules applicable to appeals apply to subrogation cases.<sup>48</sup>

44. *Brown v. McCullough*, 60 Pa. Super. 98.

45. *M. Kangerga & Bro. v. Willard* (Tex. Civ. App.), 191 S. W. 195.

46. *M. Kangerga & Bro. v. Willard* (Tex. Civ. App.), 191 S. W. 195.

47. *Wilkins v. Gibson*, 113 Ga. 31,

38 S. E. 374, 84 Am. St. Rep. 204.

48. See the titles "Appeals;" "Equity Jurisdiction and Procedure," and the following cases: *McMaken v. Niles*, 91 Iowa 628, 60 N. W. 199; *Springer's Admrs. v. Springer*, 43 Pa. 518.

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By the Editorial Staff.

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### CROSS-REFERENCES:

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For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. ACTIONS GENERALLY.**—A subscription, in so far as it is a contract, may be enforced in the same manner as other contracts.<sup>1</sup> An action to recover the amount of a subscription may be brought, according to the circumstances of the case, either in equity,<sup>2</sup> or at law.<sup>3</sup>

1. See generally the title "**Implied and Express Agreements**," and *infra*, this title.

2. *Kentucky Live Stock Breeders' Assn. v. Miller*, 119 Ky. 393, 84 S. W. 301, where the number of subscribers

and the complications and difficulties incident to apportioning the burden among them, make a law action inadequate.

3. *Hall v. Thayer*, 12 Metc. (Mass.)

130.

**II. PARTIES.** — A. GENERALLY. — Who are proper and necessary parties in actions on subscription contracts is governed by the general rules elsewhere treated.<sup>4</sup>

B. PARTIES PLAINTIFF. — The plaintiff in an action on a subscription contract is generally the promisee, or payee, or party designated by the instrument to whom the money is to be paid,<sup>5</sup> such as a committee,<sup>6</sup> or treasurer,<sup>7</sup> or trustee;<sup>8</sup> or, in most jurisdictions, the real party in interest,<sup>9</sup> such as an assignee,<sup>10</sup> or a beneficiary,<sup>11</sup> *e. g.*, a subsequently formed corporation for whose benefit the contract was made and to which the right of action passes by operation of law,<sup>12</sup> providing the action is not in a jurisdiction where a beneficiary not a party to the contract cannot maintain an action thereon.<sup>13</sup>

4. See the titles "Implied and Express Agreements," "Parties."

5. Ill.—Miller *v.* Ballard, 46 Ill. 377. Kan.—White *v.* Scott, 26 Kan. 476. Ky.—McCurdy *v.* Dudley, 1 A. K. Marsh. 288. Mo.—Heinrich *v.* Mo. & I. Coal Co., 102 Mo. App. 229, 76 S. W. 674.

[a] One advancing money upon the faith of the subscription becomes a promisee and may sue on the promise. McClure *v.* Wilson, 43 Ill. 356; Swain *v.* Hill, 30 Mo. App. 436.

6. Ill.—Miller *v.* Ballard, 46 Ill. 377. Me.—Carr *v.* Bartlett, 72 Me. 120. Md. Gittings *v.* Mayhew, 6 Md. 113. Mass. Davis *v.* Smith Am. Organ Co., 117 Mass. 456. Mo.—Swain *v.* Hill, 30 Mo. App. 436, though not named in the subscription contract, if they acted upon it. Pa.—Chambers *v.* Calhoun, 18 Pa. 13, 55 Am. Dec. 583.

Compare Hodges *v.* Nalty, 104 Wis. 464, 80 N. W. 726.

7. Ia.—McDonald *v.* Gray, 11 Iowa 508, 79 Am. Dec. 509. Pa.—Ridgely *v.* Dobson, 3 Watts & S. 118. Vt.—Blodgett *v.* Morrill, 20 Vt. 509.

Compare Gittings *v.* Mayhew, 6 Md. 113.

8. Cal.—Lasar *v.* Johnson, 125 Cal. 549, 58 Pac. 161 (beneficiary need not be joined); Los Angeles National Bank *v.* Vance, 9 Cal. App. 57, 98 Pac. 58. Ill.—Robertson *v.* March, 4 Ill. 198. Ind. Landwerlen *v.* Wheeler, 106 Ind. 523, 5 N. E. 888, without joining the cestui que trust. Ia.—Paddock *v.* Bartlett, 68 Iowa 16, 25 N. W. 906. N. Y. Dunnigan *v.* Kathan, 56 Misc. 103, 106 N. Y. Supp. 1111, *affirmed*, in 127 App. Div. 931, 111 N. Y. Supp. 1117.

See also Friedline *v.* Carthage Col-

lege, 23 Ill. App. 494; Peirce *v.* Ruley, 5 Ind. 69.

9. Bort *v.* Snell, 39 Hun (N. Y.) 388; Hodges *v.* Nalty, 104 Wis. 464, 80 N. W. 726.

10. Gerner *v.* Church, 43 Neb. 690, 62 N. W. 51. See Kentucky Live Stock Breeders' Assn. *v.* Miller, 119 Ky. 393, 84 S. W. 301. But see Dunnigan *v.* Kathan, 56 Misc. 103, 106 N. Y. Supp. 1111, *affirmed*, 127 App. Div. 931, 111 N. Y. Supp. 1117.

[a] Bank advancing the money before the subscription is collected is an equitable assignee and entitled to sue as such. Bank of American Fork *v.* Smith, 44 Utah 284, 140 Pac. 122.

11. Ark.—Rogers *v.* Galloway Female College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636. Cal.—Western Dev. Co. *v.* Emery, 61 Cal. 611. Ga. Wilson *v.* Savannah First Presb. Church, 56 Ga. 554. N. Y.—Bort *v.* Snell, 39 Hun 388. Ohio.—Irwin *v.* Lombard University, 56 Ohio St. 9, 46 N. E. 63, 60 Am. St. Rep. 727, 36 L. R. A. 239; Emmitt *v.* Brophy, 42 Ohio St. 82. Pa. Hostetter *v.* Hollinger, 117 Pa. 606, 12 Atl. 741.

12. Cal.—Christian College *v.* Hendley, 49 Cal. 347. Ill.—Whitsitt *v.* Pre-emption Presb. Church, 110 Ill. 125. Ky.—See Brooksville R. Co. *v.* Byron, 20 Ky. L. Rep. 1941, 50 S. W. 530. Ia. Shober's Admr. *v.* Lancaster County Park Assn., 68 Pa. 429; Edinboro Academy *v.* Robinson, 37 Pa. 210, 78 Am. Dec. 421.

13. Cottage Street M. E. Church *v.* Kendall, 121 Mass. 528, 23 Am. Rep. 286. See also Albany Presb. Church *v.* Cooper, 112 N. Y. 517, 20 N. E. 352, 8 Am. St. Rep. 767, 3 L. R. A. 468, and 20 STANDARD PROC. 914, et seq.



The other subscribers who have acted upon the defendant's subscription,<sup>14</sup> or, where they are too numerous, a part of them on behalf of all,<sup>15</sup> may maintain the action.

C. PARTIES DEFENDANT. — Following the general rules elsewhere discussed,<sup>16</sup> when the parties to the subscription contract are jointly liable all should be joined in an action thereon,<sup>17</sup> but when their liability is several the action is properly brought against one without joining the others,<sup>18</sup> though by statute in some states all may be included, at the plaintiff's option, in the same action.<sup>19</sup>

III. PLEADINGS. — The pleadings in an action on subscription contract follow the general rules elsewhere treated.<sup>20</sup> The subscription contract,<sup>21</sup> and the facts showing plaintiff's right to maintain the suit<sup>22</sup> must be alleged. Where the contract as pleaded imports<sup>23</sup> a con-

14. *Hodges v. Nalty*, 104 Wis. 464, 80 N. W. 726.

15. *Hodges v. Nalty*, 104 Wis. 464, 80 N. W. 726.

16. See the title "Implied and Express Agreements."

17. *Robinson v. Robinson*, 10 Me. 240; *Davis & Rankin B. & M. Co. v. Knoke*, 55 Minn. 368, 57 N. W. 62, *distinguishing Gibbons v. Bente*, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80. See 11 STANDARD PROC. 975, et seq.

[a] Plea in abatement for non-joinder of parties jointly liable. *Robinson v. Robinson*, 10 Me. 240.

18. Ga.—*Beck v. Pounds*, 20 Ga. 36.

Ill.—*Robertson v. March*, 4 Ill. 198.

Ind.—*Brown v. Marion Coml. Club*, 50 Ind. App. 670, 97 N. E. 958.

Mass. *Hall v. Thayer*, 12 Mete. 130; *Carter v. Carter*, 14 Pick. 424.

Mich.—*Davis v. Belford*, 70 Mich. 120, 37 N. W. 919.

Minn.—*Laramée v. Tanner*, 69 Minn. 156, 71 N. W. 1028.

Tex.—*Darnell v. Lyon*, 85 Tex. 455, 22 S. W. 304, 960;

*McFarland v. Lyon*, 4 Tex. Civ. App. 586, 23 S. W. 554.

See 11 STANDARD PROC. 973.

[a] Where no objection is made to the joinder of all, the right of objection, if any, is waived, see *Bank of American Fork v. Smith*, 44 Utah 284, 140 Pac. 122.

19. *Kentucky Live Stock Breeders' Assn. v. Miller*, 119 Ky. 393, 84 S. W. 301. See 11 STANDARD PROC. 976.

20. See the title "Implied and Express Agreements," and titles dealing with particular aspects of pleading.

[a] When the action is brought by a trustee, that fact should appear in the title of the cause or the body of the complaint. *Lasar v. Johnson*, 125

Cal. 549, 58 Pac. 161. See generally the title "Trusts and Trustees."

[b] Matter in confession and avoidance should not be included in the same paragraph with a denial of execution of the subscription contract. *Petty v. Church of Christ*, 95 Ind. 278. See generally the titles "Answers;" "Confession and Avoidance."

[c] Under the codes abolishing the necessity of a reply, except in case of a counterclaim or to reply matter in avoidance of the answer, a plea of want of consideration does not call for a reply where plaintiff seeks to disprove it. *Des Moines University v. Livingston*, 57 Iowa 307, 10 N. W. 738, 42 Am. Rep. 42. See generally the title "Replication and Reply."

21. See generally 11 STANDARD PROC. 981, 989.

[a] Need not be filed with the justice nor with the circuit court. *Heinrich v. Missouri & Ill. Coal Co.*, 102 Mo. App. 229, 76 S. W. 674. See also *Miller v. Preston*, 4 N. M. 314, 17 Pac. 565, and the title "Exhibits."

22. See *infra*, this note.

[a] Person Other Than Payee Named.—Where the promise is to a finance committee, and the action is brought by a corporation in which the right of action has become vested by operation of law, or otherwise, the complaint should state that fact. *Christian College v. Hendley*, 49 Cal. 347.

23. See *Des Moines University v. Livingston*, 57 Iowa 307, 10 N. W. 738, 42 Am. Rep. 42, and 11 STANDARD PROC. 987 (note 26), 988, notes 40-42.

[a] To be available as a defense lack of consideration must be pleaded, under such circumstances. *University*

sideration, none need be stated. Where necessary, demand must be alleged.<sup>24</sup>

Where a subscriber's obligation is to meet a share of a deficit, facts definitely showing the amount of that share must be averred.<sup>25</sup> Execution of the subscription contract need not, as a rule, be specifically denied,<sup>26</sup> unless a specific denial is required by statute or rule of court.<sup>27</sup>

of Des Moines *v. Livingston*, 57 Iowa 307, 10 N. W. 738, 42 Am. Rep. 42.

[b] Where the mutual promises of subscribers are regarded as the consideration of a subscription contract, and the obligation to pay is not based on the completion of the work for which the contract is made, an averment of the completion of such work is unnecessary (*Thomas v. Grace*, 15 U. C. C. P. [Can.] 462) and if made is surplusage which does not vitiate the complaint. *Petty v. Church of Christ*, 95 Ind. 278.

24. *Allen v. Bd. of Comrs. of Clin-*

ton County, 101 Ind. 553, allegation of refusal to pay, insufficient. See generally the title "Suits and Actions."

[a] Where the amount subscribed is to be paid on completion of the work undertaken, an allegation of notice and demand is unnecessary in the absence of a stipulation that they should be given. *Allen v. Bd. of Comrs. Clinton County*, 101 Ind. 553.

25. *Laramie v. Tanner*, 69 Minn. 156, 71 N. W. 1028.

26. *Davis v. Kneale*, 97 Mich. 72, 56 N. W. 220.

27. See 11 STANDARD PROC. 1016.

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**SUBSTITUTED SERVICE.**—See **Process; Service of Process and Papers.**

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**SUBSTITUTION.**—See **Amendments and Jeofails; Interpleader; New Cause of Action or Defense; Parties; Supplemental Pleading.**

Vol. XXIV

# SUBSTITUTION OF ATTORNEY

By the Editorial Staff.

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### CROSS-REFERENCES:

Attorneys;

Lawyer and Client.

For forms, see 9 STANDARD PROC. 1181.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. METHOD OF EFFECTING. — A. CONSENT.** — When no dispute or ill-will exists between a client and his attorney, a substitution of attorneys is usually effected by a voluntary arrangement or consent of the parties,<sup>1</sup> which, according to the statutes of certain juris-

1. **U. S.**—Manning v. Hayden, 5 Sawy. 360, 16 Fed. Cas. No. 9,043; Gardner v. United States, 11 Ct. Cl. 724. **Cal.**—Withers v. Little, 56 Cal. 370; Prescott v. Salthouse, 53 Cal. 221. **Ill.**—Chicago Public Stock Exchange v. McClaughry, 50 Ill. App. 358; Cohen v. Smith, 33 Ill. App. 344. **Mich.**—People v. Plymouth Plank Road Co., 32 Mich. 248. **N. Y.**—Buckley v. Buck-



dictions, may be filed with the clerk or entered upon the minutes of the court.<sup>2</sup> Consent signed by the attorney alone is insufficient.<sup>3</sup> In some jurisdictions an order of court is necessary to make consent of the parties effective;<sup>4</sup> and until such order is obtained the client cannot proceed with the case by another attorney.<sup>5</sup>

**B. APPLICATION TO COURT.**—When the parties cannot agree the procedure is an application to the court,<sup>6</sup> generally, in the form of a motion addressed to the court having jurisdiction of the cause.<sup>7</sup>

ley, 64 Hun 632, 18 N. Y. Supp. 607, 45 N. Y. St. 827; *Quinn v. Lloyd*, 36 How. Pr. 378, 5 Abb. Pr. (N. S.) 281, 7 Robt. 538. **Wis.**—*McMahon v. Snyder*, 117 Wis. 463, 94 N. W. 351.

2. *McMunn v. Lehrke*, 29 Cal. App. 298, 155 Pac. 473; *Payette v. Willis*, 23 Wash. 299, 63 Pac. 254.

3. *McMahon v. Snyder*, 117 Wis. 463, 94 N. W. 351.

4. *Redfield v. United States*, 27 Ct. Cl. 473.

5. *Chicago Public Stock Exchange v. McLaughry*, 50 Ill. App. 358.

6. **U. S.**—*Wilkinson v. Tilden*, 21 Blatchf. 192, 14 Fed. 778; *Sloo v. Law*, 4 Blatchf. 268, 22 Fed. Cas. No. 12,958. **Cal.**—*Rundberg v. Belcher*, 118 Cal. 589, 50 Pac. 670; *People's Home Sav. Bank v. San Francisco Super. Ct.*, 104 Cal. 649, 38 Pac. 452, 43 Am. St. Rep. 147, 29 L. R. A. 844. **Idaho.**—*Curtis v. Richards*, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134. **Ill.**—*Chicago Public Stock Exchange v. McLaughry*, 50 Ill. App. 358. **Mich.**—*People v. Plymouth Plank Road Co.*, 32 Mich. 248. **Mo.**—*State v. Hawkins*, 28 Mo. 366. **N. H.**—*Beliveau v. Amoskeag Mfg. Co.*, 68 N. H. 225, 40 Atl. 734, 73 Am. St. Rep. 577, 44 L. R. A. 167. **N. Y.**—*Krekeler v. Thaulé*, 73 N. Y. 608; *People v. Staten Island Bank*, 112 App. Div. 791, 99 N. Y. Supp. 486; *In re Smith*, 111 App. Div. 23, 97 N. Y. Supp. 171. **N. C.**—*Walton v. Sugg*, 61 N. C. 98, 93 Am. Dec. 580. **P. I.**—*United States v. Borromeo*, 20 Phil. Isl. 189. **Wis.**—*McMahon v. Snyder*, 117 Wis. 463, 94 N. W. 351. **Eng.**—*Macpherson v. Rorison*, 1 Dougl. 217, 99 Eng. Reprint 142. **Ont.**—*Muir v. Guinane*, 10 Ont. L. Rep. 367.

[a] **An Attorney Cannot Withdraw Without Leave of Court.**—*Copper King v. Johnson*, 195 U. S. 627, 25 Sup. Ct. 793, 49 L. ed. 351; *Rio Grande I. & C. Co. v. Gildersleeve*, 174 U. S. 603, 19 Sup. Ct. 761, 43 L. ed. 1103; *Tripp v.*

*Santa Rosa St. R. Co.*, 144 U. S. 126, 12 Sup. Ct. 655, 36 L. ed. 371; *United States v. Curry*, 6 How. (U. S.) 106, 12 L. ed. 363.

[b] **Attorneys and Solicitors.**—The rule originally applied only to attorneys at law, but it now applies with equal force to solicitors in chancery. *Chicago Public Stock Exchange v. McLaughry*, 50 Ill. App. 358.

[c] **Joinder of Parties.**—Where there are several clients they should unite in the request for an order of substitution. *Port Hope Brew. & M. Co. v. Cavanagh*, 9 Ont. W. R. 994.

[d] **Before the commencement of an action** the court has no power to make a valid order of substitution. *Aaron's Estate*, 5 Dem. Sur. 362, 7 N. Y. St. 735; *In re Krakauer*, 33 Misc. 674, 68 N. Y. Supp. 935.

[e] **Additional Counsel.**—The statute on change of attorneys does not apply to the employment of additional counsel. *Prescott v. Salthouse*, 53 Cal. 221.

[f] **Criminal Cases.**—The statute providing for substitution of attorneys does not apply to criminal cases. *Ex parte Clarke*, 62 Cal. 490.

[g] **Basis of Principle.**—Although sometimes based upon the relation existing between the attorney, or solicitor, and client, the rule rests with equal applicability upon the relation between the parties to the suit. An attorney, or solicitor, may no more withdraw his appearance from the records, without an order of court authorizing it, except with the consent of the adverse party, than he may without the consent of his client, or than his client may substitute another attorney or solicitor in his place, without his consent. *Chicago Public Stock Exchange v. McLaughry*, 50 Ill. App. 358.

7. **Cal.**—*Rundberg v. Belcher*, 118 Cal. 589, 50 Pac. 670; *Lee v. San Joaquin Co. Sup. Ct.*, 112 Cal. 354, 44 Pac.

Under some statutes the motion for a substitution may be made by the client,<sup>8</sup> while others provide that it may be made by either client or attorney.<sup>9</sup>

Notice of application by the client, for an order of substitution, must be served upon the attorney.<sup>10</sup> But a formal notice is not necessary.<sup>11</sup>

Such motion is ordinarily granted as a matter of course,<sup>12</sup> unless there is some good reason for refusing the order;<sup>13</sup> yet the right to control the substitution of attorneys is said to be within the sound discretion of the court,<sup>14</sup> especially when the moving party is a receiver appointed by the court to which the motion is made.<sup>15</sup>

The application may be withdrawn upon reimbursing the opposite party his costs,<sup>16</sup> even after the attorney's compensation has been determined or reported by a referee.<sup>17</sup>

C. PAYMENT OR SECURITY OF ATTORNEY'S FEES.—In a pending proceeding the court may order a substitution of attorneys before the

666; Board of Commissioners v. Younger, 29 Cal. 147, 87 Am. Dec. 164. Idaho. Curtis v. Richards, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134. N. Y. Myer v. Abbett, 20 App. Div. 390, 46 N. Y. Supp. 822. Wash.—Schultheis v. Nash, 27 Wash. 250, 67 Pac. 707.

[a] In Appellate Court.—A contested motion for substitution, directed to the appellate court, while the case is on appeal, may be denied without prejudice to its renewal in the lower court, when the case is to be reversed. Whitten v. Dabney, 171 Cal. 621, 154 Pac. 312.

8. Curtis v. Richards, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134; Schultheis v. Nash, 27 Wash. 250, 67 Pac. 707; Payette v. Willis, 23 Wash. 299, 63 Pac. 254.

9. McMunn v. Lehrke, 29 Cal. App. 298, 155 Pac. 473.

10. Cal.—Rundberg v. Belcher, 118 Cal. 589, 50 Pac. 670. Idaho.—Curtis v. Richards, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134. Ill.—Chicago Public Stock Exchange v. McClaughry, 50 Ill. App. 358. P. R.—Romero v. Calaf, 7 P. R. Fed. 113. Wis.—McMahon v. Snyder, 117 Wis. 463, 94 N. W. 351.

[a] Notice from one to the other is provided for by statutes authorizing the application by either attorney or client. McMunn v. Lehrke, 29 Cal. App. 298, 155 Pac. 473.

[b] The only persons who are entitled to notice of the motion for substitution are the client and his attorney first employed, according to which one seeks to make the change. Gill v.

Southern Pac. Co., 174 Cal. 84, 161 Pac. 1153.

11. Schaefer's Estate, 39 Pa. Super. 384; Schultheis v. Nash, 27 Wash. 250, 67 Pac. 707.

12. Ala.—Kelly v. Horsely, 147 Ala. 508, 41 So. 902. Ky.—Root v. McIlvaine, 22 Ky. L. Rep. 7, 56 S. W. 498. Mich.—Lanagan v. Circuit Judge, 170 Mich. 435, 136 N. W. 398. N. Y.—Halbert v. Gibbs, 16 App. Div. 126, 45 N. Y. Supp. 113; De Witt v. Stender, 52 Hun 615, 5 N. Y. Supp. 602. N. C. Newberne v. Jones, 63 N. C. 606.

Mandamus to compel, see 19 STAND-ARD PROC. 219.

Imposition of terms, see *infra*, I, C.

[a] Delivery of Pleadings and Papers.—The terms of the order of substitution having been decided, it should provide for the delivery of the pleadings and papers in the case to the new attorney. *In re Rieser*, 137 App. Div. 177, 121 N. Y. Supp. 1070.

13. State *ex rel.* Davis v. Second Judicial Dist. Court, 30 Mont. 8, 75 Pac. 516.

14. Kelly v. Horsely, 147 Ala. 508, 41 So. 902; Curtis v. Richards, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134. See *infra*, I, C.

15. People v. Staten Island Bank, 112 App. Div. 791, 99 N. Y. Supp. 486.

16. Simers v. Great Eastern Clay Products Co., 82 Misc. 422, 143 N. Y. Supp. 1020.

17. Gardiner v. Tyler, 36 How. Pr. (N. Y.) 63 *affirmed*, 5 Abb. Pr. N. S. 33. But see *In re Davis*, 7 Daly (N. Y.) 1.

fees of the former attorney are paid,<sup>18</sup> upon such terms as may be just,<sup>19</sup> but the practice is well settled that it will not enforce a substitution of attorneys, where the former attorney is without fault, unless the amount due him for his services and expenses is either paid or secured,<sup>20</sup> or provision is made for the preservation of his lien.<sup>21</sup> An exception is made, however, if, in the court's opinion, such payment is inequitable, impracticable, or impossible.<sup>22</sup> So, too, when the attorney is at fault an order of substitution will be granted un-

18. **U. S.**—*Sloo v. Law*, 4 Blatchf. 268, 22 Fed. Cas. No. 12,958. **D. C.** Kappler *v. Sumpter*, 33 App. Cas. 404. **N. Y.**—*Jeny v. Merkle*, 128 App. Div. 833, 112 N. Y. Supp. 1106; *In re Ackerman's Est.*, 166 N. Y. Supp. 1080.

19. *In re Dunn*, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; *McMahon v. Snyder*, 117 Wis. 463, 94 N. W. 351.

20. **U. S.**—*In re Paschal*, 10 Wall. 483, 19 L. ed. 992; *Du Bois v. New York*, 134 Fed. 570, 69 C. C. A. 112; *New York Phonograph Co. v. Edison Phonograph Co.*, 150 Fed. 233. **D. C.** Kappler *v. Sumpter*, 33 App. Cas. 404. **Idaho**.—*Curtis v. Richards*, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134. **Ky.**—*Joseph's Admr. v. Lapp's Admr.*, 25 Ky. L. Rep. 1875, 78 S. W. 1119. **Mich.**—*Lanagan v. Circuit Judge*, 170 Mich. 435, 136 N. W. 398. **N. J.**—*Hudson Trust & Sav. Inst. v. Carr-Curran Paper Mills* (N. J. Eq.), 44 Atl. 638. **N. Y.**—*In re Dunn*, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; *Lederer v. Goldston*, 63 Misc. 322, 117 N. Y. Supp. 151; *In re Ackerman's Estate*, 166 N. Y. Supp. 1080. **N. D.**—*Schouweiler v. Allen*, 17 N. D. 510, 117 N. W. 866. **P. R.**—*Rios v. Palou & Co.*, 7 Porto Rico Fed. 217. **Utah**.—*Sandberg v. Victor G. & S. Min. Co.*, 18 Utah 66, 55 Pac. 74. **W. Va.**—*Matheny v. Farley*, 66 W. Va. 680, 66 S. E. 1060. **Wyo.**—*Sheridan v. Hanna*, 9 Wyo. 368, 63 Pac. 1054.

[a] Statutes of some jurisdictions provide that payment of attorney's fees must be made before an order of substitution may be made. *Schultheis v. Nash*, 27 Wash. 250, 67 Pac. 707; *Payette v. Willis*, 23 Wash. 299, 63 Pac. 254.

[b] Where a cause of action is assigned pendente lite, and the assignee moves for a substitution of attorneys, the court will require the payment or security of fees and charges of the

original attorneys. *Sandberg v. Victor G. & S. Min. Co.*, 18 Utah 66, 55 Pac. 74.

[c] **Bond To Secure Fees.**—The court may not ignore the issues of amount of attorney's fees and existence of his lien, and without the consent of the parties, or sufficient cause being shown direct the substitution of another attorney upon condition that a bond be given to the former attorneys to secure their claims for services rendered. *Lederer v. Goldston*, 63 Misc. 322, 117 N. Y. Supp. 151. But compare *Rios v. Palou & Co.*, 7 P. R. Fed. 217, where a bond is favorably indicated, the amount being undetermined.

21. **U. S.**—*Ronald v. Mutual Reserve Fund Life Assn.*, 30 Fed. 228; *Wilkinson v. Tilden*, 21 Blatchf. 192, 14 Fed. 778. **Ala.**—*Kelly v. Horsely*, 147 Ala. 508, 41 So. 902. **Idaho**.—*Curtis v. Richards*, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134. **Mich.**—*Lanagan v. Circuit Judge*, 170 Mich. 435, 136 N. W. 398. **Mo.**—*United Rys. Co. v. O'Connor*, 153 Mo. App. 128, 132 S. W. 262. **N. J.**—*Hudson Trust & Sav. Inst. v. Carr-Curran Paper Mills* (N. J. Eq.), 44 Atl. 638. **N. Y.**—*In re Dunn*, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; *In re Board of Water Supply*, 179 App. Div. 377, 167 N. Y. Supp. 531; *Jeffards v. Brooklyn Heights R. Co.*, 49 App. Div. 45, 63 N. Y. Supp. 530.

[a] **Attorney's Possessory Lien.** The court cannot require the former attorney, who is without fault, to deliver to the substituted attorney the papers in his possession until his fees have been paid or secured. *Curtis v. Richards*, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134; *In re Ackerman's Est.*, 166 N. Y. Supp. 1080.

22. **Idaho**.—*Curtis v. Richards*, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134. **N. J.**—*Laird v. Laird* (N. J. Eq.),



conditionally,<sup>23</sup> as when he brings an action prematurely,<sup>24</sup> or refuses to proceed with the prosecution of the case,<sup>25</sup> or abandons it,<sup>26</sup> unless such abandonment is for good cause.<sup>27</sup>

**Determination of Amount.** — Ordinarily the amount of compensation due the former attorney, when disputed, may be determined summarily by the court having jurisdiction of the case,<sup>28</sup> or a reference for that purpose may be ordered.<sup>29</sup>

**D. NOTICE OF SUBSTITUTION.**<sup>30</sup> — When an order of substitution of attorneys is made and entered, or consent filed, notice thereof must be served upon the adverse party.<sup>31</sup> Until notice of substitution is

3 Atl. 339. **N. Y.**—*Bryant v. Brooklyn Hghts. R. Co.*, 64 App. Div. 542, 72 N. Y. Supp. 308.

[a] Where it would be inequitable to determine the amount of the attorney's fees and require their payment before a change is ordered, the court will grant the application and leave the attorney to the usual remedies the law gives him for collecting his fees. *Laird v. Laird* (N. J. Eq.), 3 Atl. 339.

23. **U. S.**—*Sloo v. Law*, 4 Blatchf. 268, 22 Fed. Cas. No. 12,958. **Mich.** *Lanagan v. Circuit Judge*, 170 Mich. 435, 136 N. W. 398. **N. Y.**—*In re Dunn*, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536; *Barkley v. N. Y. Cent. & H. R. R. Co.*, 42 App. Div. 597, 59 N. Y. Supp. 742; *Matter of Prospect Ave.*, 85 Hun 257, 32 N. Y. Supp. 1013; *Cary v. Cary*, 97 App. Div. 471, 89 N. Y. Supp. 1061.

[a] **Lien Preserved While Hearing Charge.**—When misconduct justifying an unconditional substitution of attorneys is charged and denied, the attorney's lien should be preserved by an order of court pending the determination of that question. *In re Lester's Will*, 149 App. Div. 938, 134 N. Y. Supp. 401.

24. *Jeny v. Merkle*, 128 App. Div. 833, 112 N. Y. Supp. 1106.

25. *In re Dunn*, 205 N. Y. 398, 98 N. E. 914, Ann. Cas. 1913E, 536. See *Tuck v. Manning*, 53 Hun 455, 6 N. Y. Supp. 140, court cannot withhold order of substitution where attorney refuses to proceed until his fees are paid. But see *Payette v. Willis*, 23 Wash. 299, 63 Pac. 254.

26. *Matheny v. Farley*, 66 W. Va. 680, 66 S. E. 1060.

27. *Matheny v. Farley*, 66 W. Va. 680, 66 S. E. 1060.

28. **Idaho.**—*Curtis v. Richards*, 4

*Idaho* 434, 40 Pac. 57, 95 Am. St. Rep. 134. **N. J.**—*Hudson Trust & Sav. Inst. v. Carr-Curran Paper Mills* (N. J. Eq.), 44 Atl. 638. **N. Y.**—*In re Board of Water Supply*, 179 App. Div. 877, 167 N. Y. Supp. 531; *Scheu v. Blum*, 124 App. Div. 678, 109 N. Y. Supp. 130; *Lederer v. Goldston*, 63 Misc. 322, 117 N. Y. Supp. 151.

See also 18 STANDARD PROC. 820, 835.

[a] **On application of client only**, and not on the attorney's request, will the court determine the amount of fees. *Rios v. Palou & Co.*, 7 P. R. Fed. 217.

[b] **A jury cannot be demanded** as a matter of right to determine the issue of the amount of compensation due the former attorney. *Yuengling v. Betz*, 58 App. Div. 8, 68 N. Y. Supp. 574.

29. **U. S.**—*New York Phonograph Co. v. Edison Phonograph Co.*, 150 Fed. 233; *Such v. N. Y. State Bank*, 121 Fed. 202. **Idaho.**—*Curtis v. Richards*, 4 *Idaho* 434, 40 Pac. 57, 95 Am. St. Rep. 134. **N. J.**—*Hudson Trust & Sav. Inst. v. Carr-Curran Paper Mills* (N. J. Eq.), 44 Atl. 638. **N. Y.**—*In re Board of Water Supply*, 179 App. Div. 877, 167 N. Y. Supp. 531; *Kane v. Rose*, 87 App. Div. 101, 84 N. Y. Supp. 111 (*affirmed*, 177 N. Y. 557, 69 N. E. 1125); *Dean v. Driggs*, 82 Hun 561, 31 N. Y. Supp. 548, *affirmed*, 145 N. Y. 595, 40 N. E. 163.

[a] **The referee's findings are not conclusive** and the court, in the exercise of its discretion, may reject them. *Chatfield v. Hewlett*, 2 Dem. Sur. (N. Y.) 191. See also *Dean v. Driggs*, 82 Hun 561, 31 N. Y. Supp. 548, *affirmed*, 145 N. Y. 595, 40 N. E. 163.

30. **Notice of application**, see *supra*, I, B.

31. **U. S.**—*Wilkinson v. Tilden*, 21 Blatchf. 192, 14 Fed. 778. **Cal.**—*Gill v. Southern Pac. Co.*, 174 Cal. 84, 161

given, the adverse party is bound to recognize the former attorney,<sup>32</sup> and is justified in refusing to take notice of any proceeding in the action by any one else.<sup>33</sup> Such notice need not recite the giving of notice of application to the former attorney,<sup>34</sup> nor contain a copy of the order of substitution.<sup>35</sup> Notice by the new attorney has been held insufficient,<sup>36</sup> but notice of appeal by a new attorney is sufficient notice of substitution where a formal substitution is not required after judgment.<sup>37</sup>

**Waiver of Notice.**—Notice of a change of attorneys may be waived by the adverse party by recognizing and dealing with the new attorney.<sup>38</sup>

Pac. 1153; *Withers v. Little*, 56 Cal. 370; *McMunn v. Lehrke*, 29 Cal. App. 298, 155 Pac. 473. **Ill.**—*Chicago Public Stock Exchange v. McClaughry*, 50 Ill. App. 358. **Me.**—*White v. Johnson*, 67 Me. 287. **Mich.**—*Kelley v. Alcona Circuit Judge*, 79 Mich. 392, 44 N. W. 925; *Comfort v. Stockbridge*, 38 Mich. 342. **Minn.**—*McFarland v. Butler*, 11 Minn. 72; *Hinkley v. St. Anthony Falls Water Power Co.*, 9 Minn. 55. **Mo.**—*Milliken v. McBroom*, 38 Mo. 342. **N. Y.**—*Hoffman v. Rowley*, 13 Abb. Pr. 399; *Krekeler v. Thaulé*, 49 How. Pr. 138; *Boeram v. Jerome*, 1 Wend. 293. **Ore.**—*De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705. **Wis.**—*Waterhouse v. Freeman*, 13 Wis. 339. **Eng.**—*Ryland v. Noakes*, 1 Taunt. 342, 127 Eng. Reprint 865. **Can.**—*Muir v. Guinane*, 10 Ont. L. Rep. 367.

[a] **Written notice** of an order of substitution of attorneys must be served upon the adverse party according to some statutes. *McMunn v. Lehrke*, 29 Cal. App. 298, 155 Pac. 473, Cal. Code Civ. Proc. §285.

[b] **After Judgment.**—Some statutes relating to notice of substitution of attorneys, apply only to a change made before judgment, or final determination, and notice of substitution after judgment is not necessary. *Knox v. Randall*, 24 Minn. 479; *Belle City Mfg. Co. v. Kemp*, 27 Wash. 111, 67 Pac. 580.

[c] **Notice Without Order or Consent.**—Notice of substitution to the adverse party is insufficient in the absence of an order of court or consent. *Miller v. Shall*, 67 Barb. (N. Y.) 446; *Felt v. Nichols*, 21 Misc. 404, 47 N. Y. Supp. 951.

32. **U. S.**—*Wilkinson v. Tilden*, 21 Blatchf. 192, 14 Fed. 778. **Cal.**—*Grant v. White*, 6 Cal. 55. **Me.**—*White v.*

*Johnson*, 67 Me. 287. **Mich.**—*Comfort v. Stockbridge*, 38 Mich. 342. **Minn.**—*McFarland v. Butler*, 11 Minn. 72; *Hinkley v. St. Anthony Falls Water Power Co.*, 9 Minn. 55. **Nev.**—*Hoppin v. First Nat. Bk.*, 25 Nev. 84, 56 Pac. 1121. **N. H.**—*Beliveau v. Amoskeag Mfg. Co.*, 68 N. H. 225, 40 Atl. 734, 73 Am. St. Rep. 577, 44 L. R. A. 167. **N. Y.**—*Parker v. Williamsburgh*, 13 How. Pr. 250; *Robinson v. McClellan*, 1 How. Pr. 90. **Ore.**—*Poppleton v. Nelson*, 10 Ore. 437. **Wash.**—*Belle City Mfg. Co. v. Kemp*, 27 Wash. 111, 67 Pac. 580. **Wis.**—*Boyd v. Stone*, 5 Wis. 240. **Can.**—*Muir v. Guinane*, 10 Ont. L. Rep. 367.

[a] **When the adverse party appeals**, in the absence of notice of substitution, notice of appeal is properly served upon the former attorney. *United States v. Curry*, 6 How. (U. S.) 106, 12 L. ed. 363; *Belle City Mfg. Co. v. Kemp*, 27 Wash. 111, 67 Pac. 580.

33. *Miller v. Shall*, 67 Barb. (N. Y.) 446; *Waterhouse v. Freeman*, 13 Wis. 339.

34. *Gill v. Southern Pac. Co.*, 174 Cal. 84, 161 Pac. 1153.

**Notice of application**, see *supra*, I, B.

35. *Bogardus v. Richtmeyer*, 3 Abb. Pr. (N. Y.) 179; *Dorlon v. Lewis*, 7 How. Pr. (N. Y.) 132.

36. *Waterhouse v. Freeman*, 13 Wis. 339.

37. *Magnolia Metal Co. v. Sterlingworth R. S. Co.*, 37 App. Div. 366, 56 N. Y. Supp. 16; *Belle City Mfg. Co. v. Kemp*, 27 Wash. 111, 67 Pac. 580.

38. **Cal.**—*Livermore v. Webb*, 56 Cal. 489; *Withers v. Little*, 56 Cal. 370. **Minn.**—*McFarland v. Butler*, 11 Minn. 72. **N. Y.**—*Magnolia Metal Co. v. Sterlingworth R. S. Co.*, 37 App. Div. 366, 56 N. Y. Supp. 16.

[a] **A written admission of service**

**E. NOTICE BY ADVERSE PARTY REQUESTING SUBSTITUTION.**—Statutes sometimes provide that when an attorney dies or is disbarred or suspended, or ceases to act as such, the adverse party, before taking further proceedings must notify the party for whom the attorney was acting, to appoint another attorney or appear in person.<sup>39</sup>

**II. SUBSTITUTION AFTER JUDGMENT.**—Unless required by statute, or other rule of law, giving an attorney a special interest in the judgment,<sup>40</sup> an order of substitution of attorneys, as a general rule, is unnecessary after judgment.<sup>41</sup> A client may, therefore, employ a new attorney, without requesting a formal substitution, to enforce a judgment,<sup>42</sup> or appeal therefrom,<sup>43</sup> or enter satisfaction thereof,<sup>44</sup> to move for a new trial,<sup>45</sup> or open a default.<sup>46</sup>

**III. ANNULMENT OF ORDER.**—When a client obtains an order of substitution without sufficient notice to his attorney, the order may be objected to and set aside on motion of the aggrieved attorney,<sup>47</sup> but not of the party who obtained the order.<sup>48</sup>

**IV. APPEAL.**—An application for substitution of attorneys is a

of notice of appeal without objection that it was signed by new counsel, is a waiver. *Livermore v. Webb*, 56 Cal. 489; *Withers v. Little*, 56 Cal. 370.

39. See Cal. Code Civ. Proc., §286, and *McMunn v. Lehrke*, 29 Cal. App. 298, 155 Pac. 473.

40. See the following cases: *Hinkley v. St. Anthony Falls Water Power Co.*, 9 Minn. 55; *Shuler v. Maxwell*, 38 Hun (N. Y.) 240; *Miller v. Shall*, 67 Barb. (N. Y.) 446.

41. **U. S.**—*Wilkinson v. Tilden*, 21 Blatchf. 192, 14 Fed. 778. **Minn.** *Knox v. Randall*, 24 Minn. 479; *Hinkley v. St. Anthony Falls Water Power Co.*, 9 Minn. 55. **N. J.**—*State v. Gulick*, 17 N. J. L. 435. **N. Y.**—*Egan v. Rooney*, 38 How. Pr. 121; *Connigal v. Smith*, 6 Johns. 106. **Eng.**—*Marr v. Smith*, 4 B. & Ald. 466, 6 E. C. L. 562, 106 Eng. Reprint 1007.

[a] **Void Judgment.**—The rule is not affected by the fact that the judgment is or may be void. *Ward v. Sands*, 10 Abb. N. C. (N. Y.) 60.

[b] **"Even in suits at common law,** it has been held, that after judgment, a party may sue out execution; or bring a writ of error, by a different attorney, without an order to change the attorney." *State v. Gulick*, 17 N. J. L. 435.

[c] **"The general power of an attorney ceases with the entry of judgment for his client. It was continued by the common law, for special pur-**

poses, for a year and a day after judgment, and authority in the attorney is by statute prolonged for certain periods after judgment, for specified purposes, and for those purposes only can he bind his client." *Hinkley v. St. Anthony Falls Water Power Co.*, 9 Minn. 55.

42. **Minn.**—*Knox v. Randall*, 24 Minn. 479; *Berthold v. Fox*, 21 Minn. 51. **N. J.**—*State v. Gulick*, 17 N. J. L. 435. **N. Y.**—*Ward v. Sands*, 10 Abb. N. C. 60; *Thorp v. Fowler*, 5 Cow. 446; *Cruikshank v. Goodwin*, 66 Hun 626, 20 N. Y. Supp. 757. **Eng.**—*Tipping v. Johnson*, 2 Bos. & Pul. 358, 126 Eng. Reprint 1325.

43. **Haw.**—*Nobrega v. Nobrega*, 14 Hawaii 502. **N. Y.**—*Magnolia Metal Co. v. Sterlingworth R. S. Co.*, 37 App. Div. 366, 56 N. Y. Supp. 16; *Slepin v. Beck*, 145 N. Y. Supp. 530. **Eng.** *Batchelor v. Ellis*, 7 T. R. 337, 101 Eng. Reprint 1006.

44. *Marr v. Smith*, 4 B. & Ald. 466, 6 E. C. L. 562, 106 Eng. Reprint 1007.

45. *Doe v. Bransom*, 6 Dowl. P. C. (Eng.) 490.

46. *Davis v. Solomon*, 25 Misc. 695, 56 N. Y. Supp. 80.

47. *Gill v. Southern Pac. Co.*, 174 Cal. 84, 161 Pac. 1153.

48. *Gill v. Southern Pac. Co.*, 174 Cal. 84, 161 Pac. 1153.

[a] **By adverse party**, see *Gill v. Southern Pac. Co.*, 174 Cal. 84, 161 Pac. 1153.



special proceeding and the court's decision therein is a final judgment from which an appeal lies,<sup>49</sup> to which appeal the general rules relating to appeals are applicable.<sup>50</sup>

**V. EFFECT OF SUBSTITUTION.**—When an order authorizing a substitution of attorneys has been obtained, and notice thereof served upon the adverse party, the new attorney assumes all the rights, powers, duties and obligations of the former attorney relating to the case.<sup>51</sup> The authority of the former attorney, as a rule, ceases upon the filing of the motion for substitution,<sup>52</sup> or upon signing the consent,<sup>53</sup> and the giving of the requisite notice to the adverse party,<sup>54</sup> and a motion made by him, relating to the case generally, should not be entertained.<sup>55</sup> Having obtained a judgment, he cannot, in opposition to the wishes of his client, collect more than enough to satisfy his lien,<sup>56</sup> and if he attempts to do so he may be enjoined.<sup>57</sup> The adverse party, upon receiving notice of substitution, may recognize the new attorney, and, in the absence of information impugning the validity of the order, proceed to deal with him.<sup>58</sup>

49. *Curtis v. Richards*, 4 Idaho 434, 40 Pac. 57, 95 Am. St. Rep. 134; *Sandberg v. Victor G. & S. Min. Co.*, 18 Utah 66, 55 Pac. 74.

50. See the title "Appeals" and *infra*, this note.

[a] **Presumptions.**—In the absence of affirmative proof in the record to the contrary, it will be presumed on appeal that notice of the motion for substitution was served upon the former attorney. *Gill v. Southern Pac. Co.*, 174 Cal. 84, 161 Pac. 1153.

[b] **Review of Discretionary Matters.**—The exercise of the court's discretion in granting or refusing an order of substitution of attorneys, unless clearly abused, will not be reviewed on appeal. *Kelly v. Horsely*, 147 Ala. 508, 41 So. 902.

51. **Minn.**—*Peteler Portable Ry. Mfg. Co. v. Northwestern Adamant Mfg. Co.*, 60 Minn. 127, 61 N. W. 1024. **Mo.**—*McDonough v. Daly*, 3 Mo. App. 606. **S. C.**—*McSween v. Windham*, 77 S. C. 223, 57 S. E. 847.

[a] **Cannot Adopt New Theory.** The new attorney, on appeal, is bound by the proceedings of the former attorney in the lower court and cannot adopt a position inconsistent with that assumed by the former attorney at the trial of the case. *Peteler Portable Ry. Mfg. Co. v. Northwestern Adamant Mfg. Co.*, 60 Minn. 127, 61 N. W. 1024.

[b] **Withdrawal of briefs on appeal** will not be permitted an attorney who, having entered into a dispute with his client, withdraws from the case. While counsel may sever his personal connection with the case at any time, the business of the court will not be permitted to be delayed by the withdrawal of briefs which have been filed. *La Cotts v. Quattermous*, 84 Ark. 376, 105 S. W. 872.

52. *Felt v. Nichols*, 21 Misc. 404, 47 N. Y. Supp. 951; *Quinn v. Lloyd*, 36 How. Pr. (N. Y.) 378, 5 Abb. Pr. (N. S.) 281, 7 Robt. 538.

53. *Felt v. Nichols*, 21 Misc. 404, 47 N. Y. Supp. 951; *Quinn v. Lloyd*, 36 How. Pr. (N. Y.) 378, 5 Abb. Pr. (N. S.) 281, 7 Robt. 538.

54. See *supra*, I, D.

55. *Lynch v. Lynch*, 99 Ill. App. 454; *Magnolia Metal Co. v. Sterlingworth R. S. Co.*, 37 App. Div. 366, 56 N. Y. Supp. 16.

56. *O'Neal v. Spalding*, 23 Ky. L. Rep. 1729, 66 S. W. 11.

57. *O'Neal v. Spalding*, 23 Ky. L. Rep. 1729, 66 S. W. 11.

58. *Gill v. Southern Pac. Co.*, 174 Cal. 84, 161 Pac. 1153.

**In the absence of notice** he must recognize the former attorney, see *supra*, I, D.

**SUBSTITUTION OF PARTIES.** — See **Parties**; **Revivor**; **Supplemental Pleading**.

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**SUCCESSION.** — See **Decedents' Estates**; **Executors and Administrators**; **Inheritance**; **Probate Courts**; **Wills**.

**Vol. XXIV**

# SUCCESSIVE SUITS

By the Editorial Staff.

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Splitting causes of action to confer jurisdiction, see 17 STANDARD PROC. 868.

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**I. RULE STATED.**—A single cause of action cannot be divided up into distinct demands and made the subject of separate actions,<sup>1</sup>

1. **U. S.**—*Mandeville v. Welch*, 5 42, 118 Pac. 425; *Agard v. Valencia*, Wheat. 277, 5 L. ed. 87; *Clafin v.* 39 Cal. 292, 303; *Grain v. Aldrich*, 38 Mather Elec. Co., 98 Fed. 699, 39 C. Cal. 514, 99 Am. Dec. 423. **Conn.** C. A. 241. **Ala.**—*South & N. A. R. Co.* *Burritt v. Belfy*, 47 Conn. 323, 36 Am. v. Henlein, 56 Ala. 368. **Cal.**—*Abbott* Rep. 79. **Haw.**—*Holt v. Wong Kwai*, v. The 76 Land & Water Co., 161 Cal. 18 *Hawaii* 13; *Phillips v. Lun Chong*



unless the defendant consents thereto,<sup>2</sup> or fails to raise the objection in the trial court.<sup>3</sup>

**II. EXCEPTIONS.**—In some cases the rule is stated broadly that if the plaintiff through mistake or unavoidable ignorance fails to include all his demand in his action, the general rule against splitting of causes will not be applied,<sup>4</sup> unless the ignorance was due to his

Co., 14 Hawaii 295. **Ill.**—Dulaney v. Payne, 101 Ill. 325, 40 Am. Rep. 205; Nickerson v. Rockwell, 90 Ill. 460. **Ind.** Roby v. Eggers, 130 Ind. 415, 29 N. E. 365. **Ia.**—Hogle v. Smith, 136 Iowa 32, 40, 113 N. W. 556. **Mich.**—Dutton v. Shaw, 35 Mich. 431. **Miss.**—Vicksburg Waterworks Co. v. Ford, 97 Miss. 198, 52 So. 208. **Mo.**—Union R. & T. Co. v. Traube, 59 Mo. 355; Steiglinder v. Missouri Pac. Ry. Co., 38 Mo. App. 511, 515. **Mont.**—Cohen v. Clark, 44 Mont. 151, 119 Pac. 775. **N. H.**—Kemp-ton v. Sullivan Sav. Inst., 53 N. H. 581. **N. Y.**—Gedney v. Gedney, 160 N. Y. 471, 55 N. E. 1; O'Dougherty v. Remington Paper Co., 81 N. Y. 496. **Okla.**—Akin v. Bonfils, 169 Pac. 899; Tootle v. Kent, 12 Okla. 674, 73 Pac. 310. **Pa.**—Simes & Co. v. Zane, 24 Pa. 242. **Tex.**—Craig v. Broocks, 60 Tex. Civ. App. 83, 127 S. W. 572. **Utah.** National U. F. Ins. Co. v. Denver & R. G. R. Co., 44 Utah 26, 137 Pac. 653. **W. Va.**—St. Lawrence B. & M. Co. v. Price, 49 W. Va. 432, 38 S. E. 526. **Wis.**—Stern v. Riches, 111 Wis. 591, 87 N. W. 555, 87 Am. St. Rep. 892.

See 15 STANDARD PROC. 515, et seq.

**2. U. S.**—Mandeville v. Welch, 5 Wheat. 277, 5 L. ed. 87; Southern Pac. R. Co. v. United States, 186 Fed. 737, 108 C. C. A. 607; Claflin v. Mather Elec. Co., 98 Fed. 699, 39 C. C. A. 241. **Ala.**—See Capital City Ins. Co. v. Jones, 128 Ala. 361, 30 So. 674, 86 Am. St. Rep. 152. **Cal.**—Thomas v. Rock Island G. & S. M. Co., 54 Cal. 578; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423. **Minn.**—Vineseck v. Great Northern R. Co., 136 Minn. 96, 161 N. W. 494. **Mo.**—Reper Automobile Co. v. St. Louis Union Trust Co. (Mo. App.), 187 S. W. 109. **Nev.**—State v. California Min. Co., 13 Nev. 289. **N. Y.** Carrington v. Crocker, 37 N. Y. 336. **W. Va.**—St. Lawrence B. & M. Co. v. Price, 49 W. Va. 432, 38 S. E. 526.

[a] **Implied Consent.**—Southern Pac. Ry. Co. v. United States, 186 Fed.

737, 108 C. C. A. 607; McDonald v. Tison, 94 Ga. 549, 20 S. E. 427.

**3. U. S.**—Southern Pac. Ry. Co. v. United States, 186 Fed. 737, 108 C. C. A. 607. **Cal.**—J. F. Hall-Martin Co. v. Hughes, 18 Cal. App. 513, 123 Pac. 617. **Ky.**—Cassidy v. Berkovitz, 169 Ky. 785, 185 S. W. 129. **N. Y.**—Car-vill v. Mirror Films, 178 App. Div. 644, 165 N. Y. Supp. 676. **Okla.**—Kansas City, M. & O. Ry. Co. v. Shutt, 24 Okla. 96, 104 Pac. 51, 138 Am. St. Rep. 870. **Wash.**—Brice v. Starr, 93 Wash. 501, 161 Pac. 347. See *infra*, IV.

**Pleading prior adjudication as merger or bar**, see the title "Judgments."

**4. Minn.**—Vineseck v. Great Northern R. Co., 136 Minn. 96, 161 N. W. 494. **Mo.**—Wheeler Sav. Bank v. Tracey, 141 Mo. 252, 42 S. W. 946, 64 Am. St. Rep. 505; Moran v. Plankinton, 64 Mo. 337; Coy v. St. Louis & S. F. R. Co., 186 Mo. App. 408, 172 S. W. 446. **Wis.**—Stern v. Riches, 111 Wis. 591, 87 N. W. 555, 87 Am. St. Rep. 892 (query); Hagan v. Casey, 30 Wis. 553.

But see Kline v. Stein, 46 Wash. 546, 90 Pac. 1041, 123 Am. St. Rep. 940, plaintiff's remedy is by vacating the judgment.

[a] **A judgment in an action for trespass by a stallion breaking into plaintiff's premises is not a bar to a subsequent action for damages occasioned by reason of the horse getting the plaintiff's mare with a foal, for the reason that the subject matter of the present action did not exist at the time of the former suit and could not have been within the issues.** Hagan v. Casey, 30 Wis. 553.

[b] **When a party, ignorant of the number of hogs stolen from him, discovers some and replevies them, and then afterwards learns of the conversion of others by the defendant, he may sue for their value.** The rule is that a party should not be precluded in consequence of a former action, if such action were brought in unavoidable ig-

own negligence.<sup>5</sup> If the defendant's conduct, either in perpetrating the wrong or subsequently, is such that the plaintiff is misled as to the full extent of his damage,<sup>6</sup> or where a judgment for part of a claim is entered by agreement under a mutual mistake of fact,<sup>7</sup> the judgment in such action will not operate as a bar to an action on the balance of the claim.

**III. APPLICATIONS OF THE RULE. — A. GENERALLY. —** The rule against splitting of causes is rigidly applied and enforced in common law actions,<sup>8</sup> but courts of equity are not so strict in its enforcement.<sup>9</sup> The rule applies only to entire claims which are single and indivisible in nature.<sup>10</sup> It does not preclude a prosecution of several actions upon several causes of action,<sup>11</sup> or require a joinder of every demand which may be joined.<sup>12</sup> It does not prevent the plaintiff from suing for a part of his demand,<sup>13</sup> but bars a recovery on the balance due at the time of the first action, the whole demand being treated as merged in the judgment.<sup>14</sup>

norance of the full extent of the wrongs received or the injuries done. *Moran v. Plankinton*, 64 Mo. 337.

5. **Ga.**—*Macon & A. R. Co. v. Gardard*, 54 Ga. 327. **Mass.**—See *McCaffrey v. Carter*, 125 Mass. 330. **Minn.**—*Vine-seck v. Great Northern R. Co.*, 136 Minn. 96, 161 N. W. 494. **Mo.**—*Wheeler Sav. Bank v. Tracey*, 141 Mo. 252, 259, 42 S. W. 946, 64 Am. St. Rep. 505.

6. *Johnson v. Provincial Ins. Co.*, 12 Mich. 216, 86 Am. Dec. 49; *Moran v. Plankinton*, 64 Mo. 337. But see *McCaffrey v. Carter*, 125 Mass. 330.

[a] An agent cannot set up a former recovery on his bond as a bar to a subsequent action thereon assigning a further breach in failing to account for sums, the receipt of which he fraudulently concealed. *Johnson v. Provincial Ins. Co.*, 12 Mich. 216, 86 Am. Dec. 49.

[b] Misrepresentation. — A judgment of dismissal with prejudice on a settlement of an action for damages for injuries to plaintiff's legs is not a bar to a subsequent action for injuries to plaintiff's eyes not included in the former action because of false representations of defendant's doctor that the injury was temporary. *Vine-seck v. Great Northern R. Co.*, 136 Minn. 96, 161 N. W. 494.

7. **Conn.**—*Kane v. Morehouse*, 46 Conn. 300. **Minn.**—See *Vine-seck v. Great Northern R. Co.*, 136 Minn. 96, 161 N. W. 494. **Vt.**—*Post v. Smilie*, 48 Vt. 185.

[a] Where Items Are Omitted From

**Settlement of Accounts by Mistake.** *Kane v. Morehouse*, 46 Conn. 300.

8. *Vine-seck v. Great Northern R. Co.*, 136 Minn. 96, 161 N. W. 494; *O'Dougherty v. Remington Paper Co.*, 81 N. Y. 496, 500.

[a] But the cause must be brought strictly within the rule to give it effect. *Secor v. Sturgis*, 16 N. Y. 548.

9. *Stone v. Pratt*, 25 Ill. 25; *O'Dougherty v. Remington Paper Co.*, 81 N. Y. 496, 500. See *infra*, III, C.

10. *Norrington v. Wright*, 5 Fed. 768; *Secor v. Sturgis*, 16 N. Y. 548. See 15 STANDARD PROC. 515, et seq.

11. **U. S.**—*Union Cent. L. Ins. Co. v. Drake*, 214 Fed. 536, 131 C. C. A. 82.

**Haw.**—*Holt v. Wong Kwai*, 18 Hawaii 13. **La.**—*In re Dimmick's Est.*, 111 La. 655, 35 So. 801. **Mo.**—*Union L. S. & M. Co. v. Farbstein*, 148 Mo. App. 216, 127 S. W. 656. **Neb.**—*Beck v. Devereaux*, 9 Neb. 109, 2 N. W. 365. **N. Y.**—*Secor v. Sturgis*, 16 N. Y. 548, 554.

See 15 STANDARD PROC. 516, et seq.

12. **Haw.**—*Holt v. Wong Kwai*, 18 Hawaii 13. **Mich.**—*Morehouse v. Baker*, 48 Mich. 335, 12 N. W. 170. **Mo.**—*Steiglider v. Missouri P. Ry. Co.*, 38 Mo. App. 511. **N. Y.**—*Perry v. Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663.

13. **Haw.**—*Phillips v. Lun Chong Co.*, 14 Hawaii 295. **Mo.**—*Brooks v. Ancell*, 51 Mo. 178. **W. Va.**—*Ward v. Evans*, 49 W. Va. 184, 38 S. E. 524.

**Remission of part of claim for jurisdictional purposes**, see 17 STANDARD PROC. 878.

14. See 15 STANDARD PROC. 515.

B. TO COUNTERCLAIMS AND SET-OFFS. — A person cannot maintain an action for the recovery of the balance of a claim, a portion of which has been used as a recoupment or set-off in a former suit,<sup>15</sup> unless, it has been held, the claim exceeds the plaintiff's demand and the defendant is not permitted to obtain an affirmative judgment.<sup>16</sup>

C. PARTIAL ASSIGNMENTS. — A plaintiff cannot by partial assignments of an entire cause of action split his demand and authorize separate actions upon it,<sup>17</sup> unless the defendant consents thereto.<sup>18</sup> But a partial recovery may be had in a court of equity without the debtor's assent.<sup>19</sup>

D. TESTS. — The courts have applied a number of tests in determining whether there is one cause of action which has been split, or whether there are two causes of action on which separate actions may be brought.<sup>20</sup>

E. ACTIONS ON CONTRACT. — If a contract is entire, but one action

15. Ala.—*South & N. A. R. Co. v. Henlein*, 56 Ala. 368. Ky.—*Palms' Admr. v. Howard*, 31 Ky. L. Rep. 316, 102 S. W. 267. N. Y.—*Inslee v. Hampton*, 11 Hun 156.

See *National Handle Co. v. Huffman*, 140 Mo. App. 634, 120 S. W. 690, and see 15 STANDARD PROC. 546.

16. *Gordon v. Van Cott*, 38 App. Div. 564, 56 N. Y. Supp. 554.

17. U. S.—*Mandeville v. Welch*, 5 Wheat. 277, 5 L. ed. 87; *Rodgers v. Penobscot Min. Co.*, 154 Fed. 606, 83 C. C. A. 380. Cal.—*Thomas v. Rock Island G. & S. Min. Co.*, 54 Cal. 578; *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423. Colo.—*Pueblo v. Dye*, 44 Colo. 35, 96 Pac. 969. D. C.—*Sincell v. Davis*, 24 App. Cas. 218. Ia.—*Day v. Brenton*, 102 Iowa 482, 71 N. W. 538, 63 Am. St. Rep. 460. Mich.—*Milroy v. Spurr Mt. I. M. Co.*, 43 Mich. 231, 5 N. W. 287. N. Y.—*Carvill v. Mirror Films*, 178 App. Div. 644, 165 N. Y. Supp. 676. Compare *Chase v. Deering*, 104 App. Div. 192, 93 N. Y. Supp. 434, while a debtor cannot bar a recovery on the objection that a transfer of a part of a debt would subject him to several suits, he may require all interested parties to be brought in. Va. *Phillips v. Portsmouth*, 112 Va. 164, 70 S. E. 502. W. Va.—*St. Lawrence Boom & M. Co. v. Price*, 49 W. Va. 432, 38 S. E. 526.

See 3 STANDARD PROC. 105.

[a] But an acceptance of a part payment of a demand and an assignment of the balance is not a splitting of causes of action. *Goodson v. Na-*

*tional Mas. Acc. Assn.*, 91 Mo. App. 339, 341, 353.

[b] Assignee of part of a demand is a necessary party to suit on demand to prevent splitting of the demand. *A. K. McInnis Lumb. Co. v. Rather*, 111 Miss. 55, 71 So. 264.

18. Cal.—*Thomas v. Rock Island G. & S. M. Co.*, 54 Cal. 578; *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423. D. C.—*Sincell v. Davis*, 24 App. Cas. 218. Va.—*Phillips v. Portsmouth*, 112 Va. 164, 70 S. E. 502. W. Va.—*St. Lawrence Boom & M. Co. v. Price*, 49 W. Va. 432, 38 S. E. 526.

[a] Assent or Ratification of the Assignment by the Debtor Must Be Alleged.—*Thomas v. Rock Island G. & S. Min. Co.*, 54 Cal. 578.

19. U. S.—*Rogers v. Penobscot Min. Co.*, 154 Fed. 606, 83 C. C. A. 380. N. Y.—*Carvill v. Mirror Films*, 178 App. Div. 644, 165 N. Y. Supp. 676. W. Va.—*Dudley v. Barrett*, 66 W. Va. 363, 66 S. E. 507.

See 3 STANDARD PROC. 107.

20. Principles determining whether one cause of action is stated, see 14 STANDARD PROC. 630, et seq.; 15 STANDARD PROC. 520, et seq.

[a] A test is to determine whether a case rests upon one or several acts or agreements. *Norrington v. Wright*, 5 Fed. 768; *Secor v. Sturgis*, 16 N. Y. 548. But see *Dulaney v. Payne*, 101 Ill. 325, 40 Am. Rep. 205.

[b] If different allegations and different evidence are required, the cause of action is not split. *Stark v. Starr*, 94 U. S. 477, 485, 24 L. ed. 276.



can be brought upon it.<sup>21</sup> But if there are several contracts, separate actions may be brought on each.<sup>22</sup> Accordingly, the holder of several promissory notes may maintain an action on each,<sup>23</sup> although all grew out of one and the same transaction.<sup>24</sup>

If a contract is severable, and separate causes of action accrue at different times for partial breaches of the contract,<sup>25</sup> as where the contract is to be performed by installments at different times,<sup>26</sup> an action

21. **Ala.**—*South & N. A. R. Co. v. Henlein*, 56 Ala. 368. **Cal.**—*Agard v. Valencia*, 39 Cal. 292; *Herriter v. Porter*, 23 Cal. 385. **Kan.**—*Madden v. Smith*, 28 Kan. 798. **Mass.**—*Badger v. Titcomb*, 15 Pick. 409, 26 Am. Dec. 611. **Minn.**—*Bunker v. Hanson*, 99 Minn. 426, 109 N. W. 827. **Mo.**—*Berkshire v. Hall* (Mo. App.), 202 S. W. 414. **Utah.**—*Felt City T. Co. v. Felt Inv. Co.*, 167 Pac. 835.

See 13 STANDARD PROC. 378, and 15 STANDARD PROC. 520.

**Suit on contract of guarantor**, see 10 STANDARD PROC. 672.

[a] **A contract of sale of a number of items constitutes but one cause of action.** *Madden v. Smith*, 28 Kan. 798; *Smith v. Jones*, 15 Jones & S. (N. Y.) 229.

[b] **A judgment for a sum of money and costs constitutes an entire demand.** *Clayes v. White*, 83 Ill. 540; *Camp v. Morgan*, 21 Ill. 255.

[c] **A provision as to payment of attorney's fees in the event of suit cannot be made the basis of a separate action.** *Abbott v. Brown*, 131 Ill. 108, 22 N. E. 813; *Maxwell v. Buntin*, 31 Ill. App. 278. See *Brooks v. Ancell*, 51 Mo. 178.

[d] **But separate actions may be brought on refusal to honor checks against a bank account.** *Chicago Marine & F. Ins. Co. v. Stanford*, 28 Ill. 168, 81 Am. Dec. 270.

**Actions on insurance policy**, see 14 STANDARD PROC. 21, and 22, note 52.

**Suits for wages**, see 15 STANDARD PROC. 527 and 19 STANDARD PROC. 426.

**Suits for commission of brokers**, see 8 STANDARD PROC. 884.

22. *Ash v. Lee & Co.*, 51 Miss. 101; *Secor v. Sturgis*, 16 N. Y. 548; *Bendernagle v. Cocks*, 19 Wend. 207, 32 Am. Dec. 448.

**Subject to the power of the court to consolidate the actions.** See the title, "Consolidation of Actions."

[a] **Separate sales made at different times constitute several causes of ac-**

**tion in the absence of an agreement or circumstances showing they comprise a running account.** *American Button-Hole O. & S. M. Co. v. Thornton*, 28 Minn. 418, 10 N. W. 425. See also *Stifel v. Lynch*, 7 Mo. App. 326; *Zimmerman v. Erhard*, 83 N. Y. 74, 60 How. Pr. 163, 38 Am. Rep. 396.

[b] **Separate actions against the maker and indorser of a note may be brought.** *Whipple v. Newton*, 17 Pick. (Mass.) 168. See 15 STANDARD PROC. 530 note 82.

23. **Ga.**—*Starnes v. Mutual L. & B. Co.*, 102 Ga. 597, 29 S. E. 452. **Mass.** *Badger v. Titcomb*, 15 Pick. 409, 26 Am. Dec. 611. **N. J.**—*Paton v. Doyne*, 74 N. J. L. 319, 65 Atl. 843. **N. Y.** *Secor v. Sturgis*, 16 N. Y. 548.

See 15 STANDARD PROC. 524.

[a] **Although All Have Matured** *Presstman v. Beach*, 61 Md. 203.

24. *Dulaney v. Payne*, 101 Ill. 325 40 Am. Rep. 205.

25. *Seaboard Air-Line Ry. v. Hamilton*, 16 Ga. App. 646, 85 S. E. 942; *Bendernagle v. Cocks*, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448.

26. **U. S.**—*Carter Crume Co. v. Peurrung*, 99 Fed. 888, 40 C. C. A. 150; *Colwell v. Fulton*, 117 Fed. 931; *Norington v. Wright*, 5 Fed. 768. **Ark.** *Reynolds v. Jones*, 63 Ark. 259, 38 S. W. 151. **Conn.**—*Burritt v. Belfy*, 47 Conn. 323, 36 Am. Rep. 79. **Ga.**—*Franklin v. Ford*, 13 Ga. App. 469, 79 S. E. 366. **Haw.**—*Lewers v. Redhouse*, 14 Hawaii 290. **Ill.**—*Marshall v. John Grosse Clothing Co.*, 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181. **Kan.** *Whitaker v. Hawley*, 30 Kan. 317, 1 Pac. 508. **Ky.**—*Breckenridge's Admrs. v. Lee's Exrs.*, 3 A. K. Marsh. 446. **Mass.**—*Electrelle Co. v. Maguire*, 215 Mass. 550, 102 N. E. 904; *Badger v. Titcomb*, 15 Pick. 409, 26 Am. Dec. 611. **Mo.**—*Union R. & T. Co. v. Traube*, 59 Mo. 355; *Priest v. Deaver*, 22 Mo. App. 276. **N. Y.**—*Smith Bros. v. Stern*, 148 N. Y. Supp. 1; *Secor v. Sturgis*, 16 N. Y. 548; *Bendernagle v. Cocks*, 19

on each breach or installment as it occurs or falls due will lie; but all the breaches occurring up to the commencement of the action must be included therein.<sup>27</sup> Successive suits may be brought upon distinct covenants or provisions in a contract also.<sup>28</sup>

An account made up of different items is an entire demand, and suit must be for the whole.<sup>29</sup> Although there are authorities to the contrary,<sup>30</sup> a continuous running account is by the weight of authority regarded as entire demand and cannot without agreement be split into separate demands,<sup>31</sup> unless the individual items of the account are

Wend. 207, 32 Am. Dec. 448. But compare *Pakas v. Hollingshead*, 184 N. Y. 211, 77 N. E. 40, 112 Am. St. Rep. 601, 3 L. R. A. (N. S.) 1042, contract of sale with goods to be delivered in installments. **N. C.**—*McPhail v. Johnson*, 109 N. C. 571, 13 S. E. 799. **Ore.** *Krebs Hop Co. v. Livesley*, 59 Ore. 574, 114 Pac. 944, 118 Pac. 165, Ann. Cas. 1913C, 758. **Tex.**—*Rau v. American Nat. Ins. Co. (Tex. Civ. App.)*, 154 S. W. 645. **Vt.**—*Luce v. Minard*, 87 Vt. 177, 88 Atl. 728. **Wash.**—*Davis v. Hibbs*, 73 Wash. 315, 131 Pac. 1135; *Harstad v. Olson*, 57 Wash. 264, 106 Pac. 741. **W. Va.**—*Adams v. International Supply Co.*, 61 W. Va. 401, 56 S. E. 607.

Contracts for wages, see the title "Master and Servant."

Action for rent, see 18 STANDARD PROC. 474; 15 STANDARD PROC. 524, note 46.

[a] **Where Debt Is Brought.**—But if money is to be paid in installments, and the plaintiff sues in debt instead of assumpsit or covenant, he must sue for the whole. *Badger v. Titcomb*, 15 Pick. (Mass.) 409, 26 Am. Dec. 611; *Bendernagle v. Cocks*, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448.

27. **Ark.**—*Reynolds v. Jones*, 63 Ark. 259, 38 S. W. 151. **Conn.**—*Burritt v. Belfy*, 47 Conn. 323, 36 Am. Rep. 79. **Ga.**—*Macon & A. R. Co. v. Garrard*, 54 Ga. 327; *Seaboard Air-Line Ry. v. Hamilton*, 16 Ga. App. 646, 85 S. E. 942. **Haw.**—*Lewers v. Redhouse*, 14 Hawaii 290. **Ill.**—*Nickerson v. Rockwell*, 90 Ill. 460. **Kan.**—*Whitaker v. Hawley*, 30 Kan. 317, 1 Pac. 508. **Mich.**—*Kruce v. Lakeside B. Co.*, 198 Mich. 736, 165 N. W. 609. **Mo.**—*Union R. & T. Co. v. Traube*, 59 Mo. 355. **N. C.**—*McPhail v. Johnson*, 109 N. C. 571, 13 S. E. 799. **Ohio.**—*Fox v. Althorp*, 40 Ohio St. 322. **W. Va.**—*Adams v. International Supply Co.*, 61 W. Va. 401, 56 S. E. 607.

See 15 STANDARD PROC. 525, note 50. But see *Mohrhardt v. S. P. & T. N. Ry. Co.*, 2 Wills. Civ. Cas. (Tex.) §322.

28. **Ky.**—*Breckenridge's Admrs. r. Lee's Exrs.*, 3 A. K. Marsh. 446. **N. Y.** *McIntosh v. Lown*, 49 Barb. 550. **Wis.** *Andrew v. Schmitt*, 64 Wis. 664, 26 N. W. 190.

See 15 STANDARD PROC. 526.

[a] **But all breaches of distinct covenants, existing when the action is brought must be included in the action.** *Goldberg v. Eastern Brew. Co.*, 136 App. Div. 692, 121 N. Y. Supp. 465.

29. **Ga.**—*McDonald v. Tison*, 94 Ga. 549, 20 S. E. 427; *Macon & A. R. Co. v. Garrard*, 54 Ga. 327. **Ill.**—*Nickerson v. Rockwell*, 90 Ill. 460. **N. C.** *Magruder & Co. v. Randolph & Co.*, 77 N. C. 79.

See 1 STANDARD PROC. 240. and 15 STANDARD PROC. 526; 17 STANDARD PROC. 869.

[a] **An account stated is an entire demand.** *Simpson v. Elwood*, 114 N. C. 528, 19 S. E. 598.

30. **Mass.**—*Badger v. Titcomb*, 15 Pick. 409, 26 Am. Dec. 611. **Mich.** *Phelps v. Abbott*, 116 Mich. 624, 74 N. W. 1010, under statute, the plaintiff loses his costs in the subsequent suits. **N. C.**—*Simpson v. Elwood*, 114 N. C. 528, 19 S. E. 598.

31. **Conn.**—*Bunnel v. Pinto*, 2 Conn. 431. **Ga.**—*Parks v. Oskamp, Nolting & Co.*, 97 Ga. 802, 25 S. E. 369. **Haw.** *Lewers v. Redhouse*, 14 Hawaii 290. **Ill.**—*Ryan v. Waukesha Spring Brew. Co.*, 63 Ill. App. 334. **Ia.**—*Williams-Abbott Elec. Co. v. Model Elec. Co.*, 134 Iowa 665, 112 N. W. 181, 13 L. R. A. (N. S.) 529. **Mo.**—*Peper Automobile Co. v. St. Louis Union Trust Co. (Mo. App.)*, 187 S. W. 109. **N. Y.**—*Secor v. Sturgis*, 16 N. Y. 548; *Guernsey v. Carver*, 8 Wend. 492, 24 Am. Dec. 60. **R. I.** *Potter v. Harvey*, 34 R. I. 71. **Wis.**

sold upon credits for stated periods.<sup>32</sup> The circumstance may be such as to show an intention that a book account is to be separable, however.<sup>33</sup>

**Interest.** — A contract to pay the principal of a debt with interest at stated periods contains distinct promises giving several causes of action.<sup>34</sup> Some authorities allow a separate recovery of the interest after the principal becomes due,<sup>35</sup> while some courts hold otherwise.<sup>36</sup>

**Secured Obligations.** — A note or other obligation given as security for a debt constitutes a different cause of action from that on the principal debt and may be sued on separately, unless the statute forbids.<sup>37</sup>

**F. ACTIONS EX DELICTO.** — An entire claim arising from a single tort, violating the rights of a single person, cannot be split and made

*Borgessier v. Harrison*, 12 Wis. 544, 78 Am. Dec. 757.

See 17 STANDARD PROC. 870, note 80.

32. *Ga.*—*Parris v. Hightower*, 76 Ga. 631. *Ill.*—*Ryan v. Waukesha Spring Brew. Co.*, 63 Ill. App. 334. *Mich.* *Stickel v. Steel*, 41 Mich. 350, 1 N. W. 1046. *N. Y.*—*Zimmerman v. Erhard*, 83 N. Y. 74, 60 How. Pr. 163, 38 Am. Rep. 396. *P. I.*—*Villasenor v. Erlanger*, 19 Phil. Isl. 574.

[a] If all items are due, the plaintiff may sue on each separately. *Parris v. Hightower*, 76 Ga. 631, and see cases cited *supra* this note. But see *Williams-Abbott Elec. Co. v. Model Elec. Co.*, 134 Iowa 665, 112 N. W. 181, 13 L. R. A. (N. S.) 529, holding they constitute a single demand when all the items are due.

33. *Lewers v. Redhouse*, 14 Hawaii 290.

[a] Where a concern carries on different lines of business and keeps separate accounts for each line. *Lewers v. Redhouse*, 14 Hawaii 290. Compare *Peper Automobile Co. v. St. Louis Union Trust Co.* (Mo. App.), 187 S. W. 109.

[b] Where the account has been broken for a long period, even though but one set of books is kept. *Lewers v. Redhouse*, 14 Hawaii 290.

[c] Where it is agreed that the amount of the account shall be due at the end of each month. *Beck v. Devaux*, 9 Neb. 109, 2 N. W. 365.

34. *Wehrly v. Morfoot*, 103 Ill. 183; *Dulaney v. Payne*, 101 Ill. 325, 40 Am. Rep. 205; *Andover Sav. Bank v. Adams*, 1 Allen (Mass.) 28; *Sparhawk v. Willis*, 6 Gray (Mass.) 163; *Badger v. Titcomb*, 15 Pick. (Mass.) 409, 26 Am. Dec. 611.

[a] But interest claimed as dam-

ages for nonpayment or detention of money must be recovered with the principal. *Hoblit v. Bloomington*, 71 Ill. App. 204; *Cutter v. New York*, 92 N. Y. 166.

35. *Wehrly v. Morfoot*, 103 Ill. 183; *Dulaney v. Payne*, 101 Ill. 325, 40 Am. Rep. 205, following *Andover Sav. Bank v. Adams*, 1 Allen (Mass.) 28; *Sparhawk v. Willis*, 6 Gray (Mass.) 163.

36. *Ala.*—*Ellerbe v. Troy*, 58 Ala. 143. *La.*—*Harty v. Hart*, 2 La. 518. *Me.*—*Howe v. Bradley*, 19 Me. 31.

37. *Ark.*—*Barnes v. Bradley*, 56 Ark. 105, 19 S. W. 319; *Ford v. Burks*, 37 Ark. 91. *Mass.*—*Fisher v. Fisher*, 98 Mass. 303. *Ore.*—*McCullough v. Hellman*, 8 Ore. 191. *Pa.*—See *Sykes v. Gerber*, 98 Pa. 179. *Tex.*—*Jordan v. Massey* (Tex. Civ. App.), 134 S. W. 804. *Wis.*—*First Nat. Bank v. Finck*, 100 Wis. 446, 76 N. W. 608; *Plant's Mfg. Co. v. Falvey*, 20 Wis. 200. See 15 STANDARD PROC. 530.

See 14 STANDARD PROC. 530, and the title "Pledges."

Where mortgage is given as security, see 5 STANDARD PROC. 59; 14 STANDARD PROC. 530; 19 STANDARD PROC. 889, et seq.

[a] After foreclosure of a lien for a part of a debt, a subsequent foreclosure suit may be brought for other portions if there was no adjudication of the amounts yet to fall due. *Higgins v. San Diego Sav. Bank*, 129 Cal. 184, 61 Pac. 943, if there was such an adjudication, a motion for an order to sell more under the statute is proper. See 19 STANDARD PROC. 913; 18 STANDARD PROC. 532, note 86 [b].

Separate action on lien, see *infra*, III, H; and 15 STANDARD PROC. 531; 18 STANDARD PROC. 994.



the subject of several suits,<sup>38</sup> however numerous the items of damages suffered by the plaintiff,<sup>39</sup> and even though the items of damage may arise at different times.<sup>40</sup> But, it has been held, the rule will not be applied when the plaintiff, through unavoidable ignorance,<sup>41</sup> or through fraud or misrepresentation of the defendant,<sup>42</sup> fails to include all his demand in his first action. Where injury to both person and property, resulting from a single tortious act, is regarded as a single cause of action,<sup>43</sup> but one action may be maintained for it;<sup>44</sup> where, however,

38. Cal.—Herriter *v.* Porter, 23 Cal. 385. Conn.—Johnson *v.* Connecticut Co., 85 Conn. 438, 83 Atl. 530. Ind.—Roby *v.* Eggers, 130 Ind. 415, 29 N. E. 365. Mo.—Wheeler Sav. Bank *v.* Tracey, 141 Mo. 252, 42 S. W. 946, 64 Am. St. Rep. 505; Coy *v.* St. Louis & S. F. R. Co., 186 Mo. App. 408, 172 S. W. 446. Okla.—Kansas City, M. & O. Ry. Co. *v.* Shutt, 24 Okla. 96, 104 Pac. 51, 138 Am. St. Rep. 870.

See 15 STANDARD PROC. 533.

39. Ind.—Roby *v.* Eggers, 130 Ind. 415, 29 N. E. 365. Ia.—Cracraft *v.* Cochran, 16 Iowa 301. Minn.—Vine-seck *v.* Great Northern R. Co., 136 Minn. 96, 161 N. W. 494. Mo.—Steig-lider *v.* Missouri Pac. Ry. Co., 38 Mo. App. 511, 515. N. Y.—Perry *v.* Dick-erson, 85 N. Y. 345, 39 Am. Rep. 663; Secor *v.* Sturgis, 16 N. Y. 548, 558. Ore.—Ingram *v.* Carlton Lumb. Co., 77 Ore. 633, 152 Pac. 256. Pa.—Simes & Co. *v.* Zane, 24 Pa. 242.

[a] **Injuries to Land.**—See 15 STANDARD PROC. 533, 534. Where several buildings were destroyed by a fire or where several lots were burned over. Knowlton *v.* New York & N. E. R. Co., 147 Mass. 606, 18 N. E. 580, 1 L. R. A. 625; Trask *v.* Hartford & N. H. R. Co., 2 Allen (Mass.) 331.

[b] **Where Several Animals Are Killed.**—Brannenburgh *v.* Indianapolis, P. & C. R. Co., 13 Ind. 103, 74 Am. Dec. 250; St. Louis S. W. R. Co. *v.* Moss, 9 Tex. Civ. App. 6, 28 S. W. 1038. See Chicago, I. & L. Ry. Co. *v.* Ramsey, 168 Ind. 390, 81 N. E. 79, 120 Am. St. Rep. 379.

[c] **Several Chattels Affected.**—See 15 STANDARD PROC. 534, note 98. (1) After recovery in trespass or trover for one of several chattels converted or carried off, a subsequent action for the others cannot be brought. Ill.—Karr *v.* Barstow, 24 Ill. 580. Mass.—McCaffrey *v.* Carter, 125 Mass. 330. Pa. Simes & Co. *v.* Zane, 24 Pa. 242. Wis. Stern *v.* Riches, 111 Wis. 591, 87 N.

W. 555, 87 Am. St. Rep. 892. (2) So also after recovery of a portion in replevin, trover will not lie for the remainder (Bennett *v.* Hood, 1 Allen [Mass.] 47, 79 Am. Dec. 705; Moran *v.* Plankinton, 64 Mo. 337), except (3) where the circumstances were such replevin could not have been brought for the whole. Gehlert *v.* Quinn, 35 Mont. 451, 90 Pac. 168, 119 Am. St. Rep. 864 (where a part was disposed of); Huffman *v.* Knight, 36 Ore. 581, 60 Pac. 207, where plaintiff was tenant in common as to a part of the goods taken. (4) Detinue may be brought for each chattel separately, since in detinue, the cause of action is the detention which at the election of the plaintiff is divisible and referable to each chattel detained. Wittick *v.* Traun, 27 Ala. 562, 62 Am. Dec. 778. (5) Ignorance of plaintiff or fraud or misrepresentation of defendant may change the general rule, see *supra*, II and *infra*, this section.

40. Hall *v.* Susskind, 109 Cal. 203, 41 Pac. 1012; Bendoragle *v.* Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448.

41. Moran *v.* Plankinton, 64 Mo. 337; Hagan *v.* Casey, 30 Wis. 553. See *supra*, II.

42. Vine-seck *v.* Great Northern R. Co., 136 Minn. 96, 161 N. W. 494. But see McCaffrey *v.* Carter, 125 Mass. 330, where the defendant fraudulently concealed the fact that the chattels in the second suit were part of those originally taken. See *supra*, II.

43. Whether two causes of action result from single act injuring both person and property, see 14 STANDARD PROC. 639; 15 STANDARD PROC. 538.

44. Ala.—Birmingham So. R. Co. *v.* Lintner, 141 Ala. 420, 38 So. 363, 109 Am. St. Rep. 40, 3 Ann. Cas. 461. Minn. King *v.* Chicago, M. & St. P. Ry. Co., 80 Minn. 83, 82 N. W. 1113, 81 Am. St. Rep. 238, 50 L. R. A. 161. Wyo.—Hazard Powder Co. *v.* Volger, 3 Wyo. 189, 18 Pac. 636.

it is held that two separate causes of action result, the rule is, of course, otherwise.<sup>45</sup>

Wrongs perpetrated at different times give rise to separate causes of action.<sup>46</sup>

In the case of a permanent injury to the person, the injured party cannot bring successive suits from time to time, but must in one action recover prospective as well as accrued damages,<sup>47</sup> unless the failure to include all the damage in the first suit was due to the fraud, misrepresentation or concealment of the defendant or his agent.<sup>48</sup>

**Continuing Torts.**—When the damages for the injury to realty caused by a structure, improvement or obstruction, are deemed of a permanent character and completed once for all, the plaintiff cannot bring successive suits but must recover all his damages in one action.<sup>49</sup> But when the injury is temporary in nature, or is of a continuing or recurring character, the damages are ordinarily regarded as continuing and one recovery is not a bar to successive actions for damages thereafter accruing from the same wrong.<sup>50</sup> Where the nature of the im-

See also 14 STANDARD PROC. 639, and 15 STANDARD PROC. 538.

45. **Cal.**—*Lamb v. Harbaugh*, 105 Cal. 680, 39 Pac. 56. **N. Y.**—*Reilly v. Sicilian Asphalt Pav. Co.*, 170 N. Y. 40, 62 N. E. 772, 88 Am. St. Rep. 636, 57 L. R. A. 176. **Okla.**—*Harrell v. Scott*, 51 Okla. 373, 151 Pac. 1169. **Tex.** *Watson v. Texas & P. Ry. Co.*, 8 Tex. Civ. App. 144, 27 S. W. 924. **Eng.** *Brunsdon v. Humphrey*, 53 L. J. Q. B. 476, 14 Q. B. Div. 141, 51 L. T. N. S. 529, 32 W. R. 944.

See 14 STANDARD PROC. 639; 15 STANDARD PROC. 538.

46. **Ariz.**—*Atchison, T. & S. F. R. Co. v. Carrow*, 18 Ariz. 92, 156 Pac. 965. **Cal.**—*Hall v. Susskind*, 109 Cal. 203, 41 Pac. 1012. **D. C.**—*Jackson v. Emmons*, 25 App. Cas. 146. **Mich.** *Reid, Murdoch & Co. v. Ferris*, 112 Mich. 693, 71 N. W. 484, 67 Am. St. Rep. 437; *Wheeler v. Wallace*, 53 Mich. 364, 19 N. W. 37. **N. Y.**—*Bendernagle v. Cocks*, 19 Wend. 207, 32 Am. Dec. 448.

See 15 STANDARD PROC. 533.

47. *Howell v. Goodrich*, 69 Ill. 556; *Fetter v. Beale*, 1 Salk. 11, 91 Eng. Reprint 11.

48. See *supra*, II.

49. **Ala.**—*Sloss-Sheffield S. & I. Co. v. Mitchell*, 181 Ala. 576, 61 So. 934. **Ark.**—*McAlister v. St. Louis, I. M. & S. R. Co.*, 107 Ark. 65, 154 S. W. 186; *St. Louis, I. M. & S. R. Co. v. Biggs*, 52 Ark. 240, 12 S. W. 331, 20 Am. St. Rep. 174, 6 L. R. A. 804. **Ill.**—*Chicago & E. I. R. Co. v. Loeb*, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341. **Ia.**—*Ir-*

*vine v. Oelwein*, 170 Iowa 653, 150 N. W. 674; *Hodge v. Shaw*, 85 Iowa 137, 52 N. W. 8, 39 Am. St. Rep. 290; *Powers v. Council Bluffs*, 45 Iowa 652, 24 Am. Rep. 792. **Ky.**—*Louisville & N. R. Co. v. Conn.*, 179 Ky. 478, 200 S. W. 952; *Madisonville, H. & E. R. Co. v. Wiart*, 144 Ky. 206, 138 S. W. 255; *King v. Board of Council*, 128 Ky. 321, 107 S. W. 1189. **Mass.**—*Fowle v. New Haven & N. Co.*, 112 Mass. 334, 17 Am. Rep. 106. **Minn.**—*Ziebarth v. Nye*, 42 Minn. 541, 44 N. W. 1027. **N. H.**—*Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177. **Va.**—*Virginian Ry. Co. v. Jeffries' Admr*, 110 Va. 471, 66 S. E. 731. **W. Va.**—*Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121.

See 15 STANDARD PROC. 535.

[a] Where a permanent structure is lawful, plaintiff cannot maintain successive suits. The injury is committed once for all and the entire damages must be recovered in one action. A tunnel placed in a street by lawful authority is an instance. **D. C.**—*Philadelphia, B. & W. R. Co. v. Karr*, 38 App. Cas. 193. **Ind.**—*North Vernon v. Voegler*, 103 Ind. 314, 2 N. E. 821. **Ia.** See *Harvey v. Mason City etc. R. Co.*, 129 Iowa 465, 105 N. W. 958, 113 Am. St. Rep. 483, 3 L. R. A. (N. S.) 973.

50. **Fla.**—*Savannah F. & W. Ry. Co. v. Davis*, 25 Fla. 917, 7 So. 29. **Ga.** *Farley v. Gate City Gas L. Co.*, 105 Ga. 323, 31 S. E. 193. **Ia.**—*Hughes v. Chicago, B. & Q. R. Co.*, 141 Iowa 273, 119 N. W. 924, 133 Am. St. Rep. 164. **Kan.** *Kansas Pac. Ry. Co. v. Muhlman*, 17

provement or obstruction is in doubt, some courts treat it as the parties have treated it in the action.<sup>51</sup>

G. REAL ACTIONS. — Successive actions cannot be brought to recover different portions of a tract of land in controversy.<sup>52</sup> But the plaintiff need not unite in his action of ejectment a claim for rents, profits and damages.<sup>53</sup>

Kan. 224. **Ky.**—Louisville & N. R. Co. v. Conn, 179 Ky. 478, 200 S. W. 952. **Me.**—Cumberland & O. Canal Corp. v. Hitchings, 65 Me. 140. **Miss.**—Rosa-  
mond v. Carroll Co., 101 Miss. 701, 57 So. 979. **Mo.**—Dickson v. Chicago, R. I. & P. R. Co., 71 Mo. 575. **Okla.** Pahlka v. Chicago, R. I. & P. Ry. Co., 161 Pac. 544. **Tenn.**—Nashville v. Comar, 88 Tenn. 415, 12 S. W. 1027, 7 L. R. A. 465. **Tex.**—Clark v. Dyer, 81 Tex. 339, 16 S. W. 1061. **Va.**—Virginian Ry. Co. v. Jeffries' Admr., 110 Va. 471, 66 S. E. 731. **W. Va.**—Hargreaves v. Kimberly, 26 W. Va. 787, 53 Am. Rep. 121.

See the titles, "Nuisance;" and "Trespass." And see 15 STANDARD PROC. 535.

[a] "The principle upon which a party creating a continuing nuisance is held liable to successive actions . . . is that he . . . is under legal obligation to remove, change, or repair the structure or thing complained of . . . and, failing so to do, each day's continuance of the nuisance is a repetition of the original wrong and a new action will lie therefor." Harvey v. Mason City & F. D. R. Co., 129 Iowa 465, 473, 105 N. W. 958, 113 Am. St. Rep. 483, 3 L. R. A. (N. S.) 973.

[b] **Amplification of Rule.**—Where the structure is permanent in character, and its structure and maintenance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened, and there may be as many successive recoveries as there are successive injuries. Troy v. Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177.

[c] **An illustration of the distinction,** between damages which give rise to successive actions and those which do not, is in the case of the construction of a milldam across the course of a stream. So far as the dam operates to permanently overflow the land of another and take away from the owner all beneficial use of his property, the

damage may be regarded as original and all recovered in one action. But so far as it may cause only a periodical or occasional flooding, the damage is continuing and successive recoveries can be had. Harvey v. Mason City & F. D. R. Co., 129 Iowa 465, 105 N. W. 958, 113 Am. St. Rep. 483, 3 L. R. A. (N. S.) 973.

[d] **But all the damages which have accrued up to the time of the action must be claimed.** Steiglider v. Missouri Pac. Ry. Co., 38 Mo. App. 511.

**Successive suits for trespass, see the title "Trespass."**

**Successive suits for nuisance, see 20 STANDARD PROC. 671.**

51. Louisville & N. R. Co. v. Conn, 179 Ky. 478, 200 S. W. 952; Shrout v. Chesapeake & O. Ry. Co., 157 Ky. 1, 162 S. W. 97; Chesapeake & O. Ry. Co. v. Stein, 142 Ky. 515, 134 S. W. 1169. And see Irvine v. Oelwein, 170 Iowa 653, 150 N. W. 674, *distinguishing* Risher v. Acken Coal Co., 147 Iowa 459, 124 N. W. 764, as to right to elect whether injury is continuing or permanent.

52. **Ind.**—Roby v. Eggers, 130 Ind. 415, 29 N. E. 365. **Ky.**—Dils v. Justice, 137 Ky. 822, 127 S. W. 472. **Okla.** Akin v. Bonfils, 169 Pac. 899. **Tex.** Craig v. Broocks, 60 Tex. Civ. App. 83, 127 S. W. 572. **Wash.**—Kline v. Stein, 46 Wash. 546, 90 Pac. 1041, 123 Am. St. Rep. 940.

**Compare** Rambler v. Tryon, 7 Serg. & R. (Pa.) 90, 10 Am. Dec. 444.

[a] **Where plaintiff's titles to different portions are several, separate ejectments may be brought.** Roddy v. Harah, 62 Pa. 129.

[b] **An ejectment suit brought to try the same title as a pending suit, will be stayed pending the former suit although brought for a different piece of property.** Stewart v. Hilton, 27 Misc. 239, 58 N. Y. Supp. 415.

53. Burr, McGrew & Co. v. Woodrow, 1 Bush (Ky.) 602; Walker v. Mitchell, 18 B. Mon. (Ky.) 541. *Com-*



H. LIENS. — The general rules as to splitting causes of action apply to lien suits.<sup>54</sup> But the rule does not require one with separate liens on the same property to present more than one in a single suit.<sup>55</sup>

I. CAUSES OF ACTION IN FAVOR OF OR AGAINST SEVERAL PERSONS. The rule against splitting causes of action applies where the cause is in favor of several persons jointly,<sup>56</sup> or against several persons jointly.<sup>57</sup> But it does not apply to several suits against joint and several debtors or obligors,<sup>58</sup> or prevent suing joint tortfeasors separately.<sup>59</sup> If the rights of different persons are violated by a single tortious act,<sup>60</sup> or if rights of a person in different capacities are affected,<sup>61</sup> separate causes of action arise, which may be sued on separately.

IV. OBJECTIONS.<sup>62</sup> — The pendency of a suit for a part of the cause of action may be pleaded in abatement of suits for the remaining parts,<sup>63</sup> and a recovery of a part of the cause of action in a previous suit may be pleaded in bar.<sup>64</sup> Where formal pleadings are not required, the objection may be raised in a proper case by demurrer to the evidence,<sup>65</sup> or by motion to strike out evidence.<sup>66</sup>

pare *Stewart v. Dent*, 24 Mo. 111. See the title, "*Mesne Profits*."

54. *Berkshire v. Hall* (Mo. App.), 202 S. W. 414, mechanic's lien. See 15 STANDARD PROC. 531; 18 STANDARD PROC. 994, et seq.; 19 STANDARD PROC. 612.

Secured obligations, see *supra*, III, E.

55. *Union Cent. L. Ins. Co. v. Drake*, 214 Fed. 536, 131 C. C. A. 82.

Compare 18 STANDARD PROC. 1004, note 79; 19 STANDARD PROC. 639, 641.

56. U. S.—*Bernitt v. Smith-Powers Logging Co.*, 184 Fed. 139. Cal.—*Nightingale v. Scannell*, 6 Cal. 506, 65 Am. Dec. 525. Ind.—*Roby v. Eggers*, 130 Ind. 415, 29 N. E. 365. Mich.—*Jensen v. Gamble*, 191 Mich. 233, 157 N. W. 440; *Blackburn v. Blackburn*, 132 Mich. 525, 94 N. W. 24. N. Y.—*Carrington v. Crocker*, 37 N. Y. 336.

57. *Jensen v. Gamble*, 191 Mich. 233, 157 N. W. 440.

58. *Sully v. Campbell*, 99 Tenn. 434, 42 S. W. 15, 43 L. R. A. 161.

59. *State v. Boyce*, 72 Md. 140, 19 Atl. 366, 20 Am. St. Rep. 458, 7 L. R. A. 272.

60. U. S.—*Southern Ry. Co. v. King*, 160 Fed. 332, 87 C. C. A. 284. Cal.—*Robinett v. McDonald*, 65 Cal. 611, 4 Pac. 651. Conn.—*Donaghue v. Gaffy*, 53 Conn. 43, 2 Atl. 397. Tex.—*Texas & P. Ry. Co. v. Nelson*, 9 Tex. Civ. App. 156, 29 S. W. 78.

See 14 STANDARD PROC. 638, and 15 STANDARD PROC. 539.

Where injury is to wife, see 11 STANDARD PROC. 717, et seq.

61. *Southern Ry. Co. v. King*, 160 Fed. 332, 87 C. C. A. 284. See 15 STANDARD PROC. 513.

62. Plea to jurisdiction, where cause of action is split to confer jurisdiction, see 17 STANDARD PROC. 869.

63. See 1 STANDARD PROC. 1020, 1021.

64. U. S.—*Southern Pac. Ry. Co. v. United States*, 186 Fed. 737, 108 C. C. A. 607. Conn.—*Burritt v. Belfy*, 47 Conn. 323, 36 Am. Rep. 79. N. H.—*Kempton v. Sullivan Sav. Inst.*, 53 N. H. 581. N. Y.—*Secor v. Sturgis*, 16 N. Y. 548.

Necessity and manner of pleading former adjudication, see 15 STANDARD PROC. 614, 623.

[a] Omission to plead pendency of former suit in abatement is not a waiver of the right to plead a recovery in bar. *Burritt v. Belfy*, 47 Conn. 323, 36 Am. Rep. 79.

65. *Peper Automobile Co. v. St. Louis Union Trust Co.* (Mo. App.), 187 S. W. 109, in the probate court. Compare *Maryland Cas. Co. v. Cherryvale Gas, L. & P. Co.*, 99 Kan. 563, 162 Pac. 313, L. R. A. 1917C, 487.

66. *Peper Automobile Co. v. St. Louis Union Trust Co.* (Mo. App.), 187 S. W. 109.

# SUITS AND ACTIONS

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#### CROSS-REFERENCES:

Amicable Actions;	Proceedings in Rem;
Cause of Action;	Real and Mixed Actions;
Choice and Election of Remedies;	Severance;
Consolidation of Actions;	States and Territories;
Joinder of Actions;	Successive Suits;
New Cause of Action or Defense;	Summary Proceedings;
Personal Actions;	United States.

Amendments changing character of action, see the title "New Cause of Action or Defense."

For further references and cross-references, see the index to this work and the cross-references throughout this article.

#### I. DEFINITIONS, DISTINCTIONS, AND CLASSIFICATION.

A. ACTION. — The word "action" has been defined to be the judicial means of enforcing a right,<sup>1</sup> the legal demand of one's just rights in a court of justice,<sup>2</sup> a formal demand of one's right from one and upon another made in a court of justice,<sup>3</sup> and the form in which the cause

1. *McAndrews v. Chicago L. S. & E. Ry. Co.*, 162 Fed. 856, 89 C. C. A. 546; *Ga. Code*, §4930; *Mitchell v. Georgia R. Co.*, 68 Ga. 644.

2. *Conn.*—*Waterbury Blank Book Mfg. Co. v. Hurlburt*, 73 *Conn.* 715, 49 *Atl.* 198. *Me.*—*Kennebec Water Dist. v. Waterville*, 96 *Me.* 234, 250, 52 *Atl.* 774; *Webster v. County Comrs.*, 63 *Me.* 27, 30; *Bridgton v. Bennett*, 23 *Me.* 420, 425. *Mass.*—*Valentine v. Boston*, 20 *Pick.* 201. *Mo.*—*Smith v. St. Louis Beef Canning Co.*, 14 *Mo. App.* 522, 527. *N. Y.*—*People v. Clarke*, 10

*Barb.* 120, 150. *Pa.*—*McBride's Appeal*, 72 *Pa.* 480. *Vt.*—*State v. One Bottle of Brandy*, 43 *Vt.* 297.

[a] It is a "Lawful Demand of a Man's Right."—*Me.*—*Kennebec Water Dist. v. Waterville*, 96 *Me.* 234, 250, 52 *Atl.* 774. *Mass.*—*Valentine v. Boston*, 20 *Pick.* 201. *Tenn.*—*Lightfoot v. Grove*, 5 *Heisk.* 473.

3. *In re Oliver's Guardianship*, 77 *Ohio St.* 474, 479, 83 *N. E.* 795.

[a] It "is a proceeding on the part of one person as actor against another for the infringement of some right of



of action is presented.<sup>4</sup> An action is defined by some of the codes to be an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.<sup>5</sup>

An action is a judicial proceeding.<sup>6</sup> There must be a court,<sup>7</sup> and generally it is necessary that there be a plaintiff and a defendant.<sup>8</sup> The action must be based upon a cause of action.<sup>9</sup> But it is not necessary that the court have jurisdiction of the subject matter in

the first, before a court of justice, in the manner prescribed by the court of law." *Clough v. Clough*, 10 Colo. App. 433, 51 Pac. 513.

4. *Spring v. Webb*, 227 Fed. 481. See *Harger v. Thomas*, 44 Pa. 128, 84 Am. Dec. 422.

[a] It is "the instrument whereby the party injured obtains redress for wrongs committed against him, either in respect to his personal contracts, his person, or his property." *Sanford v. Sanford*, 28 Conn. 6, 22.

[b] It is "a litigation in a civil court for the recovery of individual right, or redress of individual wrong." *Imperial Bank v. Smith*, 8 Manitoba (Can.) 440.

[c] It is "the form of a suit given by law for the recovery of that which is one's due." *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 491, 53 So. 228.

5. Cal.—Code Civ. Proc., §22; *In re Estate of Joseph*, 118 Cal. 660, 50 Pac. 768. Idaho.—*People v. Green*, 1 Idaho 235. Ohio.—*Corry v. Lamb*, 43 Ohio St. 390, 2 N. E. 851. Wis.—*Wisconsin Cent. R. Co. v. Cornell University*, 49 Wis. 162, 5 N. W. 331.

Ordinary proceeding defined, see *infra*, I, D.

6. Minn.—*Golcher v. Brisbin*, 20 Minn. 453. Vt.—*Burlington v. Burlington Traction Co.*, 70 Vt. 491, 41 Atl. 514. Can.—*Imperial Bank v. Smith*, 8 Manitoba 440.

[a] Proceedings for foreclosure by advertisement do not constitute an action. *Golcher v. Brisbin*, 20 Minn. 453.

[b] Proceedings before a board whose functions are merely administrative or ministerial, are not actions. *Burlington v. Burlington Traction Co.*, 70 Vt. 491, 41 Atl. 514.

[c] That the proceeding should be originally instituted in a court is not

always necessary. *Cass County v. Sarpy County*, 83 Neb. 435, 119 N. W. 685; *Burlington v. Burlington Traction Co.*, 70 Vt. 491, 41 Atl. 514.

[d] Although the filing of a claim before a county board is not the commencement of a suit, the filing of an appeal in court from an order thereon is. *Cass County v. Sarpy County*, 83 Neb. 435, 119 N. W. 685. See 20 STANDARD PROC. 233.

7. *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 490, 53 So. 228.

8. Ala.—*Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 490, 53 So. 228. Colo.—*Jones v. Bank of Leadville*, 10 Colo. 464, 479, 17 Pac. 272. Conn.—*Porter v. Ritch*, 70 Conn. 235, 259, 39 Atl. 169, 39 L. R. A. 353. Ky.—*Bruce v. Fox*, 1 Dana 447. N. Y.—*People ex rel. Sanders v. Colborne*, 20 How. Pr. 378, 380.

Necessity of parties, see 20 STANDARD PROC. 878.

[a] There must be an actor, reus and judex generally. *Bruce v. Fox*, 1 Dana (Ky.) 447. But it is not universally true that there can be no judgment without an actor and reus, as a lawful demand may be made judicially in an ex parte proceeding or application. *Bruce v. Fox*, 1 Dana (Ky.) 447.

9. U. S.—*Occidental Consol. Min. Co. v. Comstock Tunnel Co.*, 111 Fed. 135. Conn.—*Wildman v. Wildman*, 70 Conn. 700, 41 Atl. 1. Kan.—*Bruner v. Martin*, 76 Kan. 862, 93 Pac. 165, 123 Am. St. Rep. 172, 14 L. R. A. (N. S.) 775.

See the title "Cause of Action."

Failure to state a cause of action as affecting question of commencement of action, see *infra*, III, D, 4, i.

Collateral attack on judgment for non-existence of cause of action, see 15 STANDARD PROC. 475.

order that a proceeding before it shall be an action,<sup>10</sup> although there are authorities to the contrary.<sup>11</sup>

The term "action" usually imports some one of the ordinary proceedings conducted by the usual formula for establishing and enforcing rights in a court of justice.<sup>12</sup> In its broadest sense, the word includes all the various proceedings ordinarily allowed in courts of justice for obtaining such redress as the law provides.<sup>13</sup> In this sense, it includes criminal actions,<sup>14</sup> suits in equity,<sup>15</sup> as well as actions at law,<sup>16</sup> and by statute it includes special proceedings when necessary to so construe the term.<sup>17</sup> In a narrower sense, the term is confined to actions at law,<sup>18</sup> and is used in opposition to suits in equity,<sup>19</sup> to

10. *Blume v. New Orleans*, 104 La. 345, 29 So. 106; *Ealer v. Lodge*, 36 La. Ann. 115; *Pittsburg, C. C. & St. L. Ry. Co. v. Bemis*, 64 Ohio St. 26, 59 N. E. 745. See also the following cases: **U. S.**—*Smith v. McNeal*, 109 U. S. 426, 3 Sup. Ct. 319, 27 L. ed. 986. **Ark.**—*Little Rock M. R. & T. Ry. Co. v. Manees*, 49 Ark. 248, 4 S. W. 778, 4 Am. St. Rep. 45. **Kan.**—*Ball v. Biggam*, 6 Kan. App. 42, 49 Pac. 678. **Mass.**—*Woods v. Houghton*, 1 Gray 580. **Miss.**—*Weathersly v. Weathersly*, 31 Miss. 662. **N. C.**—*Harris v. Davenport*, 132 N. C. 697, 44 S. E. 406. **W. Va.**—*Hevener v. Hannah*, 59 W. Va. 476, 53 S. E. 635.

**Power of court to determine its own jurisdiction and proceedings after determination that it has no jurisdiction**, see 17 STANDARD PROC. 654.

11. *Moss v. Keesler*, 60 Ga. 44; *Gray v. Hodge*, 50 Ga. 262; *Sweet v. Chattanooga Elec. Light Co.*, 97 Tenn. 252, 36 S. W. 1090.

[a] **But a suit in a court having jurisdiction of the subject matter but not of the person is an action within the meaning of a statutory exception to the statute of limitations permitting the bringing of a new action within a limited time after the dismissal of a former action on certain grounds.** *Atlanta K. & N. Ry. Co. v. Wilson*, 119 Ga. 781, 47 S. E. 366.

12. *Patterson v. Murray*, 53 N. C. 278.

**Compared to special proceedings**, see *infra*, I, E, 2.

13. **Conn.**—*Mulcahy v. Mulcahy*, 84 Conn. 659, 663, 81 Atl. 242; *Waterbury Blank Book Mfg. Co. v. Hurlburt*, 73 Conn. 715, 49 Atl. 198. **Neb.**—*Gibson v. Sidney*, 50 Neb. 12, 69 N. W. 314. **Ohio.**—*Pittsburgh, C. C. & St. L. Ry. Co. v. Bemis*, 64 Ohio St. 26, 29, 59

N. E. 745, quoting *Abbott's L. D. Tex. Rogers v. Waggoner* (Tex. Civ. App.), 149 S. W. 561.

**Distress proceedings as an action**, see 18 STANDARD PROC. 521, 526.

14. *State v. Huston*, 27 Okla. 606, 113 Pac. 190, 34 L. R. A. (N. S.) 380; *State v. Schomber*, 23 Wash. 573, 63 Pac. 221.

15. **U. S.**—*Thompson v. Hubbard*, 131 U. S. 123, 150, 9 Sup. Ct. 710, 33 L. ed. 76. **Ia.**—*Richards v. Holt*, 61 Iowa 529, 16 N. W. 595. **Mass.**—*Boston v. Turner*, 201 Mass. 190, 196, 87 N. E. 634.

[a] **Under the code the word "action" includes not only such actions as were actions at law but also such as were formerly suits in equity.** **Cal.** *Lux v. Haggin*, 69 Cal. 255, 267, 10 Pac. 674, s. c., 4 Pac. 919. **N. Y.**—*Corson v. Ball*, 47 Barb. 452. **N. C.**—*Tate v. Powe*, 64 N. C. 644.

16. **Cal.**—*Lux v. Haggin*, 69 Cal. 255, 267, 10 Pac. 674, s. c., 4 Pac. 919. **N. Y.**—*Corson v. Ball*, 47 Barb. 452. **N. C.**—*Tate v. Powe*, 64 N. C. 644. **Ore.**—*Giant Powder Co. v. Oregon Western Ry. Co.*, 54 Ore. 325, 101 Pac. 209, 103 Pac. 501.

17. See *State v. Huston*, 27 Okla. 606, 113 Pac. 190, 34 L. R. A. (N. S.) 380.

[a] **Statute provides that when necessary to do so, the word "action" is to be construed as including special proceedings.** **Cal. Code Civ. Proc.** §363. See *Jones v. Board of Police*, 141 Cal. 96, 74 Pac. 696; *Estate of Joseph*, 118 Cal. 660, 50 Pac. 768.

18. *Morgan v. Hazlehurst Lodge*, 53 Miss. 665, 680; *Giant Powder Co. v. Oregon Western Ry. Co.*, 54 Ore. 325, 101 Pac. 209, 103 Pac. 501.

19. **Ill.**—*McPike v. McPike*, 10 Ill. App. 332. **N. C.**—*Tate v. Powe*, 64 N.

criminal actions,<sup>20</sup> and to special proceedings.<sup>21</sup> And it does not include summary proceedings.<sup>22</sup>

**As Affected by Manner of Commencement of Proceedings.** — An ordinary proceeding is an action whether it be commenced by scire facias, capias ad respondendum or summons and complaint.<sup>23</sup> Under certain circumstances, the word is confined to a proceeding commenced by summons,<sup>24</sup> and does not include extraordinary remedies commenceable by a writ.<sup>25</sup> Extraordinary remedies are often classed with actions, however.<sup>26</sup>

**As Affected by Stage of Proceedings.** — The term "action" includes all proceedings therein from its commencement,<sup>27</sup> to its termination.<sup>28</sup> Ordinarily the word is not applicable to writs of error.<sup>29</sup>

**Distinctions.** — The term is not synonymous with the terms "remedy,"<sup>30</sup> "right of action,"<sup>31</sup> or "cause of action,"<sup>32</sup> complaint,<sup>33</sup> or judgment.<sup>34</sup> But it is sometimes used as synonymous with "case" and "cause."<sup>35</sup>

**Actions by the government are included in the term "actions."**<sup>36</sup>

C. 644. **Ore.**—Giant Powder Co. v. Oregon Western Ry. Co., 54 Ore. 325, 101 Pac. 209, 103 Pac. 501. **W. Va.** Mynes v. Mynes, 47 W. Va. 681, 694, 35 S. E. 935.

20. **Idaho.**—People v. Green, 1 Idaho 235, 238. **Ia.**—Richards v. Holt, 61 Iowa 529, 532, 16 N. W. 595. **Ohio.** Calkins v. State, 14 Ohio St. 222, 233. **Pa.**—Harger v. Thomas, 44 Pa. 128, 84 Am. Dec. 422.

See 14 STANDARD PROC. 309, note 15.  
21. Santa Rosa v. Fountain Water Co., 138 Cal. 579, 71 Pac. 1123, 1136; In re Central Irr. Dist., 117 Cal. 382, 387, 49 Pac. 354; Nelson v. Steele, 12 Idaho 762, 88 Pac. 95. See *infra*, I, E.

[a] **Application for probate of will** is not an action. Matter of Hunter's Will, 6 Ohio 499.

22. See the title "Summary Proceedings."

23. People v. Clarke, 10 Barb. (N. Y.) 120, 150.

24. Roe v. Boyle, 81 N. Y. 305; Potter v. Frohbach, 133 Wis. 1, 112 N. W. 1087.

25. Potter v. Frohbach, 133 Wis. 1, 112 N. W. 1087.

26. Potter v. Frohbach, 133 Wis. 1, 112 N. W. 1087.

27. Clindenin v. Allen, 4 N. H. 385; Pittsburgh, C. C. & St. L. Ry. Co. v. Bemis, 64 Ohio St. 26, 59 N. E. 745.

**As to when an action is deemed commenced,** see *infra*, III, D.

28. Pittsburgh, C. C. & St. L. Ry. Co.

v. Bemis, 64 Ohio St. 26, 59 N. E. 745.

**When an action is terminated,** see *infra*, XIV.

29. Bradford v. Southern R. Co., 195 U. S. 243, 25 Sup. Ct. 55, 49 L. ed. 178 (whether a writ of error be considered a new proceeding or a continuation of the original proceeding); Moore v. Cooley, 2 Hill (N. Y.) 412.

[a] **But a release of all actions** extends to writs of error. But this proceeds upon an equitable construction of the words in the release. Moore v. Cooley, 2 Hill (N. Y.) 412.

30. **The Word "Remedy" Includes Actions.**—See the title "Remedy."

31. Wynn v. Tallapoosa County Bank, 168 Ala. 469, 491, 53 So. 228. But see Frost v. Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53. Compare *In re Hunter*, 6 Ohio 499, 501.

[a] **But the Latin word "actio"** is broader and includes both the proceeding to enforce the right and the right itself. Wynn v. Tallapoosa County Bank, 168 Ala. 469, 490, 53 So. 228.

32. Spring v. Webb, 227 Fed. 481; Wynn v. Tallapoosa County Bank, 168 Ala. 469, 492, 53 So. 228. Compare Kimball v. Baxter's Estate, 27 Vt. 628, 631. See the title "Cause of Action."

33. Giant Powder Co. v. Oregon Western Ry. Co., 54 Ore. 325, 101 Pac. 209, 103 Pac. 501.

34. See 14 STANDARD PROC. 764.

35. See *infra*, I, F.

36. Bradlaugh v. Clarke, L. R. 8



**B. SUT.**—The word "suit" is a very comprehensive term.<sup>37</sup> It includes any proceeding in a court for the purpose of obtaining such remedy as the law allows the party under the circumstances.<sup>38</sup>

The term includes all actions at law,<sup>39</sup> all actions in equity,<sup>40</sup> and suits in admiralty;<sup>41</sup> and it may include special proceedings.<sup>42</sup> But the term is seldom applied to criminal proceedings,<sup>43</sup> to proceedings in rem,<sup>44</sup> or to proceedings by appeal, error or review.<sup>45</sup> Generally the word "suit" is used synonymously with the term "action,"<sup>46</sup> but not always.<sup>47</sup> It is sometimes used in a broader sense,<sup>48</sup> and is some-

App. Cas. (Eng.) 354, 52 L. J. Q. B. 305, 48 L. T. N. S. 681, 31 W. R. 677; *Imperial Bank v. Smith*, 8 Manitoba (Can.) 440.

**37. U. S.**—*L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 128 Fed. 332, 63 C. C. A. 62. **Mo.**—*State v. Riley*, 203 Mo. 175, 186, 101 S. W. 567, 12 L. R. A. (N. S.) 900. **Tex.**—*Franks v. Chapman*, 61 Tex. 576, 581.

**38. U. S.**—*Grover & Baker Sewing Mach. Co. v. Florence Sewing Mach. Co.*, 18 Wall. 553, 585, 21 L. ed. 914. **Conn.**—*Harris v. Phoenix Ins. Co.*, 35 Conn. 310. **Ill.**—*McPike v. MCPike*, 10 Ill. App. 332, 333. **Ia.**—*Marion v. Ganby*, 68 Iowa 142, 26 N. W. 40. **Mo.**—*State v. Riley*, 203 Mo. 175, 186, 101 S. W. 567, 12 L. R. A. (N. S.) 900. **Neb.**—*Cass County v. Sarpy County*, 83 Neb. 435, 119 N. W. 685. **Ohio.**—*Baltimore & O. R. Co. v. Larwill*, 83 Ohio St. 108, 116, 93 N. E. 619, 34 L. R. A. (N. S.) 1195. **Pa.**—*In re Grape St.*, 103 Pa. 121. **Wis.**—*Milwaukee Light, H. & T. Co. v. Ela Co.*, 142 Wis. 424, 428, 125 N. W. 903, 27 L. R. A. (N. S.) 567, 20 Ann. Cas. 707.

[a] **Definition.**—(1) "A suit is the pursuit in a court of justice of the remedy to which the party, by reason of the existence of the supposed facts, believes himself to be entitled." *Baltimore & O. R. Co. v. Larwill*, 83 Ohio St. 108, 116, 93 N. E. 619, 34 L. R. A. (N. S.) 1195. (2) A suit is the prosecution of some demand in a court of justice. *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 5 L. ed. 257.

[b] "The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit." *Upshur County v. Rich*, 135 U. S. 467, 474, 10 Sup. Ct. 651, 34 L. ed. 196.

[c] "A suit at law is a contest between two parties in a court of jus-

tice." *Pearson v. Nesbit*, 12 N. C. 315, 17 Am. Dec. 569.

[d] **It Must Be a Proceeding in Some Court.**—*Hall v. Bartlett*, 9 Barb. (N. Y.) 297, 300.

**39. L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., 128 Fed. 332, 340, 63 C. C. A. 62; *Elk Garden Co. v. T. W. Thayer Co.*, 179 Fed. 556; *Cornish v. Milwaukee & L. W. R. Co.*, 60 Wis. 476, 19 N. W. 443.**

[a] **Actions both ex contractu and ex delicto** are included. *L. Bucki & Son Lumber Co. v. Atlantic Lumber Co.*, 128 Fed. 332, 340, 63 C. C. A. 62.

**40. L. Bucki & Son Lumber Co. v. Atlantic Lumber Co., 128 Fed. 332, 340, 63 C. C. A. 62; *Elk Garden Co. v. T. W. Thayer Co.*, 179 Fed. 556.**

**41. The Little Ann**, 1 Paine 40, 15 Fed. Cas. No. 8,397. See also 1 **STANDARD PROC.** 412.

**42. Tilden v. Aitkin**, 37 App. Div. 28, 55 N. Y. Supp. 735; *Wisconsin Cent. R. Co. v. Cornell University*, 49 Wis. 162, 5 N. W. 331.

**43. Leonardo v. Territory**, 1 N. M. 291, 296.

**44. The Little Ann**, 1 Paine 40, 15 Fed. Cas. No. 8,397; *Weston v. Beverly*, 10 Ga. App. 261, 73 S. E. 404.

**45. Franks v. Chapman**, 61 Tex. 576, 581.

[a] **Does Not Extend to Bills of Review.**—*Franks v. Chapman*, 61 Tex. 576, 581.

**46. Ill.**—*McPike v. MCPike*, 10 Ill. App. 332. **N. C.**—*Patterson v. Murray*, 53 N. C. 278. **Pa.**—*McBride's Appeal*, 72 Pa. 480. **Tex.**—*Webb v. Allen*, 15 Tex. Civ. App. 605, 40 S. W. 342.

**47. Frost v. Witter**, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53.

**48. Ia.**—*Marion v. Ganby*, 68 Iowa 142, 26 N. W. 40. **Miss.**—*Morgan v. Hazlehurst Lodge*, 53 Miss. 665, 680. **Mo.**—*State v. Riley*, 203 Mo. 175, 186, 101 S. W. 567, 12 L. R. A. (N. S.)

times regarded as more applicable to proceedings in chancery.<sup>49</sup>

A "suit at common law," as used in a statute, is held to be synonymous with "a suit at law."<sup>50</sup>

C. PROCEEDING.—The term "proceeding" has different meanings according to the context and the subject to which it relates.<sup>51</sup> It is a generic term.<sup>52</sup> In its more general sense, it means all the steps or measures adopted in the prosecution or defense of the action,<sup>53</sup> whether by the court or one of the parties thereto.<sup>54</sup> Any application to a court to have a matter in dispute judicially determined is a proceeding.<sup>55</sup> The term, however, is not always confined to judicial proceed-

900. N. C.—*Patterson v. Murray*, 53 N. C. 278. Ohio.—*In re Oliver's Guardianship*, 77 Ohio St. 474, 83 N. E. 795. Wis.—*Cornish v. Milwaukee & L. W. R. Co.*, 60 Wis. 476, 19 N. W. 443.

[a] The word "suit" is broader than the word "action" and applies to proceedings in courts of law and in courts of equity, whereas the word "action" technically refers to proceedings in courts of law. *Morgan v. Hazlehurst Lodge*, 53 Miss. 665, 680.

49. Ill.—*McPike v. McPike*, 10 Ill. App. 332. N. J.—*Mathis v. Stevenson*, 75 N. J. Eq. 68, 71 Atl. 267. Ore. *Giant Powder Co. v. Oregon Western Ry. Co.*, 54 Ore. 325, 101 Pac. 209, 103 Pac. 501.

50. *Parsons v. Bedford*, 3 Pet. (U. S.) 433, 447, 7 L. ed. 732; *Kirby v. Chicago & N. W. R. Co.*, 106 Fed. 551, 555.

[a] Such suits as existed at common law are not necessarily meant. *Kirby v. Chicago & N. W. R. Co.*, 106 Fed. 551, 555.

[b] Proceedings for accounting in probate courts are not common law actions. *Chapman v. American Surety Co.*, 261 Ill. 594, 104 N. E. 247.

51. *Burns v. Superior Court*, 140 Cal. 1, 5, 73 Pac. 597. See *Queens County Water Co. v. O'Brien*, 131 App. Div. 91, 115 N. Y. Supp. 495, there is no such thing as "a proceeding" known to the code.

See the titles "Supplementary Proceedings" "Summary Proceedings."

[a] Judicial Proceeding Defined. See *Martin v. Simpkins*, 20 Colo. 438, 444, 38 Pac. 1092; *Hereford v. People*, 197 Ill. 222, 228, 64 N. E. 310.

[b] The taking of a deposition is a proceeding of the court. *Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597.

[c] The act of an executive officer of a court is a proceeding of that

court, so as to shield him from an injunction or replevin issuing out of another court. *American Assn. v. Hurst*, 59 Fed. 1, 5, 7 C. C. A. 598.

52. *State ex rel. Carleton v. Lewis County Dist. Ct.*, 33 Mont. 138, 82 Pac. 789, 8 Ann. Cas. 752.

53. Cal.—*Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597. Ind.—*Hopewell v. State*, 22 Ind. App. 489, 54 N. E. 127. N. Y.—*Morewood v. Hollister*, 6 N. Y. 309. S. D.—*Uhe v. Chicago, etc. R. Co.*, 3 S. D. 563, 54 N. W. 601.

[a] It applies to any step taken by a party in the progress of the action. *Wilson v. Allen*, 3 How. Pr. (N. Y.) 369.

[b] All steps taken except those embraced in the word "pleading" are embraced. *Wilson v. Macklin*, 7 Neb. 50.

[c] It refers to the form and manner of the exercise of power. *St. Joseph Mfg. Co. Harrington*, 53 Iowa 380, 382, 5 N. W. 568; *People v. White*, 14 How. Pr. (N. Y.) 498.

54. *Burns v. Superior Court*, 140 Cal. 1, 5, 73 Pac. 597.

55. Mont.—*State ex rel. Carleton v. Lewis County Dist. Ct.*, 33 Mont. 138, 142, 82 Pac. 789, 8 Ann. Cas. 752. Ohio. *Irwin v. Bellefontaine Bank*, 6 Ohio St. 81, 87. Wash.—*State ex rel. Bittencouer v. Gordon*, 8 Wash. 488, 489, 36 Pac. 498.

See also *Burns v. Superior Court*, 140 Cal. 1, 5, 73 Pac. 597; *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341; *Hopewell v. State*, 22 Ind. App. 489, 54 N. E. 127.

[a] Whenever a controversy is determined summarily, without the intervention of a jury, it is a proceeding. *State ex rel. Bittencouer v. Gordon*, 8 Wash. 488, 36 Pac. 498.

[b] An application for a writ of mandate or ne exeat is a proceeding.

ings.<sup>56</sup> But the mere doing of a ministerial act by a non-judicial officer is not a proceeding.<sup>57</sup>

The term "proceeding" is broader than the word "action or suit."<sup>58</sup> In a broad sense it includes actions and special proceedings,<sup>59</sup> but it is sometimes used in opposition to the word "action."<sup>60</sup>

**Kinds of.**—Proceedings are of two kinds, ordinary and special.<sup>61</sup>

**D. ORDINARY PROCEEDING.**—An ordinary proceeding is one which was known to the common law and was formerly conducted in accordance with the procedure of the common law courts.<sup>62</sup> It refers to those proceedings commenced by summons and complaint,<sup>63</sup> but this is not a universal test.<sup>64</sup>

**E. SPECIAL PROCEEDING.**—**1. Generally.**—The code does not define "special proceedings."<sup>65</sup> After defining the term "action," the code merely provides every other remedy is a special proceeding.<sup>66</sup>

State *ex rel.* Bittencouer v. Gordon, 8 Wash. 488, 36 Pac. 498.

56. State v. Topeka, 68 Kan. 177, 187, 74 Pac. 647.

57. State *ex rel.* Bittencouer v. Gordon, 8 Wash. 488, 36 Pac. 498.

58. **Mont.**—*In re* McFarland, 10 Mont. 445, 455, 26 Pac. 185. **N. Y.** People v. Clarke, 9 N. Y. 349, 369. **S. D.**—Mars v. Oro Fino Min. Co., 7 S. D. 605, 617, 65 N. W. 19.

[a] In the statute relating to suits in support of adverse mining claims, the word "proceeding" is used in the sense of "action." Mars v. Oro Fino Min. Co., 7 S. D. 605, 617, 65 N. W. 19. See the title "Mines and Minerals."

59. State *ex rel.* Carleton v. Lewis County Dist. Ct., 33 Mont. 138, 142, 82 Pac. 789, 8 Ann. Cas. 752.

60. **Mo.**—Reyburn v. Handlan, 165 Mo. App. 412, 147 S. W. 846, under a statutory phrase, "action or other proceeding." **Mont.**—State *ex rel.* Carleton v. Lewis County Dist. Ct., 33 Mont. 138, 142, 82 Pac. 789, 8 Ann. Cas. 752. **Wash.**—State *ex rel.* Bittencouer v. Gordon, 8 Wash. 488, 36 Pac. 498.

See Queens County Water Co. v. O'Brien, 131 App. Div. 91, 95, 115 N. Y. Supp. 495.

[a] It Refers to Special Proceedings.—State *ex rel.* Carleton v. Lewis Co. Dist. Ct., 33 Mont. 138, 142, 82 Pac. 789, 8 Ann. Cas. 752.

61. See *infra*, I, D and E.

62. **Cal.**—*In re* Central Irrigation Dist., 117 Cal. 382, 387, 49 Pac. 354. **Idaho.**—Nelson v. Steele, 12 Idaho 762, 88 Pac. 95. **N. Y.**—Hyatt v. Seeley, 11 N. Y. 52, 55. **N. D.**—Dow v. Lillie,

26 N. D. 512, 520, 144 N. W. 1082, L. R. A. 1915D, 754.

See also Schuster v. Schuster, 84 Minn. 403, 407, 87 N. W. 1014.

63. Belknap v. Waters, 11 N. Y. 477; Dow v. Lillie, 26 N. D. 512, 520, 144 N. W. 1082, L. R. A. 1915D, 754. See also Roe v. Boyle, 81 N. Y. 305.

64. See 8 STANDARD PROC. 279, eminent domain proceedings are special proceedings and are commenced by complaint and summons.

65. See the codes.

66. **Cal.**—Code Civ. Proc., §23; Carpenter v. Jones, 121 Cal. 362, 53 Pac. 842; *In re* Central Irr. Dist., 117 Cal. 382, 387, 49 Pac. 354. **Idaho.**—Nelson v. Steele, 12 Idaho 762, 88 Pac. 95; Gwinn v. Melvin, 9 Idaho 202, 209, 72 Pac. 961, 108 Am. St. Rep. 119, 2 Ann. Cas. 770. **Mont.**—State *ex rel.* Gattan v. District Court, 39 Mont. 134, 101 Pac. 961. **N. D.**—Dow v. Lillie, 26 N. D. 512, 520, 144 N. W. 1082, L. R. A. 1915D, 754; Tracy v. Scott, 13 N. D. 577, 101 N. W. 905. **N. Y.**—Hallahan v. Herbert, 57 N. Y. 409, 414; Matter of Lima & H. F. Ry. Co., 68 Hun 252, 22 N. Y. Supp. 967, 52 N. Y. St. 186. **N. M.**—State v. Rosenwald Bros. Co., 23 N. M. 578, 170 Pac. 42. **Ohio.**—Canfield v. Brobst, 71 Ohio St. 42, 48, 72 N. E. 459; Methodist Episcopal Church Miss. Soc. v. Ely, 56 Ohio St. 405, 47 N. E. 537. **Wis.**—Milwaukee L. H. & T. Co. v. Ela Co., 142 Wis. 424, 125 N. W. 903, 27 L. R. A. (N. S.) 567, 20 Ann. Cas. 707; Wisconsin Cent. R. Co. v. Cornell University, 49 Wis. 162, 5 N. W. 331.

[a] Even though the code may not provide that every remedy other than



Such a special proceeding, therefore, is a remedy,<sup>67</sup> and the term is used in contradistinction to the term "action,"<sup>68</sup> and it is distinct from a motion.<sup>69</sup> Being a "remedy," a special proceeding must be prosecuted for the protection or enforcement of a right or the redress of a wrong.<sup>70</sup> The term implies that there is a legal controversy existing between the parties.<sup>71</sup> It has been held it always has reference to a proceeding in a court,<sup>72</sup> and the proceeding is usually civil in nature.<sup>73</sup>

**2. Distinguished From Actions.**—The distinction between "actions" and "special proceedings" is sometimes difficult.<sup>74</sup> The division is not between ex parte and adversary proceedings,<sup>75</sup> nor is the designation of the parties as plaintiff and defendant determinative that the proceeding is an action.<sup>76</sup> The distinction seems to rest upon the fact that the former is an ordinary proceeding whereas the latter is not.<sup>77</sup> Therefore any proceeding in a court which was not, under the common law and equity practice, either an action at law or suit in equity is a special proceeding;<sup>78</sup> and any proceeding that under the old mode

an action is a special proceeding, such is the case. *Methodist Episcopal Church Miss. Soc. v. Ely*, 56 Ohio St. 405, 47 N. E. 537.

[b] **Illustrations.**—Proceedings for a change of name, or in arbitration, or for a voluntary dissolution of a corporation, or for a guardianship, or for a married woman to become a sole trader are special proceedings of a civil nature. In the *Matter of Hume*, 56 Cal. Dec. 510, 176 Pac. 681.

A judgment is not a special proceeding. See 14 STANDARD PROC. 764.

**Summary proceedings** as special proceedings, see the title "**Summary Proceedings.**"

67. *Seeley v. Black*, 35 How. Pr. (N. Y.) 369, 372.

"**Remedies**" are divided by the codes into actions and special proceedings. See the codes and the title "**Remedy.**"

68. See *supra*, I, A.

But the term "action" may be construed to include special proceedings. See *supra*, I, A.

**Power of inferior court to vacate judgments in an "action" does not extend to "special proceedings."** See 15 STANDARD PROC. 153, note 41.

69. *Matter of Lima & H. F. Ry. Co.*, 68 Hun (N. Y.) 252, 22 N. Y. Supp. 967, 52 N. Y. St. 186. See the title "**Motions.**"

70. *Matter of Attorney General*, 155 N. Y. 441, 50 N. E. 57; *Seeley v. Black*, 35 How. Pr. (N. Y.) 369.

71. *Queens County Water Co. v.*

*O'Brien*, 131 App. Div. 91, 115 N. Y. Supp. 495.

72. *In re Grundysen*, 53 Minn. 346, 349, 55 N. W. 557; *In re Dodd*, 27 N. Y. 629, 633. *Contra*, *People ex rel. Clute v. Boardman*, 4 Keyes (N. Y.) 59, 67.

73. *Estate of Joseph*, 118 Cal. 660, 50 Pac. 768.

74. **N. Y.**—*Matter of Attorney General*, 155 N. Y. 441, 50 N. E. 57. **N. C.** *Tate v. Powe*, 64 N. C. 644. **Wis.**—*Ernst v. Brooklyn*, 24 Wis. 616, 617.

75. *Tate v. Powe*, 64 N. C. 644.

76. *Estate of Joseph*, 118 Cal. 660, 50 Pac. 768.

77. *Witter v. Lyon*, 34 Wis. 564, 574.

78. **Cal.**—*In re Central Irrigation Dist.*, 117 Cal. 382, 387, 49 Pac. 354. **Idaho.**—*Nelson v. Steele*, 12 Idaho 762, 88 Pac. 95. **N. D.**—*Dow v. Lillie*, 26 N. D. 512, 144 N. W. 1082, L. R. A. 1915D, 754. **Ohio.**—*Canfield v. Brobst*, 71 Ohio St. 42, 72 N. E. 459; *Barger v. Cochran*, 15 Ohio St. 460.

[a] **Rule Stated.**—Any cause of action for which there is an original writ in England, or a *capias ad respondendum* or which is relievable by ordinary bill in equity as distinguished from bills to perpetuate testimony, for discovery, etc., is a civil action. *Tate v. Powe*, 64 N. C. 644. But compare *Woodley v. Gilliam*, 64 N. C. 649.

[b] **Summary Action.**—An action, the issues to which are made up in a summary way, without pleadings, without any definite means of knowing what is to be tried is not a "civil

may be commenced by petition or motion upon notice is a special proceeding,<sup>79</sup> as is any proceeding which is purely statutory and new, and is conducted in no respect according to the forms of the common law.<sup>80</sup> But it does not necessarily follow that a proceeding which is neither a civil or criminal action shall be classed as a special proceeding for all purposes.<sup>81</sup>

Special proceedings have reference to such proceedings as may be commenced independently of actions,<sup>82</sup> and do not include proceedings in an action,<sup>83</sup> although some proceedings springing out of pending actions may be special proceedings.<sup>84</sup>

**Illustrative of special proceedings,** it has been held that the term includes proceedings to probate a will,<sup>85</sup> mandamus proceedings,<sup>86</sup> proceedings to determine heirship,<sup>87</sup> the confirmation of a guardian or executor's accounts,<sup>88</sup> eminent domain proceedings,<sup>89</sup> and appeals from proceedings before medical examiners.<sup>90</sup> But orders made by judges out of court preliminary to the bringing of an action,<sup>91</sup> including proceeding

action." *Deer Lodge v. Kohrs*, 2 Mont. 66.

**79. Minn.**—See *Schuster v. Schuster*, 84 Minn. 403, 407, 87 N. W. 1014. **Mont.**—*State ex rel. Heinze v. District Court*, 28 Mont. 227, 72 Pac. 613. **N. C.** *Tate v. Powe*, 64 N. C. 644.

**80.** *Hallahan v. Herbert*, 57 N. Y. 409, 414; *Hyatt v. Seeley*, 11 N. Y. 52; *Dow v. Lillie*, 26 N. D. 512, 521, 144 N. W. 1082, L. R. A. 1915D, 754.

**81.** *In re Eaton*, 7 N. D. 269, 274, 74 N. W. 870.

[a] **The code embraces** all special proceedings proper, *i. e.*, such as gave remedies in court through the agency of the remedial writs which had been adopted at the common law. But purely statutory proceedings regardless of their objects and purposes are not necessarily included within the term. *Tracy v. Scott*, 13 N. D. 577, 101 N. W. 905; *In re Eaton*, 7 N. D. 269, 274, 74 N. W. 870.

[b] **A statutory proceeding by injunction against a foreclosure by advertisement** is not a special proceeding within the statute relating to appeals. *Tracy v. Scott*, 13 N. D. 577, 101 N. W. 905.

**82.** *State ex rel. Heinze v. District Court*, 28 Mont. 227, 72 Pac. 613; *People v. American L. & T. Co.*, 150 N. Y. 117, 123, 44 N. E. 949; *Seeley v. Black*, 35 How. Pr. 369, 372; *Matter of Lima & H. F. Ry. Co.*, 68 Hun 252, 22 N. Y. Supp. 967, 52 N. Y. St. 186.

[a] **"A special proceeding is an independent prosecution of a remedy in**

which jurisdiction is obtained by original process." *Matter of Lima & H. F. Ry. Co.*, 68 Hun 252, 253, 22 N. Y. Supp. 967.

**83.** *Seeley v. Black*, 35 How. Pr. (N. Y.) 369, 362; *Ernst v. Brooklyn*, 24 Wis. 616.

**84.** *Deuster v. Zillmer*, 119 Wis. 402, 97 N. W. 31.

**Attachment as a special proceeding,** see 3 STANDARD PROC. 244.

**Intervention is a special proceeding,** see 14 STANDARD PROC. 288, note 5.

**85.** See *infra*, this note.

[a] **A petition to probate a will** is the beginning of a special proceeding. The filing of a petition to contest does not change its nature, although statute provides the parties shall be known as plaintiff and defendant. *In re Estate of Joseph*, 118 Cal. 660, 50 Pac. 768. See the title "Wills."

**86. Mandamus as a special proceeding,** see 19 STANDARD PROC. 123, note 14 [j].

**87.** See 12 STANDARD PROC. 916.

**88.** *Nelson v. Cowling*, 89 Ark. 334, 116 S. W. 890.

**89.** See 8 STANDARD PROC. 263.

**90.** *State ex rel. Gatton v. District Ct.*, 39 Mont. 134, 101 Pac. 961.

**91.** *Matter of Attorney General*, 155 N. Y. 441, 50 N. E. 57.

[a] **Orders for examination of witnesses before trial** are not special proceedings. *Matter of Attorney General*, 155 N. Y. 441, 50 N. E. 57. But compare *Witter v. Lyon*, 34 Wis. 564, 574.

visional remedies,<sup>92</sup> orders relating to service of process,<sup>93</sup> or granting leave to bring actions<sup>94</sup> are not special proceedings.

3. The procedure in special proceedings is not regulated by the code except upon appeals.<sup>95</sup>

F. CASE AND CAUSE.—The terms "suit," "action," "case" and "cause" are generally convertible terms,<sup>96</sup> although in common parlance "case" and "cause" have a more extended meaning,<sup>97</sup>

92. Matter of Attorney General, 155 N. Y. 441, 50 N. E. 57; Witter v. Lyon, 34 Wis. 564, 575.

[a] The appointment of a receiver is not a special proceeding. *State ex rel. Heinze v. District Court*, 28 Mont. 227, 72 Pac. 613.

93. Matter of Attorney General, 155 N. Y. 441, 50 N. E. 57.

94. Matter of Attorney General, 155 N. Y. 441, 50 N. E. 57.

95. *In re Livingston*, 34 N. Y. 555, 2 Abb. Pr. (N. S.) 1, 32 How. Pr. 20.

[a] The rules of the code may be used to supply omissions in the statute relating to special proceedings. *Crume v. Wilson*, 104 Ind. 583, 4 N. E. 169.

96. U. S.—*Blyew v. United States*, 13 Wall. 581, 20 L. ed. 638; *Kendall v. United States*, 12 Pet. 524, 634, 9 L. ed. 1181, 1224; *Ex parte Milligan*, 4 Wall. 2, 112, 18 L. ed. 281; *Taylor v. United States*, 45 Fed. 531, 539. Ga. *Grimball v. Ross*, T. N. P. Charl. 175, 181, "civil case." Mont.—*State v. Newell*, 13 Mont. 302, 34 Pac. 28.

Neb.—*Gibson v. Sidney*, 50 Neb. 12, 69 N. W. 314. Ohio.—*Baltimore & O. R. Co. v. Larwill*, 83 Ohio St. 108, 116, 93 N. E. 619, 34 L. R. A. (N. S.) 1195. Pa.—*Haupt v. Henninger*, 37 Pa. 138, 141. S. C.—*Young v. Southern Bell Tel. & Tel. Co.*, 75 S. C. 326, 55 S. E. 765, 7 L. R. A. (N. S.) 501, 9 Ann. Cas. 940. S. D.—See *Kenny v. McKenzie*, 25 S. D. 485, 492, 127 N. W. 597. Wash.—*State ex rel. Bittencouer v. Gordon*, 8 Wash. 488, 36 Pac. 498. W. Va.—*Dickey v. Smith*, 42 W. Va. 805, 809, 26 S. E. 373. Wyo.—*Messenger v. Converse County*, 19 Wyo. 309, 324, 117 Pac. 126.

Removal of "causes," see 4 STANDARD PROC. 806; and the title "Removal of Causes."

[a] "Case" Is a Generic Term. *Carroll v. Green*, 92 U. S. 509, 23 L. ed. 738.

[b] A case is a suit in law or equity, instituted according to the regular course of judicial proceedings. Pacific

*Steam Whaling Co. v. United States*, 187 U. S. 447, 23 Sup. Ct. 154, 47 L. ed. 253.

[c] "Case" includes (1) many different species of actions. *Carroll v. Green*, 92 U. S. 509, 23 L. ed. 738. (2) It includes criminal as well as civil suits. *Matthews v. Noble*, 25 Misc. 674, 55 N. Y. Supp. 190.

[d] "Civil cases are those which involve disputes or contests between man and man and which only terminate in the adjustment of the rights of plaintiffs and defendants." *Grimball v. Ross*, Charl. (Ga.) 175, 181. See also *Messenger v. Converse County*, 19 Wyo. 309, 324, 117 Pac. 126.

[e] "Cause" applies to every species of action. *Scott v. Perkins*, 28 Me. 22, 33, 48 Am. Dec. 470.

[f] A scire facias is not a cause. *United States v. Payne*, 147 U. S. 687, 13 Sup. Ct. 442, 37 L. ed. 332, 28 Ct. Cl. 552.

Distinguished from controversy, see *infra*, I, G.

97. Me.—*Scott v. Perkins*, 28 Me. 22, 33, 48 Am. Dec. 470. See *Carleton v. Bird*, 94 Me. 182, 47 Atl. 154. Pa. *Haupt v. Henninger*, 37 Pa. 138, 141. Vt.—*Gold v. Vermont Cent. R. Co.*, 19 Vt. 478, 484. Can.—*Grant v. Hunter*, 6 Man. 610.

[a] The word "cause" (1) includes any suit, action, matter, or other proceeding competently brought before and litigated in a particular court. *Grant v. Hunter*, 6 Man. (Canada) 610; *Green v. Penzance*, L. R. 6 App. Cas. (Eng.) 657, 51 L. J. Q. B. 25, 45 L. T. N. S. 353, 30 W. R. 218. (2) It is not a technical word. *Green v. Penzance*, L. R. 6 App. Cas. 657, 51 L. J. Q. B. 25, 45 L. T. N. S. 353, 30 W. R. 218. (3) A cause is the origin or foundation of a thing as of a suit or action; a ground of action. *United States v. Rhodes*, 1 Abb. (N. S.) 28, 27 Fed. Cas. No. 16,151.

[b] The word "case," when considered alone, means the facts or state



and include special proceedings unknown to the common law.<sup>98</sup>

G. **CONTROVERSY.**—The word “controversy” has been held synonymous with the terms “dispute,”<sup>99</sup> and civil action or proceeding at law.<sup>1</sup> But it is narrower than the word “case” as it does not include criminal proceedings,<sup>2</sup> although otherwise it is scarcely distinguishable.<sup>3</sup>

H. **GIST OF THE ACTION.**—The gist of the action is the essential ground or object of the action without which there is not a cause of action.<sup>4</sup>

I. **OBJECT OF THE ACTION.**—The object of the action is the relief demanded, the particular result for which the action is brought.<sup>5</sup> It

of facts which constitute the right of the individual or his cause of action, which the “proceeding,” “action” or “suit” protects or enforces. *State v. Riley*, 203 Mo. 175, 187, 101 S. W. 567, 12 L. R. A. (N. S.) 900.

**Contempt proceeding** is a “cause or matter” within a statute relating to disqualification of a judge. See 16 STANDARD PROC. 647, note 44 [f].

[c] **The trial on a third party claim** is not a “cause.” *Bernheimer v. Martin*, 66 Miss. 486, 6 So. 326.

**Case on appeal**, see the title “**Case on Appeal.**”

**Case made**, see the title “**Review.**”  
**Agreed case**, see the title “**Agreed Case.**”

98. *Carpenter v. Jones*, 121 Cal. 362, 53 Pac. 842 (civil case); *Gold v. Vermont Cent. R. Co.*, 19 Vt. 478, 484.

99. *Keith v. Levi*, 2 Fed. 743, 745, 1 McCrary 343; *Barber v. Kennedy*, 18 Minn. 216.

**Amount in controversy**, 17 STANDARD PROC. 831.

1. *Matthews v. Noble*, 25 Misc. 674, 55 N. Y. Supp. 190.

[a] **A friendly suit** is probably not a controversy. *Woodfin v. Phoebe*, 30 Fed. 289, 292. But see the title “**Amicable Actions.**”

[b] **The word “controversy”** implies not only a suit, but a suit in which something is affirmed upon one side and denied upon the other, in which there is a dispute, an issue to be tried. *Hickman v. Baltimore & O. R. Co.*, 30 W. Va. 296, 4 S. E. 654, 7 S. E. 455.

2. *In re Pacific R. Comm.*, 12 Sawy. 559, 32 Fed. 241, 255, *Matthews v. Noble*, 25 Misc. 674, 55 N. Y. Supp. 190.

3. *Smith v. Adams*, 130 U. S. 167, 9 Sup. Ct. 566, 32 L. ed. 895; *United States v. Henderlong*, 102 Fed. 2, 4;

*In re Pacific R. Comm.*, 12 Sawy. 559, 32 Fed. 241, 255; *Underhill v. Spencer*, 25 Kan. 71.

[a] “Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy.” *Smith v. Adams*, 130 U. S. 167, 173, 9 Sup. Ct. 566, 32 L. ed. 895.

[b] “A controversy . . . is a case at law or in equity brought before some competent court of justice for forensic discussion and judicial decision.” *United States v. Henderlong*, 102 Fed. 2, 4.

4. *Frazier v. Georgia R. & B. Co.*, 101 Ga. 70, 74, 28 S. E. 684 (citing *Bouv. L. Diet.*, and *Anderson’s L. Diet.*); *Kitson v. Farwell*, 132 Ill. 327, 338, 23 N. E. 1024; *Matter of Mansfield*, 120 Ill. App. 511.

[a] **It is “the cause for which an action will lie; the ground or foundation of a suit, and without which it would not be maintainable; the essential ground or object of a suit, without which it is not a cause of action.”** *Kitson v. Farwell*, 132 Ill. 327, 338, 23 N. E. 1024.

[b] **In actions ex delicto against carriers**, the gist of the action is the breach of the duty owing to the public imposed by law. *Canaday v. St. Louis United R. Co.*, 134 Mo. App. 282, 114 S. W. 88.

[c] **In the per quod actions**, the gist of the action is the loss of service. *Frazier v. Georgia R. & B. Co.*, 101 Ga. 70, 74, 28 S. E. 684.

5. *Occidental Consol. Min. Co. v. Comstock Tunnel Co.*, 111 Fed. 135, *Lassiter v. Norfolk & C. R. Co.*, 136 N. C. 89, 91, 48 S. E. 642, 1 Ann. Cas. 456.

is not the "cause of action,"<sup>6</sup> or the "subject of action."<sup>7</sup>

J. GROUND OF ACTION.—The "ground of action" has been defined as the foundation, basis, or data, upon which a cause of action rests.<sup>8</sup> It is distinct from cause of action.<sup>9</sup>

II. CONDITIONS PRECEDENT.—A. GENERALLY.<sup>10</sup>—Conditions precedent to an action, whether created by law or by contract of the parties, must be complied with,<sup>11</sup> unless their performance is excused<sup>12</sup> or waived.<sup>13</sup> The condition precedent may constitute an

6. *Scarborough v. Smith*, 18 Kan. 399. See 4 STANDARD PROC. 808.

7. *Scarborough v. Smith*, 18 Kan. 399.

8. 2 Bouv. Law Diet. 1383.

[a] "The basis of a suit, the foundation or fundamental state of facts on which an action rests; the real object of the plaintiff in bringing his suit." Black Law. Diet. "Ground."

Stating more than one ground of action, see 20 STANDARD PROC. 61; 6 STANDARD PROC. 705; 4 STANDARD PROC. 121, and see the title "Several Counts."

Pleading with a double aspect, see 4 STANDARD PROC. 122.

9. See *infra*, this note, and the title "New Cause of Action or Defense."

Setting forth several grounds is not a union of several causes of action, see 14 STANDARD PROC. 648.

[a] As used in a statute permitting a claimant to amend to correct any mistake, defect, or informality in the statement of claim, not changing the ground of action, "the phrase 'ground of action' . . . refers to the real object of the plaintiff in presenting his claim." *Huntington's Appeal*, 73 Conn. 582, 585, 48 Atl. 766; *Nash v. Adams*, 24 Conn. 33, 39.

10. Accrual of cause of action, see III.

11. U. S.—*Lange v. Union Pac. R. Co.*, 126 Fed. 338, 62 C. C. A. 48. Colo.—*Cannon v. Williams*, 14 Colo. 21, 23 Pac. 456. Kan.—*Swisher v. Atchison, T. & S. F. R. Co.*, 76 Kan. 97, 90 Pac. 812. Mich.—*Willey v. Gillett*, 171 Mich. 153, 136 N. W. 1116. N. Y.—*Carpenter v. Stevens*, 12 Wend. 589; *Bowes v. New York Christian Home*, 64 How. Pr. 509. Pa.—*Tenth Nat. Bank v. Smith Const. Co.*, 218 Pa. 581, 67 Atl. 872.

Conditions precedent as to foreign corporations, see 5 STANDARD PROC. 725.

To mechanics' lien suits, see 19 STANDARD PROC. 627.

Issuance of execution as a condition precedent to actions on injunction bonds, see 13 STANDARD PROC. 331. To action on a bail bond, see the title "Recognizances and Bail."

Presenting claim against municipality, see 20 STANDARD PROC. 92, 115; 11 STANDARD PROC. 199.

Return of property before bringing an action for fraud and deceit, see 10 STANDARD PROC. 42.

Cost bond in libel suits, see 18 STANDARD PROC. 892.

[a] Payment of Taxes.—*Carhart v. West*, 44 Ga. 657; *Cary v. Edmondson*, 44 Ga. 651.

[b] Absence of resulting injury in a particular case does not dispense with a performance. Colo.—*Cannon v. Williams*, 14 Colo. 21, 23 Pac. 456. Mich.—*Willey v. Gillett*, 171 Mich. 153, 136 N. W. 1116. Pa.—*Tenth Nat. Bank v. Smith Const. Co.*, 218 Pa. 581, 67 Atl. 872.

[c] By resort to the forum of another jurisdiction, the performance of precedent acts required by the statute creating the right of action cannot be avoided. *Chambers v. Baltimore & O. R. Co.*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. ed. 143; *Denver & R. G. R. Co. v. Wagner*, 167 Fed. 75, 92 C. C. A. 527; *Swisher v. Atchison T. & S. F. R. Co.*, 76 Kan. 97, 90 Pac. 812.

12. *Carpenter v. Stevens*, 12 Wend. (N. Y.) 589; *Fleming v. Gilbert*, 3 Johns. (N. Y.) 528. And see *infra*, this section.

[a] By Repudiation of the Debt. *Mee v. Montclair*, 83 N. J. L. 274, 83 Atl. 764.

13. *Carpenter v. Stevens*, 12 Wend. (N. Y.) 589.

[a] Conditions precedent created by contract may be waived. *Hall v. Long*, 34 Misc. 1, 68 N. Y. Supp. 522; *New Jersey Steel & Iron Co. v. Robinson*, 33 Misc. 361, 68 N. Y. Supp. 577; *Dicker-*

essential element of the cause of action,<sup>14</sup> or it may pertain, not to the cause of action, but to the right to prosecute the action only.<sup>15</sup>

**What Excuses Non-performance.** — Performance of conditions precedent may be excused because prevented by the opposite party,<sup>16</sup> or because it would be a useless ceremony.<sup>17</sup> But impossibility of performance does not excuse performance.<sup>18</sup>

**B. EXHAUSTION OF EXTRA-JUDICIAL REMEDIES. — 1. Associations Generally.** — As a general rule a member of an association who has been expelled therefrom must exhaust his remedies therein before resorting to the courts,<sup>19</sup> unless the remedy provided is inadequate.<sup>20</sup>

**2. Mutual Benefit Associations. — a. Generally.** — Mutual benefit societies may require an appeal to its tribunals as a condition precedent to a right of action by a member.<sup>21</sup> The rules of such societies sometimes provide that the determination of controversies by the tribunals of the association shall be final and conclusive, and shall preclude a resort to the courts, but the courts are in conflict as to the validity of such a rule.<sup>22</sup>

It is a general rule with certain exceptions that a member of a beneficial association is required to comply with a by-law or constitutional provision requiring exhaustion of every remedy and every means of

man *v. Reeder*, 59 Wash. 405, 109 Pac. 1060. See 10 STANDARD PROC. 225.

14. **Kan.**—*Swisher v. Atchison T. & S. F. Ry. Co.*, 76 Kan. 97, 90 Pac. 812. **N. Y.**—*Graham v. Scripture*, 26 How. Pr. 501. **Wis.**—*Hilliard v. Wisconsin L. Ins. Co.*, 137 Wis. 208, 117 N. W. 999.

15. *Watts v. Everett*, 47 Iowa 269; *Malloy v. Chicago & N. W. Ry. Co.*, 109 Wis. 29, 85 N. W. 130.

[a] **Where the cause of action is complete** and something is yet to be done as a condition of the right to enforce such cause of action, the nonperformance must be a matter of abatement only. *Lombard v. McMillan*, 95 Wis. 627, 635, 70 N. W. 673.

16. *Carpenter v. Stevens*, 12 Wend. (N. Y.) 589; *Fleming v. Gilbert*, 3 Johns. (N. Y.) 528; *New York v. Butler*, 1 Barb. (N. Y.) 325, 337.

17. See *infra*, II, D, 7.

18. *Carpenter v. Stevens*, 12 Wend. (N. Y.) 589.

19. *Engvall v. Buchie*, 73 Wash. 534, 132 Pac. 231.

**As to labor unions**, see 18 STANDARD PROC. 414, action for damages.

See the title, "Religious Societies."

[a] **Action for Damages.**—*Rabb v. Trevelyan*, 122 La. 174, 47 So. 455.

[b] **Action To Compel Reinstatement.**—*Hickey v. Baine*, 195 Mass. 446,

81 N. E. 201; *Corregan v. Hay*, 94 App. Div. 71, 87 N. Y. Supp. 956.

20. *Corregan v. Hay*, 94 App. Div. 71, 87 N. Y. Supp. 956.

21. *Kempton Lodge v. Mazingo*, 180 Ind. 566, 103 N. E. 411; *Supreme Council v. Forsinger*, 125 Ind. 52, 58, 25 N. E. 129, 21 Am. St. Rep. 196, 9 L. R. A. 501; *Lindahl v. Supreme Court*, 100 Minn. 87, 110 N. W. 358, 117 Am. St. Rep. 666, 8 L. R. A. N. S. 916.

22. See the following cases: **Cal.** *Robinson v. Templar Lodge*, 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193, note; *Levy v. Magnolia Lodge*, 110 Cal. 297, 42 Pac. 887. **Ind.**—*Supreme Council v. Forsinger*, 125 Ind. 52, 25 N. E. 129, 21 Am. St. Rep. 196, 9 L. R. A. 501; *Voluntary Relief Dept. v. Spencer*, 17 Ind. App. 123, 46 N. E. 477. **Ky.** *Pennsylvania Co. v. Reager's Admr.*, 152 Ky. 824, 154 S. W. 412, Ann. Cas. 1915B, 312 note, 52 L. R. A. (N. S.) 841. **N. C.**—*Kelly v. Trimont Lodge*, 154 N. C. 97, 69 S. E. 764, 52 L. R. A. (N. S.) 823 note. **Ohio.**—*Myers v. Jenkins*, 63 Ohio St. 101, 57 N. E. 1089, 81 Am. St. Rep. 613. **Utah.**—*Pearson v. Anderburg*, 28 Utah 495, 80 Pac. 307, reviewing cases. **W. Va.**—*Robinson v. Brotherhood of Railroad Trainmen*, 80 W. Va. 567, 92 S. E. 730, L. R. A. 1917E, 995.



appeal in the order before resort to the courts for relief,<sup>23</sup> and a failure to do so is a complete defense to the action.<sup>24</sup> Where the general right of appeal is provided for with no provision requiring a resort thereto, the remedy provided must be exhausted before resort to the courts when the matter in controversy involves discipline, policy or doctrine;<sup>25</sup> but such a provision has been held to be permissive merely when the action is to vindicate rights not dependent on matters of discipline, and does not require an appeal before resorting to the courts.<sup>26</sup>

b. *Action for Restoration to Membership.*—Where the expelled member proceeds by mandamus or other remedy to compel a restoration to membership, he must first exhaust his remedies within<sup>27</sup> the as-

23. **Cal.**—*Schou v. Sotoyome*, 140 Cal. 254, 73 Pac. 996. **Conn.**—*McGuinness v. Court Elm City, No. 1, Foresters of A.*, 78 Conn. 43, 60 Atl. 1023. **Ill.** *People ex rel. Keefe v. Woman's Catholic Order of Foresters*, 162 Ill. 78, 44 N. E. 401. **Ind.**—*Bauer v. Samson Lodge*, 102 Ind. 262, 1 N. E. 571. **Kan.** *Supreme Lodge v. Raymond*, 57 Kan. 647, 47 Pac. 533, 49 L. R. A. 373, note. **Mass.**—*Correia v. Portuguese Fraternity*, 218 Mass. 305, 105 N. E. 977. **Neb.** *Wilber v. Lincoln Aerie*, 99 Neb. 428, 156 N. W. 658. **N. J.**—*Grand Castle v. Bridgeton Castle (N. J. Eq.)*, 40 Atl. 849. **N. Y.**—*Laford v. Deems*, 81 N. Y. 507, 8 Abb. N. C. 344; *Poultney v. Bachman*, 31 Hun 49; *Shirtcliffe v. Wall*, 68 App. Div. 375, 74 N. Y. Supp. 189. **R. I.**—*Wood v. What Cheer Lodge*, 20 R. I. 795, 38 Atl. 895; *Whitty v. McCarthy*, 20 R. I. 792, 36 Atl. 129.

As to exceptions, see *infra*, II, B, 2, f.

24. *Finnerty v. Supreme Council K. of A.*, 115 Iowa 398, 88 N. W. 834.

25. **Cal.**—*Lawson v. Hewel*, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400. **Ill.** *People ex rel. Keefe v. Women's Catholic Order of Foresters*, 162 Ill. 78, 44 N. E. 401; *Brotherhood of R. R. Trainmen v. Greaser*, 108 Ill. App. 598; *Grand Lodge Brotherhood of R. R. Trainmen v. Randolph*, 84 Ill. App. 220. **N. J.**—*O'Brien v. Musical Mut. P. & B. Union*, 64 N. J. Eq. 525, 54 Atl. 150; *Zeliff v. Knights of Pythias*, 53 N. J. L. 536, 22 Atl. 63. **N. Y.**—*Johansen v. Blume*, 53 App. Div. 526, 65 N. Y. Supp. 987.

Questions involving discipline, see *infra*, II, B, 2, d, (I).

26. **Ill.**—*Supreme Lodge A. M. P. v. Meister*, 204 Ill. 527, 68 N. E. 454; *People ex rel. Keefe v. Women's Catholic Order of Foresters*, 162 Ill. 78, 44

N. E. 401; *Brotherhood of R. R. Trainmen v. Greaser*, 108 Ill. App. 598; *Grand Lodge Brotherhood of R. R. Trainmen v. Randolph*, 84 Ill. App. 220. **Ind.** *Supreme Council v. Garrigus*, 104 Ind. 133, 3 N. E. 818; *Bauer v. Samson Lodge K. P.*, 102 Ind. 262, 271, 1 N. E. 571; *Supreme Lodge K. of P. v. Andrews*, 31 Ind. App. 422, 67 N. E. 1009. **Kan.**—*Supreme Lodge v. Dey*, 58 Kan. 283, 49 Pac. 74.

27. **U. S.**—*Supreme Lodge K. P. v. Wilson*, 66 Fed. 785, 14 C. C. A. 264. **Cal.**—*Levy v. Magnolia Lodge*, 110 Cal. 297, 42 Pac. 887; *Neto v. Conselho Amor*, 18 Cal. App. 234, 122 Pac. 973; *Dingwall v. Amalgamated Assn.*, 4 Cal. App. 565, 88 Pac. 597. **Ill.**—*People ex rel. Keefe v. Woman's Catholic Order of Foresters*, 162 Ill. 78, 44 N. E. 401; *Blumenfeldt v. Korschuck*, 43 Ill. App. 434. **Ia.**—*Byram v. Sovereign Camp*, 108 Iowa 430, 79 N. W. 144, 75 Am. St. Rep. 265. **Md.**—*Camp No. 6 v. Arrington*, 107 Md. 319, 68 Atl. 548. **Mass.** *Correia v. Portuguese Fraternity*, 218 Mass. 305, 105 N. E. 977; *Horgan v. Metropolitan Mutual Aid Assn.*, 202 Mass. 524, 88 N. E. 890. **Miss.**—*Independent Order v. Wilkes*, 98 Miss. 179, 53 So. 493, 52 L. R. A. (N. S.) 817; *Ward v. David & J. Lodge*, 90 Miss. 116, 43 So. 302. **Mo.**—*Glaridon v. Supreme Lodge K. P.*, 50 Mo. App. 45; *Hoeffner v. Grand Lodge*, 41 Mo. App. 359. **N. J.**—*Zeliff v. Knights of Pythias*, 53 N. J. L. 536, 22 Atl. 63. **N. Y.**—*Holomany v. National Slav. Soc.*, 39 App. Div. 573, 57 N. Y. Supp. 720. **Tex.** *St. Louis & S. W. R. Co. v. Thompson*, 102 Tex. 89, 99, 113 S. W. 144, 19 Am. Cas. 1250; *Screwmen's Benev. Assn. v. Benson*, 76 Tex. 552, 13 S. W. 379.

[a] Whether the association is incorporated or unincorporated, the rule, requiring the prosecution of remedies

sociation, whether the expulsion is irregular,<sup>28</sup> or void,<sup>29</sup> unless the remedy provided in the order is inadequate.<sup>30</sup>

c. *Action for Damages*.—A member of a benefit association who has been expelled therefrom by illegal and void proceedings need not exhaust his remedies within the order by appeal before bringing an action for damages,<sup>31</sup> although some authorities hold otherwise.<sup>32</sup>

d. *Actions for Benefits*.—(I.) *Cases Involving Questions of Discipline*. When the denial of benefits is due to the suspension or removal of the member and the proceedings were erroneous on the law and facts but not void, the remedies provided by the rules and laws of the society must be first exhausted before suing for benefits,<sup>33</sup> even though the action is brought by the beneficiary after the death of the member.<sup>34</sup> But where the proceedings were void, for want of jurisdiction over the person or subject matter, the remedies in the order need not be exhausted, even when required by the constitution<sup>35</sup> of the lodge or so-

within it, applies, where the question is one merely of membership, irrespective of the enforcement of a property right. *O'Brien v. Musical Mut. P. & B. Union*, 64 N. J. Eq. 525, 54 Atl. 150.

28. *Neto v. Conselho Amor*, 18 Cal. App. 234, 122 Pac. 973; *People ex rel. Keefe v. Women's Catholic Order of Foresters*, 162 Ill. 78, 83, 44 N. E. 401.

29. *Cal.*—*Dingwall v. Amalgamated Assn.*, 4 Cal. App. 565, 88 Pac. 597. *Mo.*—*Hoeffner v. Grand Lodge*, 41 Mo. App. 359. *Tex.*—*Screwmen's Benev. Assn. v. Benson*, 76 Tex. 552, 13 S. W. 379.

But see *People ex rel. Keefe v. Women's Catholic Order of Foresters*, 162 Ill. 78, 83, 44 N. E. 401.

30. *Brown v. Supreme Court of Order of Foresters*, 176 N. Y. 132, 68 N. E. 145, 34 Misc. 556, 70 N. Y. Supp. 397. See *infra*, II, B, 2, f.

31. *Ia.*—See *Fort v. Iowa L. H.*, 146 Iowa 183, 123 N. W. 224. *Minn.*—*Malmsted v. Minneapolis Aerie No. 34*, F. O. E., 111 Minn. 119, 126 N. W. 486, 137 Am. St. Rep. 542, where proceedings were void. *Miss.*—*Independent Order v. Wilkes*, 98 Miss. 179, 53 So. 493, 52 L. R. A. (N. S.) 817. *Mo.*—*Slater v. Supreme Lodge*, 76 Mo. App. 387. *Tex.*—*St. Louis & S. W. R. Co. v. Thompson*, 102 Tex. 89, 113 S. W. 144, 19 Ann. Cas. 1250, reversing (Tex. Civ. App.), 108 S. W. 453; *Thompson v. Grand International Brotherhood*, 41 Tex. Civ. App. 176, 91 S. W. 834.

32. *McGuinness v. Court Elm City No. 1, Foresters of A.*, 78 Conn. 43, 60 Atl. 1023 (an action for damages and for an injunction); *Blumenfeldt v.*

*Korschuck*, 43 Ill. App. 434. See also 18 STANDARD PROC. 415, where damages for expulsion from a labor union is sought. And see *Rabb v. Trevelyan*, 122 La. 174, 47 So. 455.

33. *U. S.*—*Supreme Lodge K. P. v. Wilson*, 66 Fed. 785, 14 C. C. A. 264; *Hall v. Supreme Lodge Knights of Honor*, 24 Fed. 450. *Ia.*—*Finnerty v. Supreme Council C. K. of A.*, 115 Iowa 398, 88 N. W. 834. *Me.*—*Jeane v. Grand Lodge*, 86 Me. 434, 30 Atl. 70. *Mass.*—*Karcher v. Supreme Lodge*, 137 Mass. 368. *N. Y.*—*Johansen v. Blume*, 53 App. Div. 526, 65 N. Y. Supp. 987. *Ore.*—*Montour v. Grand Lodge*, 38 Ore. 47, 62 Pac. 524.

[a] Mere irregularities of procedure short of substantial denial of the hearing contemplated by the contract of the parties are remediable in the first instance in the tribunals of the order. *Kulberg v. National Council*, 124 Minn. 437, 145 N. W. 120.

34. *Ia.*—*Finnerty v. Supreme Council C. K. of A.*, 115 Iowa 398, 88 N. W. 834. *Mass.*—*Karcher v. Supreme Lodge*, 137 Mass. 368. *Mich.*—*Canfield v. Great Camp of K. of M.*, 87 Mich. 626, 49 N. W. 875, 24 Am. St. Rep. 186, 13 L. R. A. 625.

[a] The reason is that the beneficiary has no vested interest in the certificate sued on until the death of the member and he takes only what is left. *Finnerty v. Supreme Council C. K. of A.*, 115 Iowa 398, 88 N. W. 834.

35. *U. S.*—*Hall v. Supreme Lodge Knights of Honor*, 24 Fed. 450. *Mo.*—*Gardon v. Supreme Lodge K. P.*, 50 Mo. App. 45; *Hoeffner v. Grand Lodge*,

ciety, whether the action is brought by the member<sup>36</sup> or his beneficiary.<sup>37</sup>

(II.) **Cases Not Involving Questions of Discipline.**—Where no questions of discipline are involved, a rule of the society affording remedies in the order merely, does not require a resort thereto as a condition precedent to an action for benefits.<sup>38</sup> But a rule providing a board to examine claims requires the member to give the board an opportunity to examine his claim before resorting to suit.<sup>39</sup> And a rule requiring the exhaustion of remedies in the order before suing for benefits is binding on a member,<sup>40</sup> unless com-

41 Mo. App. 359. **N. J.**—O'Brien v. Musical Mutual P. & B. Union, 64 N. J. Eq. 525, 54 Atl. 150; Knights of Pythias v. Eskholme, 59 N. J. L. 255, 35 Atl. 1055, 59 Am. St. Rep. 609. **Okla.** Woodmen of the World v. Gilliland, 11 Okla. 384, 67 Pac. 485. **Wis.**—Langnecker v. Trustees of Grand Lodge, A. O. U. W., 111 Wis. 279, 87 N. W. 293, 87 Am. St. Rep. 860, 55 L. R. A. 185.

But compare Finnerty v. Supreme Council C. K. of A., 115 Iowa 398, 88 N. W. 834.

[a] **Reason.**—Where the judgment is void and the member treats it as such, he continues to be a member, and need not seek reinstatement. Hoeffner v. Grand Lodge, 41 Mo. App. 359.

[b] **The case** "may be likened to a judgment rendered by a court which has no jurisdiction of the subject-matter or the person. No appeal or writ of error is necessary to get rid of such a judgment; it is void in all courts and places." Hall v. Supreme Lodge Knights of Honor, 24 Fed. 450, 454; Knights of Pythias v. Eskholme, 59 N. J. L. 255, 35 Atl. 1055, 59 Am. St. Rep. 609.

[c] **Where no notice of the proceedings** is given, resort to the remedies within the order is not a prerequisite. Kulberg v. National Council, 124 Minn. 437, 145 N. W. 120.

[d] **Acquiescence and Resistance of Expulsion.**—(1) If the member continues to tender his dues when payable, he manifests his disavowance of the order of expulsion and may sue for the benefits without exhausting his remedies in the order. So also he may sue where he resists expulsion and fails to pay subsequent dues because not demanded. But when he takes no steps to secure reinstatement and when he is notified of an assessment upon his certificate and fails to pay it, he may be

held to have acquiesced in the expulsion. Glardon v. Supreme Lodge, 50 Mo. App. 45. (2) A clear indication of an intention to refuse further recognition of the assured's membership renders a subsequent tender of dues unnecessary. Kulberg v. National Council, 124 Minn. 437, 145 N. W. 120; Langnecker v. Trustees of Grand Lodge A. O. U. W., 111 Wis. 279, 87 N. W. 293, 87 Am. St. Rep. 860, 55 L. R. A. 185.

36. *People ex rel. Keefe v. Women's Catholic Order of Foresters*, 162 Ill. 78, 83, 44 N. E. 401.

37. **U. S.**—Hall v. Supreme Lodge Knights of Honor, 24 Fed. 450. **Ill.** *People ex rel. Keefe v. Women's Catholic Order of Foresters*, 162 Ill. 78, 83, 44 N. E. 401. **Mo.**—Hoeffner v. Grand Lodge, 41 Mo. App. 359; Mulroy v. Supreme Lodge, 28 Mo. App. 463.

38. See *supra*, II, B, 2, a, and *infra*, this section.

[a] **Where the certificate is a positive agreement** to pay in the event of disability, favorable action on the claim is not a condition precedent to an action, where a resort to the remedies in the order is permissive. Brotherhood of Ry. Trainmen v. Greaser, 108 Ill. App. 598.

39. *Robinson v. Irish-American Benev. Soc.*, 67 Cal. 135, 7 Pac. 435.

40. **Cal.**—Berlin v. Eureka Lodge K. P., 132 Cal. 294, 64 Pac. 254; Robinson v. Templar Lodge, 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193; Levy v. Magnolia Lodge, 110 Cal. 297, 42 Pac. 887. **Ga.**—Harrington v. Workingmen's Benev. Assn., 70 Ga. 340. **Ill.**—Grand Central Lodge A. O. U. W. v. Grogan, 44 Ill. App. 111. **Ind.**—Supreme Council v. Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298; Bauer v. Samson Lodge, 102 Ind. 262, 1 N. E. 571. **Ky.** *Pennsylvania Co. v. Reager's Admr.*,



plance with it is excused for some reason.<sup>41</sup> If the contract provides that the decision of the tribunal of the order shall be final, and if the contract is held to be valid, the member cannot resort to the courts after an adverse decision on the merits, in the absence of fraud and mistake.<sup>42</sup> But if the contract is held to be void in so far as it makes such decisions conclusive,<sup>43</sup> the member is not required as a condition precedent to exhaust his remedy within the order before suing for benefits.<sup>44</sup> An agreement to submit certain facts to arbitration is valid and a compliance therewith is a condition precedent to the action.<sup>45</sup> Where the tribunals of the order are open only to members, a beneficiary who is not a member need not exhaust remedies in the order before bringing an action for benefits.<sup>46</sup>

152 Ky. 824, 154 S. W. 412, Ann. Cas. 1915B, 312, 52 L. R. A. (N. S.) 841. Minn.—Lindahl v. Supreme Court, 100 Minn. 87, 110 N. W. 358, 117 Am. St. Rep. 666, 8 L. R. A. (N. S.) 916, note. N. H.—Levy v. Order of Iron Hall, 67 N. H. 593, 38 Atl. 18. N. J.—Roxbury Lodge v. Hocking, 60 N. J. L. 439, 38 Atl. 693, 64 Am. St. Rep. 596.

41. See *infra*, II, B, 2, f.

42. Pennsylvania Co. v. Reager's Admr., 152 Ky. 824, 154 S. W. 412, Ann. Cas. 1915B, 312, 52 L. R. A. (N. S.) 841. And see note in 52 L. R. A. (N. S.) 823.

43. Kelly v. Trimont Lodge, 154 N. C. 97, 69 S. E. 764, 52 L. R. A. (N. S.) 823.

44. Ia.—Prader v. National Masonic Acc. Assn., 95 Iowa 149, 63 N. W. 601. Minn.—Whitney v. National Masonic Acc. Assn., 52 Minn. 378, 54 N. W. 184. N. C.—Kelly v. Trimont Lodge, 154 N. C. 97, 69 S. E. 764, 52 L. R. A. (N. S.) 823. Utah.—Pearson v. Anderburg, 28 Utah 495, 500, 80 Pac. 307; Daniher v. Grand Lodge, 10 Utah 110, 37 Pac. 245.

But see Supreme Council v. Forsinger, 125 Ind. 52, 59, 25 N. E. 129, 21 Am. St. Rep. 196, 9 L. R. A. 501.

[a] **Contracts Distinguished.**—(1) If, in a contract creating a definite legal obligation to pay a certain sum of money on a specified contingency, there is embodied an agreement that the rights of the parties shall be determined by arbitration and that no action shall be brought, the agreement does not preclude an action on the contract. But this case is distinguishable from those where the agreement provides only for the determination by arbitration of some particular fact or facts, and those where the contract is

to pay only such sum as shall be determined by the arbitrators. Whitney v. National Masonic Acc. Assn., 52 Minn. 378, 54 N. W. 184. (2) "If the constitution or agreement provides for the determination only of some particular fact or facts, or of a question where no obligation to pay a fixed sum is expressed in the contract, or where no particular thing is to be done, but only such sum is to be paid, or such thing is to be done, as may be determined by the arbitrators, then, in such and like cases, the provision or agreement to submit is binding, in the absence of fraud. The case at bar must be distinguished from these classes of cases, however, for here the sum to be paid is definite; and the constitution, which provides, in general terms, that all claims and rights of members and beneficiaries shall be submitted to the board of arbitration of its own creation and that its decision shall be final and conclusive, is legally ineffectual to bar this action. The rule of law is well settled that in such a case an agreement to arbitrate does not preclude the parties to it from resorting to their legal remedies. Nor is a submission to arbitration, under such an agreement, a condition precedent to the bringing of an action." Daniher v. Grand Lodge, A. O. U. W., 10 Utah 110, 122, 37 Pac. 245.

45. Baltimore & O. R. Co. v. Stankard, 56 Ohio St. 224, 46 N. E. 577, 60 Am. St. Rep. 745, 49 L. R. A. 381. See also Whitney v. National Masonic Acc. Assn., 52 Minn. 378, 54 N. W. 184; Daniher v. Grand Lodge A. O. U. W., 10 Utah 110, 122, 37 Pac. 245.

46. Grimbly v. Harrold, 125 Cal. 24, 57 Pac. 558, 73 Am. St. Rep. 19; Kumle v. Grand Lodge A. O. U. W., 110 Cal.

e. *Action for Injunction Against Assessments.*—The method of raising funds to carry out its benevolent purposes is a matter of policy, and an injunction suit against the collection of an assessment will not lie until exhaustion of remedies provided by the order.<sup>47</sup>

f. *Exceptions to Rules Requiring Exhaustion of Remedy in Association.*—There are exceptions to the rule requiring the exhaustion of remedies in benefit associations.<sup>48</sup> Thus although the rule may be applicable to a particular case, the courts may be resorted to in the first instance where no right of appeal or remedy is provided for a particular case,<sup>49</sup> or when the rules are unreasonable, or in violation of the law,<sup>50</sup> or when the remedy by appeal is inadequate,<sup>51</sup> or where the right of appeal exists only as a matter of favor,<sup>52</sup> or where the conduct of the society is such as to excuse the exhaustion of the remedies afforded therein.<sup>53</sup> So also when the full penalty for resorting to the courts, under the rules of the order, that of expulsion, has been paid, the exhaustion of the remedies provided is not a prerequisite to the action.<sup>54</sup>

C. NOTICE.<sup>55</sup>—As a general rule in the absence of statute or con-

204, 42 Pac. 634; *Strasser v. Staats*, 59 Hun 143, 13 N. Y. Supp. 167.

47. *Reno Lodge v. Grand Lodge*, 54 Kan. 73, 37 Pac. 1003, 26 L. R. A. 98.

48. See *infra*, this section.

[a] *Submission of claim to committee established to try offenses against members*, is not required where no offense is charged against the claimant, as where his right to benefits is denied solely by virtue of a void by-law. *Lofthus v. Division No. 7, A. O. H. (N. J. L.)*, 60 Atl. 1119.

49. *Ia.*—*Bryam v. Sovereign Camp*, 108 Iowa 430, 79 N. W. 144, 75 Am. St. Rep. 265. *Mass.*—*Horgan v. Metropolitan Mut. Aid Assn.*, 202 Mass. 524, 88 N. E. 890. *Mich.*—*Golden Star Lodge No. 1 v. Watterson*, 158 Mich. 696, 123 N. W. 610, 133 Am. St. Rep. 404. *N. J.* *Roxbury Lodge v. Hocking*, 60 N. J. L. 439, 38 Atl. 693, 64 Am. St. Rep. 596. *N. Y.*—*People ex rel. Weiss v. Philip Bernstein S. & B. Soc.*, 161 App. Div. 823, 146 N. Y. Supp. 886; *Gray v. Chapter-General of A. K. of S. J.*, 70 App. Div. 155, 75 N. Y. Supp. 267.

50. *Cal.*—*Schou v. Sotoyome Tribe*, 140 Cal. 254, 73 Pac. 996. *Minn.*—*Lindahl v. Supreme Court*, 100 Minn. 87, 110 N. W. 358, 117 Am. St. Rep. 666, 8 L. R. A. (N. S.) 916. *Mo.*—*Kane v. Supreme Tent*, 113 Mo. App. 104, 87 S. W. 547.

51. *Ky.*—*Schmidt v. Abraham Lincoln Lodge*, 84 Ky. 490, 2 S. W. 156. *Mo.*—*State ex rel. Schrempf v. Grand Lodge*, 70 Mo. App. 456. *N. Y.*—*Brown v. Supreme Court of Order of Foresters*,

176 N. Y. 132, 68 N. E. 145. *Pa.*—*Weiss v. Musical Mut. Protective Union*, 189 Pa. 446, 42 Atl. 118, 69 Am. St. Rep. 820.

[a] *Where no session of the appellate court of the society could be held for two years.* *Lindahl v. Supreme Court*, 100 Minn. 87, 110 N. W. 358, 117 Am. St. Rep. 666, 8 L. R. A. N. S. 916; *Brown v. Supreme Court I. O. F.*, 34 Misc. 556, 70 N. Y. Supp. 397.

52. *Supreme Lodge v. Dey*, 58 Kan. 283, 49 Pac. 74; *Holomany v. National Slav. Soc.*, 39 App. Div. 573, 57 N. Y. Supp. 720.

53. *Cal.*—*Schou v. Sotoyome Tribe*, 140 Cal. 254, 73 Pac. 996. *Mo.*—*State ex rel. Schrempf v. Grand Lodge*, 70 Mo. App. 456. *Wis.*—*Wuerfler v. Trustees*, 116 Wis. 19, 92 N. W. 433, 96 Am. St. Rep. 940.

[a] *Where the Order Fails To Comply With Its Own Laws.*—*Schou v. Sotoyome Tribe*, 140 Cal. 254, 73 Pac. 996.

[b] *Where the tribunal has prejudged the matter in issue.* *Correia v. Portuguese Fraternity*, 218 Mass. 305, 105 N. E. 977.

[c] *Where the Society Denies Liability.*—*Supreme Lodge Order of M. P. v. Meister*, 204 Ill. 527, 68 N. E. 454.

[d] *When the Society Refuses To Hear the Claim on the Merits.*—*Berlin v. Eureka Lodge*, 132 Cal. 294, 64 Pac. 254.

54. *Ramell v. Duffy*, 82 App. Div. 496, 81 N. Y. Supp. 600.

55. *Notice of intention to bring*

tract requiring it, notice, unless excused,<sup>56</sup> is a condition precedent to an action only when the matter is to be considered more properly in the knowledge of the plaintiff than of the defendant.<sup>57</sup> But it is otherwise if both parties have the same means of information.<sup>58</sup> Therefore if the defendant's obligation depends upon the performance of an act to or by a stranger, notice is not ordinarily required.<sup>59</sup> Likewise notice of injury is not a condition precedent<sup>60</sup> to an action for damages for

foreclosure suit, see 19 STANDARD PROC. 919.

Notice to officers, see 20 STANDARD PROC. 748.

Notice in forcible entry and detainer suits, see 8 STANDARD PROC. 1093.

Notice to indemnitor to defend prior suit unnecessary, 12 STANDARD PROC. 26

*Lis pendens* and notice of suit, see the title, "*Lis Pendens*."

Notice to abate a nuisance, see 20 STANDARD PROC. 675.

Notice of adoption proceedings, see 20 STANDARD PROC. 859.

56. **Mass.**—*Blakely v. Grant*, 6 Mass. 386. **N. Y.**—*Schultz v. Depuy*, 3 Abb. Pr. 252. **Tenn.**—*Harlan v. Dew*, 3 Head 505.

57. **U. S.**—*Slacum v. Pomeroy*, 6 Cranch 221, 3 L. ed. 204. **Ala.**—*Carlisle v. Cahawba & M. R. Co.*, 4 Ala. 70, citing 1 Chit. Pl. 360. **Cal.**—*People v. Edwards*, 9 Cal. 286. **Conn.**—*Jones v. Hoyt*, 25 Conn. 374. **Ill.**—*Chase v. Sycamore & C. R. Co.*, 38 Ill. 215. **Ky.** *Peck v. McMurty*, 2 A. K. Marsh. 358. **Mass.**—*Lent v. Padelford*, 10 Mass. 230, 238, 6 Am. Dec. 119; *Farwell v. Smith*, 12 Pick. 83. **N. H.**—*Whitton v. Whitton*, 38 N. H. 127, 137, 75 Am. Dec. 163; *Watson v. Walker*, 23 N. H. 471. **N. Y.**—*Cole v. Jessup*, 2 Barb. 309. **Ohio.**—*Bush v. Critchfield*, 4 Ohio 103. **Tex.**—*Cooper v. Loughlin*, 75 Tex. 524, 13 S. W. 37. **Vt.**—*Lamphere v. Cowen*, 42 Vt. 175. **Wis.**—*Susenguth v. Rautoul*, 48 Wis. 334, 4 N. W. 328.

Necessity for alleging, see 20 STANDARD PROC. 663, and *infra* II, G.

[a] **Rule Applies to Equity and Law.**—*Farwell v. Smith*, 12 Pick. (Mass.) 83.

[b] The rule implies that the defendant is without means of readily informing himself other than from the plaintiff. *Lamphere v. Cowen*, 42 Vt. 175. To the same effect, see *Whitton v. Whitton*, 38 N. H. 127, 137, 75 Am. Dec. 163.

[c] "The law implies that the part-

ies must have agreed or intended that notice should be given by the party entitled to the benefit of a condition, of every fact necessary for the other party to know, to enable him to perform the condition, and of every material circumstance connected with it, which is within his peculiar and personal knowledge, or which depends on his choice, so that the other party has no means, or no reasonable means, to arrive at that knowledge except from the party himself." *Whitton v. Whitton*, 38 N. H. 127, 137, 75 Am. Dec. 163.

58. See cases in next preceding note.

59. **Conn.**—*Ward v. Henry*, 5 Conn. 595, 13 Am. Dec. 119. **N. H.**—*Whitton v. Whitton*, 38 N. H. 127, 137, 75 Am. Dec. 163. **Ohio.**—*Bush v. Critchfield*, 4 Ohio 103.

[a] **Rule Stated.**—"Where the performance of the condition depends on anything to be done by the party entitled to the performance, to or with any third person, who is distinctly named or designated, or by any such third person to or with him" notice need not be given. *Whitton v. Whitton*, 38 N. H. 127, 137, 75 Am. Dec. 163.

[b] **In an action against an indorser of a note**, notice of nonpayment by the maker need not be given. *Wilder v. De Wolf*, 24 Ill. 190. Demand on indorser, see *infra*, II, D, 2.

60. **U. S.**—*Denver & R. G. R. Co. v. Norgate*, 141 Fed. 247, 72 C. C. A. 365, 6 L. R. A. N. S. 981. **Ala.**—*Birmingham Ry. & Elec. Co. v. Wildman*, 119 Ala. 547, 24 So. 548. **Ill.**—*Chicago, R. I. & P. Ry. Co. v. Steckman*, 125 Ill. App. 299. **Ind.**—*Ohio & M. Ry. Co. v. Hemberger*, 43 Ind. 462, 466. **Kan.** *St. Louis & S. F. Ry. Co. v. Little*, 75 Kan. 716, 90 Pac. 447. **Mass.**—*Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667. **Minn.**—*Pesek v. New Prague*, 97 Minn. 171, 106 N. W. 365. **W. Va.**—See *Chancey v. Roane Co. Ct.*, 51 W. Va. 252, 41 S. E. 156.



injury to person or property, unless statute so provides.<sup>61</sup> The giving of notice is sometimes required as a condition precedent to the action, by the contract sued upon,<sup>62</sup> or by statute.<sup>63</sup> When so required, notice must be given<sup>64</sup> if the case is within the scope of the contract or statutory requirement,<sup>65</sup> unless the provision is waived,<sup>66</sup> or is so unreasonable or uncertain as to be void,<sup>67</sup> or is otherwise dispensed with.<sup>68</sup> A distinction exists between those cases in which the giving of notice is a condition upon the right to damages as well as the remedy, and those in which it is a condition upon the remedy alone.<sup>69</sup> Sometimes

61. See *Malloy v. Chicago & N. W. Ry. Co.*, 109 Wis. 29, 85 N. W. 130; *Meisenheimer v. Kellogg*, 106 Wis. 30, 81 N. W. 1033, and *infra*, this section.

62. Ill.—*Baxter v. Louisville N. A. & C. Ry. Co.*, 165 Ill. 78, 80, 45 N. E. 1003; *Coles v. Louisville E. & St. L. R. Co.*, 41 Ill. App. 607, 612. N. H. *Watson v. Walker*, 23 N. H. 471. Vt. *Tarbell v. Tarbell*, 60 Vt. 486, 15 Atl. 104.

**Proof of loss made to freight carriers**, see 10 STANDARD PROC. 225.

**Notice and proof of loss to insurance company**, see 14 STANDARD PROC. 44, 51.

63. See the statutes and the following: U. S.—*Denver & R. G. R. Co. v. Wagner*, 167 Fed. 75, 92 C. C. A. 527. Ia.—*Sachs v. Sioux City*, 109 Iowa 224, 80 N. W. 336. Kan.—*Swisher v. Atchison Topeka & S. F. R. Co.*, 76 Kan. 97, 90 Pac. 812. N. Y.—*Crapo v. Syracuse*, 183 N. Y. 395, 76 N. E. 465. Tex.—*El Paso & N. E. R. Co. v. Gutierrez* (Tex. Civ. App.), 111 S. W. 159, New Mexico statute. Wis.—*Hupfer v. National Distilling Co.*, 119 Wis. 417, 96 N. W. 809; *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475.

**Notice to employer of injury**, see 18 STANDARD PROC. 461.

**Notice to passenger carriers**, see the title "Passengers."

**Notice to municipalities**, see 20 STANDARD PROC. 95, and 115; 11 STANDARD PROC. 199, 274.

**Notice of injuries received by reason of a defective highway**, see 11 STANDARD PROC. 199 and 274.

**Under statute relating to death by wrongful act**, see 6 STANDARD PROC. 409.

64. See cases in two preceding notes. [a] **Action as Notice**.—But where a statute provides that no action for an injury shall be commenced unless notice is given within six months and the action is commenced within one year, a complaint filed within three months

serves every purpose of the notice and dispenses with it. *Welsh v. Barber Asphalt Pav. Co.*, 167 Fed. 465, 93 C. C. A. 101, action under employer's liability act.

65. *Missouri Pac. Ry. Co. v. Larussi*, 161 Fed. 66, 88 C. C. A. 230, holding the statute does not apply to actions by the administrator.

66. U. S.—*Welch v. Barber Asphalt Pav. Co.*, 167 Fed. 465, 93 C. C. A. 101. Ill.—*Louisville & N. R. Co. v. Cunningham*, 88 Ill. App. 289, 294; *Chicago & A. R. Co. v. Grimes*, 71 Ill. App. 397, 403. N. Y.—*Wolven v. Gabler*, 132 App. Div. 45, 116 N. Y. Supp. 359. Ore. *Long Creek Bldg. Assn. v. State Ins. Co.*, 29 Ore. 569, 46 Pac. 366. Wis. *Guile v. La Crosse Gas & Elec. Co.*, 145 Wis. 157, 130 N. W. 234.

See 19 STANDARD PROC. 462, note 58.

**Town cannot waive notice**, see 11 STANDARD PROC. 200, 275; 20 STANDARD PROC. 97.

67. *Baxter v. Louisville N. A. & C. Ry. Co.*, 165 Ill. 78, 45 N. E. 1003; *Kane v. Supreme Tent*, 113 Mo. App. 104, 87 S. W. 547.

68. Where presentation of claim to municipality would be useless, see 20 STANDARD PROC. 94.

**By denial of liability by insurance company**, see 14 STANDARD PROC. 52.

**Knowledge of claim by municipal officers** does not dispense with notice, see 11 STANDARD PROC. 200 (note 95), 275; 20 STANDARD PROC. 94.

69. Mass.—*Baird v. Baptist Society*, 208 Mass. 29, 94 N. E. 296. Vt.—*Kent v. Lincoln*, 32 Vt. 591. Wis.—*Relyea v. Tomahawk Paper & Pulp Co.*, 102 Wis. 301, 78 N. W. 412, 72 Am. St. Rep. 878.

See 6 STANDARD PROC. 409; 11 STANDARD PROC. 200.

[a] **Distinction Between Statutory and Common Law Causes of Action**. (1) "A notice required to be given be-

the statutory notice is not a prerequisite, but is in the nature of a statute of limitations.<sup>70</sup>

D. DEMAND AND REFUSAL. — 1. Generally.<sup>71</sup> — A demand is sometimes required by statute,<sup>72</sup> or contract of the parties.<sup>73</sup>

In the absence of such express requirement, a demand is a condition precedent to an action when a demand is an integral part of the cause of action,<sup>74</sup> or when the duty to pay or do some act does not arise until after a demand,<sup>75</sup> unless the demand is excused for some

fore the commencement of a purely statutory action (such as an action against a city for injuries resulting from a defective highway) is necessarily a condition precedent to the cause of action, because, the entire right of action being given by statute, it only comes into existence when the required notice has been given, but . . . a notice required to be given by statute prior to the commencement of an action to enforce a common-law right . . . is necessarily a statute in the nature of a statute of limitations, because the right exists without the aid of any statute." *Meisenheimer v. Kellogg*, 106 Wis. 30, 81 N. W. 1033; *Relyea v. Tomahawk Paper & Pulp Co.*, 102 Wis. 301, 78 N. W. 412, 72 Am. St. Rep. 878, followed in *Malloy v. Chicago & N. W. Ry. Co.*, 109 Wis. 29, 85 N. W. 130. (2) Where the legislature which gives a right of action declares it can be exercised only on condition that within 90 days after the cause of action arose, the plaintiff should give notice, this is a condition precedent to the right of action, the nonperformance of which takes away the cause of action. *Denver & R. G. R. Co. v. Wagner*, 167 Fed. 75, 84, 92 C. C. A. 527.

[b] On failing to allege notice of injury to the city, the declaration states no cause of action. Notice is not a matter of procedure to enforce the right, but an act essential to perfect the claim. *Walters v. Ottawa*, 240 Ill. 259, 267, 88 N. E. 651.

70. *Spinello v. New York*, N. H. & H. R. Co., 183 Fed. 762, 106 C. C. A. 189; *Bulkley v. Norwich & W. Ry. Co.*, 81 Conn. 284, 70 Atl. 1021, 129 Am. St. Rep. 212. And see 6 STANDARD PROC. 409.

71. Before proceedings to compel attorney to pay over money wrongfully withheld, see 18 STANDARD PROC. 855.

Demand before a mandamus proceeding, see 19 STANDARD PROC. 170.

As against a freight carrier, no de-

mand is necessary generally. See 10 STANDARD PROC. 225.

Demand upon corporation to sue before stockholder's suit brought, see 5 STANDARD PROC. 705.

Demand Before Forcible Entry and Detainer Suit.—See 8 STANDARD PROC. 1093.

Demand for release or satisfaction of a mortgage, see 19 STANDARD PROC. 876.

Presentation of claims against a decedent's estate before action thereon, see 6 STANDARD PROC. 527; 19 STANDARD PROC. 896, and 955.

Demand and refusal in actions by and against assignees for benefit of creditors, see 3 STANDARD PROC. 75 and 79.

72. See the statutes.

73. See *Colby v. Reed*, 99 U. S. 560, 25 L. ed. 484.

74. *Danielson v. Neal*, 164 Cal. 748, 130 Pac. 716; *Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836.

75. Cal.—*Danielson v. Neal*, 164 Cal. 748, 130 Pac. 716; *Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836. Me.—*Bicknell v. Hill*, 33 Me. 297. Mass.—*Heard v. Lodge*, 20 Pick. 53, 61, 32 Am. Dec. 197. Mont.—*Cassidy v. Slemmons*, 41 Mont. 426, 109 Pac. 976. N. H.—*Whitton v. Whitton*, 38 N. H. 127, 139, 75 Am. Dec. 163. N. Y.—*First Nat. Bank v. Story*, 200 N. Y. 346, 355, 93 N. E. 940, 34 L. R. A. (N. S.) 154; *Delaware Trust Co. v. Calm*, 195 N. Y. 231, 88 N. E. 53. S. C.—*West v. Murph*, 3 Hill 284, 285.

[a] "Wherever a right arises or is dependent upon demand; in other words, when the demand is an integral part of the cause of action, it must be made before action brought." *Danielson v. Neal*, 164 Cal. 748, 130 Pac. 716.

[b] The purpose of the rule requiring a demand is to enable the party to discharge his obligation without incurring the expense of a law suit. *Thompson v. Whitney*, 20 Utah 1, 57 Pac. 429.

[c] Where the manner or time of the performance depends on the pleas-

reason.<sup>76</sup> But when there is either a precedent debt or duty,<sup>77</sup> or a present unconditional duty to do the act,<sup>78</sup> a special demand is not necessary. A previous demand is also held to be unnecessary where the duty is strictly of a public nature.<sup>79</sup>

**Suit as Demand.**—A suit is sometimes held to be a sufficient demand.<sup>80</sup> But this is not true when a special demand is necessary.<sup>81</sup>

**By Party Forced to Defend.**—It has been held that where one is forced into court as a defendant, a demand on his part with respect to the matter in suit, which would have been necessary had he been the moving party, may be excused.<sup>82</sup>

**Necessity of Refusal.**—When a demand is required, there must be a refusal to comply with the demand,<sup>83</sup> or conduct tantamount thereto.<sup>84</sup>

**2. In Actions for Money Due Upon Contract.**—A previous demand is not necessary to an action against a debtor upon a contract to pay his own debt. The action is a sufficient demand.<sup>85</sup> But where

ure of the party, a request is essential. *Whitton v. Whitton*, 38 N. H. 127, 139, 75 Am. Dec. 163.

76. See *infra*, II, D, 7.

77. *Cal.*—*Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836. *Conn.*—*Manning v. Chesky*, 90 Conn. 647, 98 Atl. 357; *Thresher v. Stonington Sav. Bank*, 68 Conn. 201, 36 Atl. 38. *Ind.*—*Ferguson v. Dunn's Admr.*, 28 Ind. 58. *Mo.*—*Landis v. Saxton*, 105 Mo. 486, 16 S. W. 912, 24 Am. St. Rep. 403. *N. H.*—*Hayes v. Morrison*, 38 N. H. 90, 98. *S. C.*—*West v. Murph*, 3 Hill 284, 285.

See *infra*, II, D, 2.

78. *Danielson v. Neal*, 164 Cal. 748, 130 Pac. 716; *Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836; *Moore v. State*, 55 Ind. 360.

79. *Chumasero v. Potts*, 2 Mont. 242. See 19 STANDARD PROC. 170.

[a] **In case of a public duty**, strictly of a public nature, not affecting individual interests, where no one is especially empowered to demand performance, no demand and refusal is required. *Chumasero v. Potts*, 2 Mont. 242, 255.

[b] **The law is a sufficient demand** and an omission to perform is a refusal. *Chumasero v. Potts*, 2 Mont. 242, 255.

80. *Ill.*—*Florsheim v. Palmer*, 99 Ill. App. 559. *Ind.*—*Bertha v. Sparks*, 19 Ind. App. 431, 49 N. E. 831. *N. Y.*—*Locklin v. Moore*, 57 N. Y. 360. *Wash.*—*Hopkins v. International Lumber Co.*, 33 Wash. 181, 73 Pac. 1113.

See *infra*, this section.

81. *Pope v. Hays*, 1 Mo. 450.

82. *Harshman v. Mitchell*, 117 Ind.

312, 20 N. E. 228; *Stix v. Sadler*, 109 Ind. 254, 9 N. E. 905.

83. *Cal.*—*Shirley v. Cottonwood School Dist.*, 96 Cal. xviii, 31 Pac. 365. *Conn.*—*Bridgeport Bank v. New York & N. H. R. R. Co.*, 30 Conn. 231, 272. *Kan.*—*State v. Dolley*, 83 Kan. 80, 109 Pac. 992. *Mo.*—*Ward v. Moffett*, 38 Mo. App. 395. *N. H.*—*Whittier v. Whittier*, 31 N. H. 452, 465.

**Refusal of corporation to sue** before stockholder's suit brought, see STANDARD PROC. 705.

84. *Lake Erie & W. R. Co. v. State*, 139 Ind. 158, 38 N. E. 596; *Lindabury v. Ocean*, 47 N. J. L. 417, 1 Atl. 701.

[a] **Silence is equivalent to a refusal.** *Higgins v. Emmons*, 5 Conn. 76, 13 Ann. Dec. 41; *Kyle v. Hoyle*, 6 Mo. 526.

85. *Ill.*—*Welsh Bros. v. Harvey*, 128 Ill. App. 329. *Ind.*—*Bertha v. Sparks*, 19 Ind. App. 431, 49 N. E. 831. *Mo.*—*Beekman Lumber Co. v. Acme Harvester Co.*, 215 Mo. 221, 114 S. W. 1087. *N. H.*—*Watson v. Walker*, 23 N. H. 471. *N. Y.*—*First Nat. Bank v. Story*, 200 N. Y. 346, 93 N. E. 940, 34 L. R. A. (N. S.) 154; *In re Brown's Estate*, 77 Misc. 507, 137 N. Y. Supp. 978. See *Delaware Trust Co. v. Calm*, 195 N. Y. 234, 88 N. E. 53. *Tex.*—*Bal-  
lew v. Casey*, 60 Tex. 573.

**As a prerequisite to an action for money had and received**, no demand is required. 19 STANDARD PROC. 843.

**Action on injunction bond**, see 13 STANDARD PROC. 331.

**Action on officer's bonds**, see 20 STANDARD PROC. 750.

**No demand on indemnitor in con-**



the party's promise to pay on request is not to pay his own debt but is a collateral promise to pay the debt of another, a demand is necessary.<sup>86</sup> Thus in actions upon commercial paper brought against the maker or acceptor, a demand is not required,<sup>87</sup> even where the note is payable on demand.<sup>88</sup> But presentment to the maker, accompanied with a demand for payment is an essential condition precedent to fix the liability of an indorser.<sup>89</sup>

tract of indemnity is essential, see 12 STANDARD PROC. 26.

**Demand of payment of mortgage, see 19 STANDARD PROC. 919.**

[a] **When a party agrees to pay his own debt on request, it is regarded as an undertaking to pay generally, and no special request need be alleged.** *Nelson v. Bostwick*, 5 Hill (N. Y.) 37, 40 Am. Dec. 310, *quot.* in *First Nat. Bank v. Story*, 200 N. Y. 346, 350, 93 N. E. 940, 34 L. R. A. (N. S.) 154.

86. *First Nat. Bank v. Story*, 200 N. Y. 346, 93 N. E. 940, 34 L. R. A. (N. S.) 154; *Nelson v. Bostwick*, 5 Hill 37, 40 Am. Dec. 310; *Devenly v. Welbore*, Cro. Eliz. 85, 78 Eng. Reprint 344; *Case of an Hostler*, Yelv. 66, 80 Eng. Reprint 46; *Harwood v. Turberville*, 6 Mod. 200, 87 Eng. Reprint 955.

[a] **Where the appellant is a surety, a demand on the principal is a part of the contract and is a condition precedent.** *Pennsylvania Coal Co. v. Blake*, 85 N. Y. 226, 235.

87. **Ala.**—*Long v. Gwin*, 188 Ala. 196, 66 So. 88. **Cal.**—*Montgomery v. Tutt*, 11 Cal. 307. **Ga.**—*Farmers' Bank v. Johnson*, 134 Ga. 486, 68 S. E. 85, 137 Am. St. Rep. 242, 30 L. R. A. N. S. 697. **N. Y.**—*Toden v. Sharp*, 4 Johns. 183; *Beall v. Russell*, 76 Misc. 244, 134 N. Y. Supp. 633. **Eng.**—*Giles v. Hartis*, 1 Ld. Raym. 254, 91 Eng. Reprint 1066.

[a] **Even though the note is payable at a particular place on a day certain, the time and place are merely model, forming no essential part of the contract, and a demand is not a condition precedent to an action against the maker or acceptor.** **Cal.**—*Montgomery v. Tutt*, 11 Cal. 307. **Fla.**—*Greeley v. Whitehead*, 35 Fla. 523, 17 So. 643, 48 Am. St. Rep. 258, 28 L. R. A. 286. **Mass.**—*Farmers' Nat. Bank v. Venner*, 192 Mass. 531, 78 N. E. 540, 7 Ann. Cas. 690; *Carley v. Vance*, 17 Mass. 389; *Ruggles v. Patten*, 8 Mass. 480. **N. Y.**—*Locklin v. Moore*, 57 N. Y. 360; *Caldwell v. Cassidy*, 8 Cow. 271; *Green v. Goings*, 7 Barb. 652. **Tenn.**—*Bing-*

*hampton Pharmacy v. First Nat. Bank*, 131 Tenn. 711, 718, 176 S. W. 1038.

[b] **The failure to make a demand can only be set up in bar of damages and costs.** *Greeley v. Whitehead*, 35 Fla. 523, 17 So. 643, 48 Am. St. Rep. 258, 28 L. R. A. 786; *Locklin v. Moore*, 57 N. Y. 360.

[c] **A note payable in services at a particular time may be sued on without a previous demand.** *Johnson v. Seymour*, 19 Ind. 24.

[d] **But when the promisor's undertaking is to pay if a certain thing happens, neither the amount to be paid, nor the time when payment, if ever, will be due, being known, and the happening of the event upon which payment depends lies peculiarly in the knowledge of the obligee, demand of payment is necessary before the bringing of suit.** *Florsheim v. Palmer*, 99 Ill. App. 559.

88. **Ill.**—*Knecht v. Boshold*, 138 Ill. App. 430; *Florsheim v. Palmer*, 99 Ill. App. 559, the suit is a demand. **Ky.**—*Reidbaugh v. Grover*, 2 Ky. L. Rep. 223. **Mass.**—*Farmers' Nat. Bank v. Venner*, 192 Mass. 531, 78 N. E. 540, 7 Ann. Cas. 690. **N. Y.**—*Church v. Stevens*, 56 Misc. 572, 107 N. Y. Supp. 310.

See 4 STANDARD PROC. 224.

**Otherwise if the note is payable after demand, see 4 STANDARD PROC. 528.**

[a] **But an action on a note payable in "legal services on demand," cannot be made without proof of demand.** *Hoskell v. Mathews*, 37 Me. 541.

89. **Ark.**—*Jones v. Robinson*, 11 Ark. 504, 54 Am. Dec. 212. **Cal.**—*Merchants' Nat. Bank v. Bentel*, 166 Cal. 473, 137 Pac. 25. **Colo.**—*Sykes v. Kruse*, 49 Colo. 560, 113 Pac. 1013. **Fla.**—*Baumeister v. Kuntz*, 53 Fla. 340, 42 So. 886. **Mass.**—*Bennett v. Tremont Securities Co.*, 221 Mass. 218, 108 N. E. 891.

And see 4 STANDARD PROC. 224.

[a] **Whether the paper is endorsed before or after maturity, a demand and notice is required.** *Jones v. Robinson*, 11 Ark. 504, 54 Am. Dec. 212.

**3. In Trover, Replevin, Detinue.**—In actions of trover, replevin, detinue or their statutory equivalent, a demand is a necessary prerequisite to the action only when there has been no unlawful withholding or use of the property until a demand is refused.<sup>90</sup> Where there has been a conversion independent of any demand,<sup>91</sup> as when the original taking or receipt of the property is wrongful, or tortious,<sup>92</sup> or when the property though lawfully received is misapplied or disposed of, or is actively converted,<sup>93</sup> or is not accounted for,<sup>94</sup> a demand is not required.

**90. Ark.**—*Person v. Wright*, 35 Ark. 169. **Cal.**—*Burke v. Maguire*, 154 Cal. 456, 98 Pac. 21; *Wood v. McDonald*, 66 Cal. 546, 6 Pac. 452; *Paige v. O'Neal*, 12 Cal. 483. **Colo.**—*Klug v. Munce*, 40 Colo. 276, 90 Pac. 603; *Salida B. & L. Assn. v. Davis*, 16 Colo. App. 294, 64 Pac. 1046; *Moynahan v. Prentiss*, 10 Colo. App. 295, 51 Pac. 94. **Ga.**—*Shore v. Brown*, 19 Ga. App. 476, 91 S. E. 909. **Ill.**—*Doherty v. Grand Trunk Western Ry. Co.*, 194 Ill. App. 354. **Ind.**—*Haffner v. Barnard*, 123 Ind. 429, 24 N. E. 152. **Minn.**—*Guthrie v. Olson*, 44 Minn. 404, 46 N. W. 853; *Glencoe v. McLeod*, 40 Minn. 44, 41 N. W. 239. **N. H.**—*Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 508. **N. Y.**—*Hall v. Robinson*, 2 N. Y. 293; *Onondaga Nation v. Thacher*, 29 Misc. 428, 61 N. Y. Supp. 1027. **N. C.**—*Finch v. Clarke*, 61 N. C. 335. **Wis.**—*George v. McGovern*, 83 Wis. 555, 53 N. W. 899, 35 Am. St. Rep. 77.

[a] The purpose of the demand is to show a conversion of the property, or an unlawful holding thereof. *Whitman G. & S. Min. Co. v. Tritle*, 4 Nev. 494.

[b] Where a judgment which has been paid is afterwards reversed, a demand before suit is required. *Scholey v. Halsey*, 72 N. Y. 578.

[c] **Demand Excused.**—Where in his answer the defendant claims a right to the property in himself and demands its return, a demand is not required. *Guthrie v. Olson*, 44 Minn. 404, 46 N. W. 853.

**91. Cal.**—*Wood v. McDonald*, 66 Cal. 546, 6 Pac. 452. **Colo.**—*Salida B. & L. Assn. v. Davis*, 16 Colo. App. 294, 64 Pac. 1046. **Fla.**—*Louisville & N. R. R. Co. v. Citizens & People's Nat. Bank*, 77 So. 104, L. R. A. 1918C, 610. **Ind.**—*Deeters v. Sellers*, 102 Ind. 458, 1 N. E. 854. **Mich.**—*Baxter v. Woodward*, 191 Mich. 379, 158 N. W. 137, Ann. Cas. 1918C, 946. **Mo.**—*White Sewing-Mach.*

*Co. v. Betting*, 46 Mo. App. 417. **Nev.**—*Whitman G. & S. Min. Co. v. Tritle*, 4 Nev. 494. **N. H.**—*Jones v. Stone*, 102 Atl. 377. **Okla.**—*Bank of Commerce v. Gaskill*, 44 Okla. 728, 145 Pac. 1131.

[a] If the defendant had converted the property before the demand, he is liable. *Wood v. McDonald*, 66 Cal. 546, 6 Pac. 452.

**92. Ark.**—*Person v. Wright*, 35 Ark. 169. **Cal.**—*Paige v. O'Neal*, 12 Cal. 483. **Fla.**—*Evans v. Kloeppel*, 72 Fla. 267, 73 So. 180. **Ill.**—*Greenberg v. Stevens*, 212 Ill. 606, 72 N. E. 722; *Adams v. Wallace*, 122 Ill. App. 550. **Ind.**—*Deeters v. Sellers*, 102 Ind. 458, 1 N. E. 854. **Minn.**—*Guthrie v. Olson*, 44 Minn. 404, 46 N. W. 853; *Glencoe v. McLeod*, 40 Minn. 44, 41 N. W. 239. **Mo.**—*White Sewing-Mach. Co. v. Betting*, 46 Mo. App. 417. **Nev.**—*Whitman G. & S. Min. Co. v. Tritle*, 4 Nev. 494. **N. H.**—*Hyde v. Noble*, 13 N. H. 494, 38 Am. Dec. 508. **N. Y.**—*Marshall v. De Cordova*, 26 App. Div. 615, 50 N. Y. Supp. 294. **Okla.**—*Sale v. Shipp*, 160 Pac. 502; *Bank of Commerce v. Gaskill*, 44 Okla. 728, 145 Pac. 1131. **Utah.**—*Woodward v. Edmunds*, 20 Utah 118, 57 Pac. 848.

**93. Ala.**—*Haas v. Taylor*, 80 Ala. 459, 466, 2 So. 633. **Cal.**—*Allsopp v. Joshua Hendy Mach. Wks.*, 5 Cal. App. 228, 90 Pac. 39. **Minn.**—*Guthrie v. Olson*, 44 Minn. 404, 46 N. W. 853. **Mo.**—*Milliken v. Larrabee* (Mo. App.), 192 S. W. 103; *Ward v. D. A. Morr Transfer & S. Co.*, 119 Mo. App. 83, 95 S. W. 964. **N. Y.**—*Ranous v. Hughes*, 19 Misc. 46, 42 N. Y. Supp. 519.

[a] In the case of waste or destruction of the property. *Haas v. Taylor*, 80 Ala. 459, 466, 2 So. 633.

[b] Before suing for money received for an express purpose which is not so applied, a demand is not required. *Thresher v. Stonington Sav. Bank*, 68 Conn. 201, 36 Atl. 38.

**94. Cal.**—*Allsopp v. Joshua Hendy*

**Demand Against Subsequent Purchasers or Possessors.**—Many courts hold that a demand is not necessary before action brought against a purchaser of the property from one without title, even where he has purchased in good faith,<sup>95</sup> though some courts hold otherwise.<sup>96</sup> But one who purchases with knowledge and with notice,<sup>97</sup> or who subsequently sells the property or otherwise converts it to his own use,<sup>98</sup> may be sued without a demand.

**Principal and Agent.**—Before a principal can recover money received by his agent in the course of his agency, a demand is generally required.<sup>99</sup>

**4. On Breach of Conditions Subsequent in Deeds.**—The mere breach of a condition subsequent in a conveyance of freehold does not divest the estate.<sup>1</sup> And therefore before an action for recovery of the premises could be brought at common law, the forfeiture must have been consummated by a re-entry.<sup>2</sup> Under the modern practice, an actual re-entry is not required as a general rule,<sup>3</sup> but some equivalent act,<sup>4</sup> such as a demand for the premises or notification that the grantor is

Mach. Wks., 5 Cal. App. 228, 90 Pac. 39. **Ill.**—Bedell *v.* Janney, 9 Ill. 193, 201. **P. R.**—Olivieri *v.* Tomei, 1 Porto Rico Fed. 125.

See the title "Principal and Agent."

**95. Cal.**—Harpending *v.* Meyer, 55 Cal. 555. **Me.**—Rodick *v.* Coburn, 68 Me. 170; Freeman *v.* Underwood, 66 Me. 229, 233; Galvin *v.* Bacon, 11 Me. 28, 25 Am. Dec. 258. **Mass.** Gilmore *v.* Newton, 9 Allen 171, 85 Am. Dec. 749; Stanley *v.* Gaylord, 1 Cush. 536, 48 Am. Dec. 643. **Mich.** Hake *v.* Buell, 50 Mich. 89, 14 N. W. 710; Trudo *v.* Anderson, 10 Mich. 357, 81 Am. Dec. 795. But see Rodgers *v.* Brittain, 39 Mich. 477. **N. H.**—Lovejoy *v.* Jones, 30 N. H. 164; Hyde *v.* Noble, 13 N. H. 494, 38 Am. Dec. 508. **Ore.**—Velsian *v.* Lewis, 15 Ore. 539, 16 Pac. 631, 3 Am. St. Rep. 184.

[a] **The purchase by the defendant from a bailee amounts to a conversion and no demand is required.** Lovejoy *v.* Jones, 30 N. H. 164.

**96. Minn.**—Jumiska *v.* Andrews, 87 Minn. 515, 92 N. W. 470; Plano Mfg. Co. *v.* Northern Pac. Elevator Co., 51 Minn. 167, 53 N. W. 202. **N. Y.**—Stephens *v.* Meriden Britannia Co., 13 App. Div. 268, 43 N. Y. Supp. 226; Rawley *v.* Brown, 18 Hun 456; Barrett *v.* Warren, 3 Hill 348. **N. D.**—Skjerseth *v.* Woodworth Elev. Co., 35 N. D. 295, 160 N. W. 70. **S. C.**—Ladson *v.* Mostowitz, 45 S. C. 388, 23 S. E. 49.

**97. Ill.**—Butters *v.* Haughwout, 42

Ill. 18, 89 Am. Dec. 401; Adams *v.* Wallace, 122 Ill. App. 550. **Ind.**—Kuhns *v.* Gates, 92 Ind. 66. **Okla.**—Bank of Commerce *v.* Gaskill, 44 Okla. 728, 145 Pac. 1131.

**98. Bank of Commerce v. Gaskill,** 44 Okla. 728, 145 Pac. 1131.

**99. Wiley v. Logan,** 95 N. C. 358; Olivieri *v.* Tomei, 1 Porto Rico Fed. 125. See 19 STANDARD PROC. 844.

**1. Bredell v. Kerr,** 242 Mo. 317, 337, 147 S. W. 105; Nicoll *v.* New York & E. R. Co., 12 N. Y. 121. See 18 STANDARD PROC. 701.

**2. Board of Education v. Baker,** 124 Tenn. 39, 134 S. W. 863. See 18 STANDARD PROC. 703, 706, 707; Moore *v.* Sharpe, 91 Ark. 407, 121 S. W. 341, 23 L. R. A. (N. S.) 937, and note; Adkins *v.* Adkins, 171 Ky. 762, 188 S. W. 843.

**3. Cal.**—Firth *v.* Los Angeles Pacific Land Co., 28 Cal. App. 399, 152 Pac. 935. **Ind.**—Lindsey *v.* Lindsey, 45 Ind. 552. **N. C.**—Brittain *v.* Taylor, 168 N. C. 271, 84 S. E. 280.

See 18 STANDARD PROC. 706, 707.

**Contra,** Board of Education *v.* Baker, 124 Tenn. 39, 134 S. E. 863.

**4. Miss.**—Yazoo & M. V. R. R. Co. *v.* Lakeview Traction Co., 100 Miss. 281, 56 So. 393. **Mo.**—Bredell *v.* Kerr, 242 Mo. 317, 337, 147 S. W. 105. **N. C.** Brittain *v.* Taylor, 168 N. C. 271, 84 S. E. 280. **Wis.**—Mash *v.* Bloom, 133 Wis. 646, 114 N. W. 457, 14 L. R. A. (N. S.) 1187.

See 18 STANDARD PROC. 707.



claiming them,<sup>5</sup> is necessary before an action can be brought to recover the premises. By the weight of modern authority the bringing of an action of ejectment,<sup>6</sup> or an action to quiet title and compel a reconveyance,<sup>7</sup> is equivalent to a demand or re-entry.<sup>8</sup> And in some states a right of entry merely is sufficient to sustain the action.<sup>9</sup>

**5. Reformation.**—A demand for correction,<sup>10</sup> unless excused,<sup>11</sup> is held by some courts to be a condition precedent to an action for reformation of a deed. But if in addition to the reformation other relief is sought, a demand is unnecessary.<sup>12</sup>

**6. Specific Performance.**—The necessity for demand as a condition precedent to a suit for specific performance is elsewhere treated.<sup>13</sup>

**7. Demand Excused.**—A sufficient excuse for a failure to make a demand is equivalent to a demand.<sup>14</sup> And if it would be a useless ceremony to make a demand,<sup>15</sup> as where the defendant refuses to perform

**5. Ind.**—*Lindsey v. Lindsey*, 45 Ind. 552. **Ky.**—*Adkins v. Adkins*, 171 Ky. 762, 188 S. W. 843, where the breach works a forfeiture. **N. Y.**—*Nicoll v. New York & E. R. Co.*, 12 N. Y. 121. **Wis.**—*Mash v. Bloom*, 133 Wis. 646, 114 N. W. 457, 14 L. R. A. (N. S.) 1187.

**6. Colo.**—*Fusha v. Dacono T. S. Co.*, 60 Colo. 315, 153 Pac. 226, Ann. Cas. 1917C, 108. **Ill.**—*Hart v. Lake*, 273 Ill. 60, 112 N. E. 286. **Miss.**—*Yazoo & M. V. R. R. Co. v. Lakeview Traction Co.*, 100 Miss. 281, 56 So. 393. **N. J.**—See *Bouvier v. Baltimore & N. Y. R. Co.*, 65 N. J. L. 313, 47 Atl. 772, 67 N. J. L. 281, 51 Atl. 781, 60 L. R. A. 750; *Cornelius v. Den ex dem. Ivins*, 26 N. J. L. 376, 387. **N. C.**—*Brittain v. Taylor*, 168 N. C. 271, 84 S. E. 280. **Okla.**—*Ross v. Sanderson*, 162 Pac. 709, L. R. A. 1917C, 879 note. **Ore.**—*Seeck v. Jakel*, 71 Ore. 35, 141 Pac. 211, L. R. A. 1915A, 679. **Eng.**—*Goodright v. Cator*, 2 Dougl. 477, 485, 99 Eng. Reprint 304.

**7. Firth v. Los Angeles Pac. Land Co.**, 28 Cal. App. 399, 152 Pac. 935.

**8.** See 18 STANDARD PROC. 706, 707. *Bouvier v. Baltimore & N. Y. R. Co.*, 65 N. J. L. 313, 47 Atl. 772, 67 N. J. L. 281, 51 Atl. 781, 60 L. R. A. 750.

**10. Citizens Nat. Bank v. Judy**, 146 Ind. 322, 43 N. E. 259; *Sparta School Township v. Mendell*, 138 Ind. 188, 37 N. E. 604; *Earl v. Van Natta*, 29 Ind. App. 532, 64 N. E. 901. See *Nichols & Shepard Co. v. Berning*, 37 Ind. App. 109, 76 N. E. 776. But see *Danielson v. Neal*, 164 Cal. 748, 130 Pac. 716, a demand is not necessary in California.

**11.** See *infra*, this note and II, D, 7.

[a] If it appears it would not have been complied with, a demand is not necessary. *Jones v. McNealy*, 139 Ala. 378, 35 So. 1022, 101 Am. St. Rep. 38. See *First Nat. Bank v. Bacon*, 113 App. Div. 612, 98 N. Y. Supp. 717, holding a demand unnecessary as the defendant could not comply with it.

**12.** See *infra*, this note.

[a] If a recovery of the land is sought, in addition to reformation, no prior demand is required. *Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259; *Sparta School Tp. v. Mendell*, 138 Ind. 188, 37 N. E. 604; *Earl v. Van Natta*, 29 Ind. App. 532, 545, 64 N. E. 901.

[b] Where the action is to quiet title, no demand for reformation is necessary. *Lucas v. Labertue*, 88 Ind. 277.

**13.** See the title, "Specific Performance."

**14. Wilson v. Monticello**, 85 Ind. 10.

**15. Cal.**—*Wilson v. Bd. of Directors of Veterans' Home*, 138 Cal. 67, 70 Pac. 1059. **Ill.**—*Ward v. Montgomery*, 67 Ill. App. 346. **Ind.**—*Board of Trustees v. State ex rel. Eaton*, 175 Ind. 147, 93 N. E. 851; *Huffman v. Rickets*, 60 Ind. App. 526, 111 N. E. 322. **Mass.**—*Heard v. Lodge*, 20 Pick. 53, 32 Am. Dec. 197. **Pa.**—*Com. ex rel. Hamilton v. Pittsburgh*, 34 Pa. 496. **Wash.**—*Kimball v. Farmers' & Mechanics' Bank*, 50 Wash. 610, 97 Pac. 748; *State v. Byrne*, 32 Wash. 264, 73 Pac. 394; *Burrows v. McCalley*, 17 Wash. 269, 49 Pac. 508.

See 5 STANDARD PROC. 707, stockholder's suit.

[a] Where the Defendant States in

and repudiates the contract,<sup>16</sup> or where he denies his liability,<sup>17</sup> or in his answer or plea shows that a demand would not have been complied with,<sup>18</sup> a demand, although otherwise essential, is excused. So also a demand is excused where it is impossible under the circumstances to make it.<sup>19</sup>

**8. Requisites of Demand.**—The demand must be made by a person entitled to receive a compliance therewith where it contemplates or the circumstances make it proper that compliance may be made or tendered to him.<sup>20</sup> Ordinarily, demand should be made upon the person bound to make the delivery, or comply therewith,<sup>21</sup> but this<sup>22</sup> is not

**Advance He Will Not Deliver.**—Wood v. McDonald, 66 Cal. 546, 6 Pac. 452.

[b] **Where defendant asserts superior title, in replevin.** Cal.—Daggett v. Gray, 110 Cal. 169, 42 Pac. 568. Minn. Plano Mfg. Co. v. Northern Pacific Elevator Co., 51 Minn. 167, 53 N. W. 202. Neb.—Wilcox v. Beitel, 43 Neb. 457, 61 N. W. 722. Wis.—Byrne v. Byrne, 89 Wis. 659, 62 N. W. 413.

[c] **Where the Agent Fled.**—Wilson v. Monticello, 85 Ind. 10.

16. Harshman v. Mitchell, 117 Ind. 312, 20 N. E. 228; Jennings v. Shertz, 45 Ind. App. 120, 88 N. E. 729; Foster v. Leininger, 33 Ind. App. 669, 72 N. E. 164; Heard v. Lodge, 20 Pick. (Mass.) 53, 61, 32 Am. Dec. 197.

17. Ala.—Hammett v. Brown, 60 Ala. 498. Mass.—Heard v. Lodge, 20 Pick. 53, 32 Am. Dec. 197. Mont.—Cassidy v. Slemmons, 41 Mont. 426, 109 Pac. 976. N. Y.—Walradt v. Maynard, 3 Barb. 584. N. C.—McGuire v. Williams, 123 N. C. 349, 31 S. E. 627; Wiley v. Logan, 95 N. C. 358. Pa.—Krause v. Dorrance, 10 Pa. 462, 51 Am. Dec. 496.

18. Guthrie v. Olson, 44 Minn. 404, 46 N. W. 853.

[a] **Where the defendant in his answer denies all liability, it is apparent that a demand would have met with a refusal and proof of a demand is not required.** Thompson v. Whitney, 20 Utah 1, 57 Pac. 429.

19. Jenks v. School Dist., 18 Kan. 356.

20. Owens v. Ballard County Court, 8 Bush (Ky.) 611; Haynes v. Brown, 36 N. H. 545, 564; Phelps v. Gilchrist, 28 N. H. 266, 277.

[a] **An authorized agent may make a demand** Taylor v. Spears, 6 Ark. 381 44 Am. Dec. 519; Phelps v. Gilchrist, 30 N. H. 171.

[b] **A demand by a person with a receipted bill is sufficient.** Nash v.

Union Mut. Ins. Co., 43 Me. 343, 69 Am. Dec. 65.

[c] **But possession of the appliances necessary for the immediate removal of the building demanded is not necessary to a valid demand.** Edmundson v. Bric, 136 Mass. 189.

21. Phelps v. Gilchrist, 28 N. H. 266, 277.

[a] **If the defendants are joint debtors, a demand on one is sufficient to sustain an action against both.** Scholey v. Halsey, 72 N. Y. 578. But see Mitchell v. Williams, 4 Hill (N. Y.) 13.

[b] **A demand on one partner (1) binds all.** Royal Lumb. Co. v. Elsberry, 185 Ala. 462, 64 So. 71; Johnson v. Frix, 177 Ala. 251, 58 So. 427. (2) A refusal by a partner is evidence of a conversion as to both. Mitchell v. Williams, 4 Hill (N. Y.) 13. And see the title, "Partnership."

22. See *infra*, this note.

[a] **A demand of the agent in possession of the property (1) is a demand of the principal.** Deeters v. Sellers, 102 Ind. 458, 1 N. E. 854. (2) While a demand upon and a refusal by the servant of a pawnbroker or common carrier, within the scope of whose employment it is to determine whether a delivery shall be made, may be evidence of a conversion (Amberg v. Philbrick, 33 Ill. App. 200), (3) yet in the case of a pledge, such a refusal by the general agent, but without being directed by his principal, is not. Amberg v. Philbrick, 33 Ill. App. 200. (4) The same is true of an involuntary gratuitous bailee. Amberg v. Philbrick, 33 Ill. App. 200.

[b] **Leaving a demand in writing at debtor's domicile is sufficient.** Hunter v. Spurlock, 3 La. 97, 22 Am. Dec. 165.

always necessary. It must be made at a proper time,<sup>23</sup> and place,<sup>24</sup> and in a proper form,<sup>25</sup> although no particular form of demand is required.<sup>26</sup> The demand must be reasonable.<sup>27</sup> But it need not be in writing<sup>28</sup> unless required by the contract,<sup>29</sup> or by statute.<sup>30</sup>

**Waiver of Objections To Demand.** — A failure to make objections to defects in the demand at the time it is made is a waiver thereof.<sup>31</sup>

**E. LEAVE OF COURT.**<sup>32</sup> — Leave of court is, of course, ordinarily not a prerequisite to the bringing of an action.<sup>33</sup> In some classes of cases, however, either at common law on grounds of policy, or by vir-

23. *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231.

[a] **After Plaintiff's Right Accrued.**—*Haas v. Taylor*, 80 Ala. 459, 466, 2 So. 633.

[b] **The demand must be in a reasonable time** where a party's right to sue depends for its perfection upon a demand to put his adversary in default. *Thomas v. Pacific Beach Co.*, 115 Cal. 136, 46 Pac. 899; *Grotefend v. May*, 33 Cal. App. 321, 165 Pac. 27.

[c] **Within Statute of Limitations.** "If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action." *Codman v. Rogers*, 10 Pick. (Mass.) 112, 119; *Landis v. Saxton*, 105 Mo. 486, 16 S. W. 912, 24 Am. St. Rep. 403.

24. See *infra*, this note.

[a] **Need not be made (1) at place of delivery.** *Higgins v. Emmons*, 5 Conn. 76, 13 Am. Dec. 41. (2) **But in such case, the bailee is entitled to a reasonable time to make delivery.** *Phelps v. Gilchrist*, 28 N. H. 266, 277.

[b] **A demand must be made at the domicile of the defendant, when no place of delivery is specified in the contract.** *Hunter v. Spurlock*, 3 La. 97, 22 Am. Dec. 165.

25. *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231.

**Demand on corporation to sue**, see 5 STANDARD PROC. 708.

[a] **Must Not be Accompanied by Insult or Abuse.**—*Bayden v. Burke*, 14 How. (U. S.) 575, 14 L. ed. 548.

[b] **Where a demand is made by an agent, or attorney, the party may require reasonable evidence of his authority to make it.** *Baxter v. McKinlay*, 16 Cal. 76; *Payne v. Smith*, 12 N. H. 34.

26. *Del.*—*Truax v. Parvis*, 7 Houst. 330, 32 Atl. 227. *Kan.*—*Gregg v. George & Co.*, 16 Kan. 546. *Vt.*—*Bishop v. Brown*, 51 Vt. 330.

[a] **May Be by Letter.**—*Lovejoy v. Jones*, 30 N. H. 164.

27. *Kemmerer v. Haggerty*, 139 Fed. 693; *Higgins v. Emmons*, 5 Conn. 76, 13 Am. Dec. 41.

28. *Colby v. Reed*, 99 U. S. 560, 25 L. ed. 484.

29. *Colby v. Reed*, 99 U. S. 560, 25 L. ed. 484.

30. See the statutes and *Seem v. McLees*, 24 Ill. 192.

**In forcible entry and detainer, the notice must be written.** See 8 STANDARD PROC. 1093.

**Demand for release of mortgage**, see 19 STANDARD PROC. 876.

[a] **A demand by reading the paper is not a demand made in writing.** *Seem v. McLees*, 24 Ill. 192.

31. *Cal.*—*Baxter v. McKinley*, 16 Cal. 76. *Ind.*—*Bartlett v. Adams*, 43 Ind. 447. *N. H.*—*Payne v. Smith*, 12 N. H. 34. *N. J.*—*McCormick v. Stephany*, 61 N. J. Eq. 208, 219, 48 Atl. 25.

[a] **A specific objection made as a reason for noncompliance with the demand is a waiver of other objections.** *Bartlett v. Adams*, 43 Ind. 447.

32. **As a condition to bill of review**, see 4 STANDARD PROC. 420.

**Leave to file cross-bill**, see 6 STANDARD PROC. 282.

**Leave of court to intervene**, see 14 STANDARD PROC. 314.

**Leave of court to bid at judicial sale**, see 16 STANDARD PROC. 774.

**Leave of court to amend**, see 13 STANDARD PROC. 105.

33. **Action by assignee for benefit of creditors**, see 3 STANDARD PROC. 74.

**Action by assignee of insolvent**, see 13 STANDARD PROC. 662.

**Action on injunction bond**, see 13 STANDARD PROC. 331.

**Action on judgment, except where statute provides otherwise.** See 16 STANDARD PROC. 367.

**Suit to set aside a judicial sale on**



tue of statute, such leave is necessary,<sup>34</sup> except, in some cases, where the action is by the state.<sup>35</sup> But even when required, it is held that leave to sue is not part of the cause of action,<sup>36</sup> but pertains to the right to prosecute the action only.<sup>37</sup> Proceedings taken without the required leave may be stayed,<sup>38</sup> and the party proceeded against for contempt.<sup>39</sup>

**Waiver.**—The want of leave of court, when required, may be waived.<sup>40</sup>

**Procedure.**—The application for leave of court is by a proper petition setting forth the facts.<sup>41</sup> Notice to the adverse party is sometimes required.<sup>42</sup>

**Discretion of the Court.**—Whether leave of court shall be granted is a matter resting within the discretion of the court.<sup>43</sup>

**Nunc Pro Tunc.**—An omission to obtain leave of court may be cured by a subsequent order granting leave nunc pro tunc.<sup>44</sup>

**Effect of Order Granting Leave.**—The court in granting leave does not determine the sufficiency of the cause of action.<sup>45</sup>

**Review of Discretion.**—The discretion of the court in granting or re-

the ground of fraud, see 16 STANDARD PROC. 818.

**Action on officer's bond,** see 20 STANDARD PROC. 750; except, by statute, where action is by the state. *Nye v. Kelly*, 19 Wash. 73, 52 Pac. 528.

**34. Actions against assignees for benefit of creditors,** see 3 STANDARD PROC. 79.

**Actions on executor's bond,** see 8 STANDARD PROC. 784.

**Actions by and against insane persons,** see 13 STANDARD PROC. 581.

[a] **Applications for mandamus to compel public board to perform duty,** see *Sterling v. University of Michigan*, 110 Mich. 369, 68 N. W. 253, 34 L. R. A. 150. See *People v. Regents of University*, 4 Mich. 98.

**Action to recover deficiency on mortgage foreclosure,** see 19 STANDARD PROC. 1068.

**Actions against receivers,** see the title, "Receivers."

**35.** See *infra*, this note.

[a] **An action on an official bond by state agent for the benefit of the state** is an action by the state within the statute requiring leave of court except when the action is brought by the state. *Nye v. Kelly*, 19 Wash. 73, 52 Pac. 528.

**36.** *Watts v. Everett*, 47 Iowa 269; *Dean v. Eldridge*, 29 How. Pr. (N. Y.) 218. *Contra*, *Graham v. Scripture*, 26 How. Pr. (N. Y.) 501.

**As affecting manner of raising objection,** see *infra* II, H.

**Necessity of pleading,** see *infra*, II, G.

**37.** *Watts v. Everett*, 47 Iowa 269.

**38.** See 13 STANDARD PROC. 582; 4 STANDARD PROC. 421.

**39.** See 13 STANDARD PROC. 582.

**40.** *Mitchell v. Hardie*, 84 Ala. 349, 4 So. 182; *Griggs v. Gear*, 8 Ill. 2; *Manufacturers Paper Co. v. Lindblom*, 68 Ill. App. 539. But see *Farish v. Austin*, 25 Hun (N. Y.) 430.

[a] **By Demurring or Answering.** *Mitchell v. Hardie*, 84 Ala. 349, 4 So. 182; *Griggs v. Gear*, 8 Ill. 2; *Manufacturers Paper Co. v. Lindblom*, 68 Ill. App. 539.

**41.** See 8 STANDARD PROC. 785.

**42.** See 19 STANDARD PROC. 1068. But see 8 STANDARD PROC. 785.

**43.** *Lee's Case*, 43 N. J. Eq. 175, 11 Atl. 124.

[a] **The propriety of granting leave to sue is governed and determined by equitable principles.** *Equitable Life Ins. Soc. v. Stevens*, 63 N. Y. 341; *Steiner v. Day*, 161 App. Div. 742, 147 N. Y. Supp. 200.

**44.** *Dunham v. Fitch*, 48 App. Div. 321, 62 N. Y. Supp. 905. See 16 STANDARD PROC. 367, note 45. But see *In re Delahunty*, 63 Hun 634, 18 N. Y. Supp. 395, 28 Abb. N. C. 245, 44 N. Y. St. 836.

**45.** *Kent v. West*, 33 App. Div. 112, 53 N. Y. Supp. 244.

fusing leave is not subject to review unless abused.<sup>46</sup> Nor is the order open to collateral attack.

F. TENDER. — Tender as a condition precedent to an action is treated in a specific title.<sup>47</sup>

G. PLEADING PERFORMANCE OF CONDITIONS PRECEDENT. — The complaint or declaration must allege or show a performance of conditions precedent,<sup>48</sup> or an excuse for non-performance,<sup>49</sup> whether the condition pertains to the cause of action,<sup>50</sup> or whether it pertains to the right to prosecute the action merely,<sup>51</sup> although in the latter case there are authorities holding to the contrary.<sup>52</sup> But a compliance with provisions which are in the nature of a statute of limitations rather than a condition precedent need not be alleged.<sup>53</sup>

Exhaustion of Extrajudicial Remedies. — That a member of an associa-

Effect of leave to file a bill of review, see 4 STANDARD PROC. 423.

46. See 4 STANDARD PROC. 424.

47. See the title "Tender." See 16 STANDARD PROC. 210, as condition to actions to set aside execution sale.

In fraud cases, see 10 STANDARD PROC. 42.

48. See 6 STANDARD PROC. 677; 14 STANDARD PROC. 39.

In actions on contract, see 14 STANDARD PROC. 995.

Alleging presentation of claim to municipality, see 20 STANDARD PROC. 102 and 118.

Notice of injury on highway, see 11 STANDARD PROC. 227 and 281.

Alleging notice of injury in action for death by wrongful act, see 6 STANDARD PROC. 409.

Notice to employer of injury, see 19 STANDARD PROC. 475.

In application for mandamus, see 19 STANDARD PROC. 262.

In mortgage foreclosure suits, see 19 STANDARD PROC. 955.

In mechanics' lien suits, see 19 STANDARD PROC. 664.

Alleging tender, see 13 STANDARD PROC. 85, and the title "Tender."

Alleging notice, see 20 STANDARD PROC. 662; 14 STANDARD PROC. 995.

Manner of alleging performance, see 6 STANDARD PROC. 692; 14 STANDARD PROC. 42.

[a] A general averment "though often requested," is insufficient. A specific allegation of a request is required. *Whitton v. Whitton*, 38 N. H. 127, 139, 75 Am. Dec. 163.

49. See 6 STANDARD PROC. 677, and the cross-references in the next preceding note.

[a] Answer excusing allegation of performance, see *supra*, II, D, 7, and the title "Tender." A demand being excused by the defendant's answer denying all liability, need not be proved and therefore need not be pleaded. So that a variance in proving a cause of action in which a demand would be necessary becomes immaterial. *Casidy v. Slemons*, 41 Mont. 426, 109 Pac. 976.

50. *Denver & R. G. R. Co. v. Wagner*, 167 Fed. 75, 92 C. C. A. 527; *Wentworth v. Summit*, 60 Wis. 281, 19 N. W. 97, notice of injury.

51. *Watts v. Everett*, 47 Iowa 269, leave of court.

52. *Castle v. Guilford*, 86 Vt. 540, 86 Atl. 804; *Kent v. Lincoln*, 32 Vt. 591, holding notice of injury is but a step for enforcing a legal remedy, and though it must be taken and proved, it need not be alleged.

53. U. S.—*Spinello v. New York, N. H. & H. R. Co.*, 183 Fed. 762, 106 C. C. A. 189. Conn.—*Bulkley v. Norwich & W. Ry. Co.*, 81 Conn. 284, 70 Atl. 1021, 129 Am. St. Rep. 212, notice of injury. N. Y.—*Hawley v. Johnstown*, 40 App. Div. 568, 58 N. Y. Supp. 49. Wis.—*Davis v. Appleton*, 109 Wis. 580, 85 N. W. 515, where the charter of a city provided no action upon claims shall be brought until after presentation thereof. See *Malloy v. Chicago & N. W. Ry. Co.*, 109 Wis. 29, 85 N. W. 130, as to the effect of a denial of the allegation when made.

Compare 6 STANDARD PROC. 416, and the title "Limitation of Actions."

[a] Remedy of Defendant.—A non-compliance must be set up by defense

tion has exhausted his remedies in the order must be alleged in his petition for mandamus<sup>54</sup> or complaint,<sup>55</sup> when this is a condition precedent.<sup>56</sup>

**Leave of Court.** — If leave of court is a condition precedent it must be pleaded as a general rule.<sup>57</sup>

**H. OBJECTIONS TO FAILURE TO ALLEGE OR PERFORM CONDITIONS PRECEDENT.** — The manner in which the defendant must object to a failure to comply with, or a failure to allege a compliance with conditions precedent depends upon whether the condition constitutes an element of the cause of action, or whether it pertains to the right to maintain the suit.<sup>58</sup> In the latter case, a noncompliance must be shown by plea in abatement,<sup>59</sup> or by answer,<sup>60</sup> or perhaps by demurrer,<sup>61</sup> or it is waived.<sup>62</sup> But where the objection goes to the cause of action the objection may be raised at any time.<sup>63</sup> It may be raised by demurrer,<sup>64</sup> by pleading a failure to comply with the condition by way of defense,<sup>65</sup> by objection to the introduction of any evidence,<sup>66</sup> by motion for a non-

or it will be waived. *Davis v. Appleton*, 109 Wis. 580, 85 N. W. 515.

54. *People ex rel. Keefe v. Women's Catholic Order of Foresters*, 162 Ill. 78, 44 N. E. 401; *Texas Land & M. Co. v. Worsham*, 76 Tex. 556, 13 S. W. 384.

55. See 14 STANDARD PROC. 51.

[a] **The better practice** is to plead the existence of a tribunal within the lodge to pass upon the question, and aver that the plaintiff has exhausted his remedies in the lodge, and has a cause of action against the lodge in the civil courts, setting out the facts which give him such cause of action. *Myers v. Jenkins*, 63 Ohio St. 101, 116, 57 N. E. 1089, 81 Am. St. Rep. 613.

56. See *supra*, II, B.

57. **1a.**—*Watts v. Everett*, 47 Iowa 269. **Neb.**—*Waugh v. Newell*, 62 Neb. 438, 87 N. W. 143. **N. Y.**—*Graham v. Scripture*, 26 How. Pr. 501; *Underhill v. Phillips*, 30 App. Div. 238, 51 N. Y. Supp. 801, 5 N. Y. Ann. Cas. 395; *Kent v. West*, 33 App. Div. 112, 53 N. Y. Supp. 244. *Contra*, *Dean v. Eldridge*, 29 How. Pr. 218, holding leave of court being no part of the cause of action, need not be alleged, or at least a failure to allege it does not render the complaint amenable to general demurrer.

[a] Although it pertains to the right to prosecute the action, and not to the cause of action. *Watts v. Everett*, 47 Iowa 269. But see *Dean v. Eldridge*, 29 How. Pr. (N. Y.) 218.

58. *Hilliard v. Wisconsin Life Ins. Co.*, 137 Wis. 208, 117 N. W. 999.

59. *Hilliard v. Wisconsin Life Ins. Co.*, 137 Wis. 208, 117 N. W. 999; *Lombard v. McMillan*, 95 Wis. 627, 70 N. W. 673.

60. *Meisenheimer v. Kellogg*, 106 Wis. 30, 81 N. W. 1033.

[a] **Issues Raised by a Denial.**—A statement of giving of notice which is a mere limitation, and a denial thereof in the answer presents no issue fatal to the plaintiff's recovery. *Malloy v. Chicago & Northwestern Ry. Co.*, 109 Wis. 29, 85 N. W. 130.

61. *Meisenheimer v. Kellogg*, 106 Wis. 30, 81 N. W. 1033, although whether the question may be presented by demurrer may admit of some doubt. But see *Dean v. Eldridge*, 29 How. Pr. (N. Y.) 218, not ground for general demurrer.

62. *Welsh v. Barber Asphalt Pav. Co.*, 167 Fed. 465, 93 C. C. A. 101; *Meisenheimer v. Kellogg*, 106 Wis. 30, 81 N. W. 1033; *Lombard v. McMillan*, 95 Wis. 627, 70 N. W. 673.

63. *Olmstead v. Pound Ridge*, 71 Hun 25, 24 N. Y. Supp. 615.

64. **Mass.**—*Dickie v. Boston & A. R. Co.*, 131 Mass. 516. **N. Y.**—*Graham v. Scripture*, 26 How. Pr. 501. **Wis.** *Wentworth v. Summit*, 60 Wis. 281, 19 N. W. 97.

And see 6 STANDARD PROC. 912, note 23.

65. *Lange v. Union Pac. R. Co.*, 126 Fed. 338, 62 C. C. A. 48.

[a] **May Be Pleased Either in Abatement or in Bar.**—*Lombard v. McMillan*, 95 Wis. 627, 70 N. W. 673.

66. *Denver & R. G. R. Co. v. Wag-*



suit,<sup>67</sup> or by motion at the close of the evidence for a directed verdict;<sup>68</sup> and by some authorities it has been held to be a fatal defect not cured by verdict.<sup>69</sup>

That there has been no demand before suit may be proved under a general denial.<sup>70</sup> But statutes sometimes provide otherwise.<sup>71</sup>

As to leave of court, some courts have held that it is not a part of the cause of action,<sup>72</sup> and an objection that leave was not obtained must be made by motion,<sup>73</sup> rather than by demurrer on the ground no cause of action is stated,<sup>74</sup> although the defect could be raised by demurrer on the ground the facts "do not entitle the plaintiff to the relief demanded."<sup>75</sup> A special plea in abatement is proper.<sup>76</sup> A reversal of the order granting leave subsequent to the commencement of the action may be set up in a supplemental answer.<sup>77</sup>

### III. COMMENCEMENT OF ACTIONS. — A. IN GENERAL.<sup>78</sup>

The commencement of an action means the suing out of process or originating proceedings whereby an action is instituted to establish some right or redress some wrong.<sup>79</sup> The word is not always used in a technical sense.<sup>80</sup> With respect to civil actions the word "prosecution" includes the institution of a suit,<sup>81</sup> as well as the pursuit of a

ner, 167 Fed. 75, 92 C. C. A. 527; Benware v. Pine Valley, 53 Wis. 527, 10 N. W. 695.

67. Lombard v. McMillan, 95 Wis. 627, 70 N. W. 673. See the title "Dismissal, Discontinuance and Nonsuit."

68. Denver & R. G. R. Co. v. Wagner, 167 Fed. 75, 92 C. C. A. 527, where statutory notice was not alleged.

69. Smith v. Chicago Heights, 141 Ill. App. 588; Philomath v. Ingle, 41 Ore. 289, 68 Pac. 803. But see *contra*, 21 STANDARD PROC. 425, note 92.

70. See 7 STANDARD PROC. 97.

71. See the statutes and Harrison v. Lakenan, 189 Mo. 581, 600, 88 S. W. 53, under a statute providing that an objection that no demand was made must be set up by way of defense and must be accompanied by a tender of the amount due.

72. See *supra*, II, E.

73. Watts v. Everett, 47 Iowa 269; Collins v. Toppin, 63 N. J. Eq. 381, 51 Atl. 933, motion to strike from files.

74. *Id.*—Watts v. Everett, 47 Iowa 269. N. J.—Collins v. Toppin, 63 N. J. Eq. 381, 51 Atl. 933. N. Y.—Dean v. Eldridge, 29 How. Pr. 218.

That amended pleading is filed without leave of court is not ground for demurrer, see 6 STANDARD PROC. 921.

75. Watts v. Everett, 47 Iowa 269.

Demurrer on this ground generally, see 6 STANDARD PROC. 911.

76. Johannes v. Youngs, 48 Wis. 101, 4 N. W. 32.

77. United States L. Ins. Co. v. Gage, 26 Abb. N. C. 16, 13 N. Y. Supp. 837.

[a] The summons will not be set aside on motion in such case. United States L. Ins. Co. v. Gage, 26 Abb. N. C. 16, 13 N. Y. Supp. 837.

78. See *supra*, I, A.

In federal courts, under conformity act, see the title "United States Courts."

In the justice's court, see 17 STANDARD PROC. 986.

When action is deemed pending, see 1 STANDARD PROC. 1008, and 14 STANDARD PROC. 317.

Attachment before commencement of an action, see 3 STANDARD PROC. 469.

When action in support of adverse claim to a mine must be commenced, see 19 STANDARD PROC. 787.

79. Wilson v. Baptist Education Soc., 10 Barb. (N. Y.) 308, 318. See also Cohens v. Virginia, 6 Wheat. (U. S.) 264, 408, 5 L. ed. 257; Bridges v. Koppelman, 63 Misc. 27, 117 N. Y. Supp. 306.

80. Bummelhart v. Boone, 147 Iowa 390, 126 N. W. 338, in the statute it has reference to the issuance of the writ of replevin.

81. Clinton v. Heagney, 175 Mass. 134, 55 N. E. 894.

remedy after the institution of the proceedings.<sup>82</sup>

**B. COMMENCEMENT AS FIXING RIGHTS AND DEFENSES.—1. Generally.**—The plaintiff in an action at law must recover, if at all, upon his right of action as it exists at the institution of the suit.<sup>83</sup>

**Defenses.**—At common law matters of special defense arising after commencement of the action and before plea must be pleaded to the further maintenance of the action,<sup>84</sup> and cannot be pleaded in bar generally.<sup>85</sup> If such matter arises after plea it must be pleaded *puis darrein continuance*.<sup>86</sup> But in actions on the case, defenses admissible under the general issue are provable although they arise subsequently to the bringing of the action.<sup>87</sup> The same is true in trespass where the distinction between the two forms of action is abolished.<sup>88</sup> In defamation suits too, a retraction and apology made after commencement of the suit may be set up in mitigation of damages in some states.<sup>89</sup> In equity, it has been held that the defendant may, in his answer, avail himself of matters arising between the bill and answer.<sup>90</sup> The code

82. *Clinton v. Heagney*, 175 Mass. 134, 55 N. E. 894.

83. **U. S.**—*American Bonding & Trust Co. v. Gibson Co.*, 145 Fed. 871, 76 C. C. A. 155. **Ala.**—*Prouty v. Alabama G. S. R. Co.*, 174 Ala. 404, 56 So. 980. **Ark.**—*Hornor v. Hanks*, 22 Ark. 572, 580. **Cal.**—*Compressed Air Mach. Co. v. West San Pablo, etc. Co.*, 9 Cal. App. 361, 99 Pac. 531. **Conn.** *State ex rel. Huntington v. Huntington Town School Committee*, 82 Conn. 563, 74 Atl. 882; *Woodbridge v. Pratt*, 69 Conn. 304, 334, 37 Atl. 688. **Ga.** *Potts-Thompson Liquor Co. v. Potts*, 135 Ga. 451, 69 S. E. 734. **Ill.**—*Kelly v. Galbraith*, 186 Ill. 593, 610, 58 N. E. 431 (this is the rule in actions at law); *Jones v. Renault Selling Branch*, 204 Ill. App. 422. **Ind.**—See *Musselman v. Manly*, 42 Ind. 462. **Ky.**—*Jones v. Patterson*, 23 Ky. L. Rep. 1838, 66 S. W. 377. **Md.**—*Stonebraker v. Littleton*, 119 Md. 173, 86 Atl. 150. **Mass.** *Dalton v. American Ammonia Co.*, 121 N. E. 407. **Mo.**—*Tobin v. McCann*, 17 Mo. App. 481. **N. Y.**—*National Contracting Co. v. Hudson River Water Power Co.*, 110 App. Div. 133, 97 N. Y. Supp. 92; *Harriton v. Edwards*, 169 N. Y. Supp. 172. **Vt.**—*Stanley v. Turner*, 68 Vt. 315, 35 Atl. 321.

See also *infra*, III, B, 2, a.

**Pleading subsequently occurring facts by supplemental pleading**, see the title "Supplemental Pleading."

[a] But interest to the time of trial may be recovered. *Robertson v. Howard*, 83 Kan. 453, 112 Pac. 162.

Only existing causes of action can

be joined, see 14 STANDARD PROC. 684.

84. **Ala.**—*McDougald's Admr. v. Rutherford*, 30 Ala. 253. **Ga.**—See *Horne v. Rodgers*, 103 Ga. 649, 30 S. E. 562. **Ill.**—*Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Mount v. Scholes*, 120 Ill. 394, 11 N. E. 401; *Ryan v. Baltimore & O. R. Co.*, 60 Ill. App. 612. **N. C.**—*Williams v. Hutton & B. Co.*, 164 N. C. 216, 80 S. E. 257; *Smithwick v. Ward*, 52 N. C. 64, 75 Am. Dec. 453.

[a] The defense could not avail the defendant for the purpose of adjudging the rights of the parties, but was only effective to dismiss the action. *Williams v. Hutton & B. Co.*, 164 N. C. 216, 80 S. E. 257.

85. *Mount v. Scholes*, 120 Ill. 394, 11 N. E. 401. See *Williams v. Hutton & B. Co.*, 164 N. C. 216, 80 S. E. 257.

86. *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Ryan v. Baltimore & O. R. Co.*, 60 Ill. App. 612. Compare *Tillotson v. Preston*, 3 Johns. (N. Y.) 229, where the defendant after an impleading pleaded payment.

See the titles "Supplemental Pleading;" "Puis Darrein Continuance, Pleas of."

87. *Kapischki v. Koch*, 180 Ill. 44, 54 N. E. 179; *Chicago v. Babcock*, 143 Ill. 358, 32 N. E. 271; *Bird v. Randall*, 3 Burr. 1345, 97 Eng. Reprint 866.

88. *Kapischki v. Koch*, 180 Ill. 44, 54 N. E. 179, the defense of former recovery.

89. *Turner v. Hearst*, 115 Cal. 394, 47 Pac. 129.

90. See 4 STANDARD PROC. 167. But

does not require that new matter constituting a defense must exist at the time of the commencement of the action.<sup>91</sup> And a counterclaim connected with the plaintiff's cause of action or with the subject of action need not necessarily or entirely mature before action commenced, nor even before answer filed.<sup>92</sup>

**2. Premature Commencement.**—a. *Generally.*—It is a general rule, with certain statutory exceptions,<sup>93</sup> that an action cannot be commenced until the accrual of the cause of action,<sup>94</sup> and until the debt is due.<sup>95</sup> If commenced before, the action is prematurely brought and cannot be maintained,<sup>96</sup> against objection,<sup>97</sup> and the action is not saved by the subsequent accrual of a cause of action,<sup>98</sup> even by an amend-

see *Hornor v. Hanks*, 22 Ark. 572; *Dowrer v. Wilson*, 33 Vt. 1.

[a] **This Rule in Equity Prevails Under the Code.**—*Beebe v. Dowd*, 22 Barb. (N. Y.) 255, 259.

91. *Colo.*—See *Whitsett v. Clayton*, 5 Colo. 476. *N. Y.*—*Gabay v. Doane*, 77 App. Div. 413, 79 N. Y. Supp. 312; *Willis v. Chipp*, 9 How. Pr. 568. *N. C.* *Williams v. Hutton & B. Co.*, 164 N. C. 216, 80 S. E. 257.

But see *Musselman v. Manly*, 42 Ind. 462 (the defendant cannot set up a defense that did not exist at the commencement of the action); *Ireland v. Montgomery*, 34 Ind. 174, holding the defense cannot be pleaded in bar of the action generally. *Compare* the title "Supplemental Pleading."

[a] "Any facts existing at the time the defendant answers, and which show that the plaintiff ought not to have a judgment against the defendant, may be inserted in the answer." *Willis v. Chipp*, 9 How. Pr. (N. Y.) 568.

[b] **A settlement since suit brought may be pleaded in the answer.** *Willis v. Chipp*, 9 How. Pr. (N. Y.) 568.

92. *Smith & Co. v. French*, 141 N. C. 1, 53 S. E. 435. And see the title "Set-off, Counterclaim and Recoupment."

93. See the statutes.

**Attachment in actions on claims not yet due**, see 3 STANDARD PROC. 331.

**Garnishment in actions on claims not yet due**, see 10 STANDARD PROC. 383.

94. *Cal.*—*Lewis v. Fox*, 122 Cal. 244, 54 Pac. 823; *Bacigalupi v. Phoenix Bldg., etc. Co.*, 14 Cal. App. 632, 112 Pac. 892. *Ga.*—*Crosby v. Georgia Realty Co.*, 138 Ga. 746, 76 S. E. 38; *Wadley v. Jones*, 55 Ga. 329. *N. Y.* *Delaware Trust Co. v. Calm*, 195 N. Y.

231, 88 N. E. 53. *Tenn.*—*Blevins v. Alexander*, 4 Sneed 583; *Arnold v. Elliott*, 7 Humph. 354. *Tex.*—*Culbertson v. Cabeen*, 29 Tex. 247; *Crook v. McGreal*, 3 Tex. 487.

[a] **There must be some cause of action at the commencement of the suit.** *Wadley v. Jones*, 55 Ga. 329, 330.

[b] **A cause of action accrues from the time the right to sue for the breach attaches.** *Walker v. Bowman*, 27 Okla. 172, 111 Pac. 319, Ann. Cas. 1912B, 839, 30 L. R. A. (N. S.) 642.

95. *Ark.*—*Hicks v. Branton*, 21 Ark. 186. *Conn.*—*Walter H. Goodrich & Co. v. Friedman*, 92 Conn. 262, 102 Atl. 607. *Md.*—*Thomas v. Turner*, 16 Md. 105. *Mass.*—*Weeks v. Walcott*, 15 Gray 54. *N. J.*—*Holzappel v. Hoboken Mfg. R. Co.* (N. J. L.), 104 Atl. 209.

[a] **Even in the case of an installment contract, no claim that matures after suit brought cannot be included in the judgment.** *Holzappel v. Hoboken Mfg. R. Co.* (N. J. L.), 104 Atl. 209.

96. *Ark.*—*Hornor v. Hanks*, 22 Ark. 572, 581. *Conn.*—*Dickerman v. New York, N. H. & H. R. Co.*, 72 Conn. 271, 275, 44 Atl. 228. *Ga.*—*Crosby v. Georgia Realty Co.*, 138 Ga. 746, 76 S. E. 38; *Wadley v. Jones*, 55 Ga. 329. *Ill.*—*Stitzel v. Miller*, 157 Ill. App. 390. *Miss.*—*Winston v. Miller*, 12 Smed. & M. 550. *W. Va.*—*Bogges v. Bartlett*, 72 W. Va. 377, 78 S. E. 241.

97. See *infra*, III, B, 2, c.

98. *U. S.*—*American Bonding & Trust Co. v. Gibson Co.*, 145 Fed. 871, 76 C. C. A. 155. *Ark.*—*Rodgers v. Wise*, 106 Ark. 310, 153 S. W. 253, 43 L. R. A. (N. S.) 1009; *Jones v. Dyer*, 92 Ark. 460, 123 S. W. 757. *Fla.* *Marianna & B. R. Co. v. Maund*, 62 Fla. 538, 56 So. 670. *Ill.*—*Hamlin, Hale & Co. v. Race*, 78 Ill. 422, 425.



ment,<sup>99</sup> or by a supplemental pleading showing accrual of the cause of action after action brought.<sup>1</sup> In some states, however, the action is not abated because prematurely brought, but the plaintiff is charged with the costs already accrued.<sup>2</sup>

In equity, it has been held that the relief administered is such as the facts existing at the close of the litigation demand,<sup>3</sup> or at least, a failure to present facts arising subsequent to the commencement of the suit by supplemental bill is not reversible error.<sup>4</sup>

And in admiralty, on an allowance of costs, an action which has accrued in the meantime may be allowed to stand.<sup>5</sup>

An action is not premature because it is brought in violation of an agreement to forbear bringing suit,<sup>6</sup> or because the plaintiff is not ready to try the case when it is brought.<sup>7</sup>

b. *Action Premature in Part.*—In an action involving separable claims, the right to try those which have accrued is not affected by the fact that the action is premature as to others.<sup>8</sup>

c. *Objections, Waiver and Cure.*—Prematurely in bringing suit is not a jurisdictional matter, and does not render void a judgment on an obligation not due at the commencement of the action but due be-

**Kan.**—Smith v. Woodleaf, 21 Kan. 717, 720. **Mass.**—Phelps v. Palmer, 15 Gray 499, 77 Am. Dec. 378. **Okla.**—Bank of Chelsea v. School Dist., 162 Pac. 809. **Pa.**—White v. Miller, 43 Pa. Super. 572. **Tenn.**—Blevins v. Alexander, 4 Sneed 583.

99. American Bond. & Trust Co. v. Gibson County, 145 Fed. 871, 76 C. C. A. 155, as there is nothing to amend. But see Foley v. Houston Co-op. & Mfg. Co. (Tex. Civ. App.), 106 S. W. 160.

1. American Bonding & Trust Co. v. Gibson County, 145 Fed. 871, 76 C. C. A. 155; Lewis v. Fox, 122 Cal. 244, 252, 54 Pac. 823. But compare Bethany Hospital Co. v. Philippi, 82 Kan. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194, holding the question is not a practical one after the supplemental pleading.

Nature of the facts which may be pleaded by supplemental pleading, see the title "Supplemental Pleading."

2. Lynch v. Schemmel, 176 Iowa 499, 155 N. W. 1019; Gribben v. Clement, 141 Iowa 144, 119 N. W. 596, 133 Am. St. Rep. 157; Cox v. Reinhardt, 41 Tex. 591; Culbertson v. Cabeen, 29 Tex. 247, 254; Potter County v. Boesen (Tex. Civ. App.), 191 S. W. 787. Compare St. Louis S. W. R. Co. v. Jenkins (Tex. Civ. App.), 89 S. W. 1106, where evidence of additional interest acquired by plaintiff after suit brought,

was excluded on the ground of variance from his pleading.

3. Kelly v. Galbraith, 186 Ill. 593, 58 N. E. 431; Delaware Trust Co. v. Calm, 195 N. Y. 231, 88 N. E. 53; Wormser v. Metropolitan St. Ry. Co., 184 N. Y. 83, 76 N. E. 1036, 112 Am. St. Rep. 596; Mann v. Utica, 44 How. Pr. (N. Y.) 334. But see Hornor v. Hanks, 22 Ark. 572, 580. Compare Downer v. Wilson, 33 Vt. 1, holding the decree cannot be made upon matters happening pending suit unless brought in by proper supplemental pleading.

4. Woodbridge v. Pratt, 69 Conn. 304, 334, 37 Atl. 688; Kelly v. Galbraith, 186 Ill. 593, 58 N. E. 431.

[a] Although a supplemental bill should have been filed, the judgment will not be reversed on the ground no such bill is filed, because it is error without prejudice. Kelly v. Galbraith, 186 Ill. 593, 58 N. E. 431.

5. In admiralty, see 1 STANDARD PROC. 424.

6. Williams v. Scott, 83 Ind. 405 (the party's remedy is by action for damages); Durbin v. Northwestern Scraper Co., 36 Ind. App. 123, 73 N. E. 297.

7. Central Imp. & Contracting Co. v. Grasser C. Co., 119 La. 263, 44 So. 10.

8. Ga.—Sanner v. Sayne, 78 Ga. 467, 3 S. E. 651. **Kan.**—Anthony v. Smith-

fore issue joined, trial and judgment.<sup>9</sup> Therefore the objection that the defendant was sued upon a cause of action before its accrual must be made at the proper time,<sup>10</sup> or will be deemed waived if the cause of action has accrued pending the suit.<sup>11</sup> Accordingly the objection cannot be raised after a special plea to the merits which does not raise the objection,<sup>12</sup> or for the first time on the trial by an instruction,<sup>13</sup> or by motion for judgment non obstante veredicto,<sup>14</sup> or by motion to vacate the judgment,<sup>15</sup> or upon appeal.<sup>16</sup> But if the prematurity arises from a failure to perform a condition precedent which goes to the cause of action, the objection is not waived by a failure to object,<sup>17</sup> and may be the basis for motion in arrest of judgment.<sup>18</sup> Prematurity in failing to satisfy a condition precedent going to the remedy, however, is a mere matter in abatement.<sup>19</sup>

**Manner of Objection.** — The fact that the action is prematurely brought is ground for motion to dismiss,<sup>20</sup> for demurrer,<sup>21</sup> for plea in

son, 70 Kan. 132, 78 Pac. 454. **La.** Fidelity & Deposit Co. v. Johnston, 117 La. 880, 42 So. 357.

9. Lord v. Dowling Co., 52 Fla. 313, 323, 42 So. 585; Anthony v. Smithson, 70 Kan. 132, 78 Pac. 454.

10. Ferguson v. Carr, 85 Ark. 246, 107 S. W. 1177.

11. **Ark.**—Kansas City So. Ry. Co. v. Greer, 90 Ark. 531, 119 S. W. 1121; Ferguson v. Carr, 85 Ark. 246, 107 S. W. 1177. **Kan.**—Anthony v. Smithson, 70 Kan. 132, 78 Pac. 454. See Robertson v. Howard, 83 Kan. 453, 112 Pac. 162, holding that perhaps subsequently accruing claims submitted without objection may be allowed. **Ore.**—Fiore v. Ladd, 29 Ore. 528, 46 Pac. 144.

[a] **The bringing in of a new cause of action which accrued after the commencement of the suit is waived by the filing of a demurrer or an answer without objection on that ground.** Ferguson v. Carr, 85 Ark. 246, 107 S. W. 1177.

12. Anthony v. Smithson, 70 Kan. 132, 78 Pac. 454; El Reno Elec. L. & T. Co. v. Jennison, 5 Okla. 759, 50 Pac. 144. See Fiore v. Ladd, 29 Ore. 528, 46 Pac. 144.

13. Stitzel v. Miller, 157 Ill. App. 390, where the suit was begun before the maturity of the note and the summons was served afterwards.

14. Fiore v. Ladd, 29 Ore. 528, 46 Pac. 144.

15. Lord v. Dowling Co., 52 Fla. 313, 42 So. 585.

16. **Ark.**—Kansas City So. Ry. Co. v. Greer, 90 Ark. 531, 119 S. W. 1121.

**Ia.**—Bohanan v. Bohanan, 150 Iowa 182, 129 N. W. 819. **Pa.**—Welch v. Miller, 210 Pa. 204, 59 Atl. 1065; Benjamin v. Zell, 100 Pa. 33.

[a] **When the cause of action had accrued at the time of answering to the merits, the defendant cannot raise the objection of prematurity for the first time on appeal.** Bohanan v. Bohanan, 150 Iowa 182, 129 N. W. 819.

17. Hilliard v. Wisconsin Life Ins. Co., 137 Wis. 208, 117 N. W. 999 (this objection may be made at any time); Lombard v. McMillan, 95 Wis. 627, 70 N. W. 673.

[a] **When an insurance policy provides it shall have a surrender value only on delivery of the policy and giving of notice, no cause of action exists until performance of the conditions imposed. Consequently an objection to prematurity of the suit arising from a failure of performance before suit brought or afterwards may be made at any time.** Hilliard v. Wisconsin Life Ins. Co., 137 Wis. 208, 117 N. W. 999.

See *supra*, II, H.

18. See 2 STANDARD PROC. 989.

19. Harris v. North American Ins. Co., 190 Mass. 361, 77 N. E. 493, 4 L. R. A. (N. S.) 1137; Hilliard v. Wisconsin Life Ins. Co., 137 Wis. 208, 117 N. W. 999; Lombard v. McMillan, 95 Wis. 627, 70 N. W. 673. And see *supra*, II, H.

20. See 7 STANDARD PROC. 675.

[a] **Without Prejudice.**—American Bonding & Trust Co. v. Gibson Co., 145 Fed. 871, 76 C. C. A. 155.

21. See 6 STANDARD PROC. 921.

abatement,<sup>22</sup> or in some states, for a plea in bar,<sup>23</sup> in accordance with the general rules regulating such objections. The fact that a suit is prematurely brought may under certain circumstances constitute new matter which must be specially pleaded,<sup>24</sup> otherwise the defense may be availed of under a general issue,<sup>25</sup> or general denial.<sup>26</sup> Nor will garnishment proceedings had after judgment be dismissed for prematurity of the action.<sup>27</sup>

The subsequent accrual of the action will not defeat the objection.<sup>28</sup>

**Cure of Objection.** — A confession of judgment cures the defect of prematurity,<sup>29</sup> but a judgment by default does not.<sup>30</sup>

**C. DELAY IN BRINGING SUIT.** — Mere delay in bringing actions at

[a] **By demurrer on the ground the complaint does not state facts sufficient to constitute a cause of action.** *Hentsch v. Porter*, 10 Cal. 555.

[b] **A general demurrer does not question the right to introduce a new cause of action not in existence at the time of the commencement of the action.** *Ferguson v. Carr*, 85 Ark. 246, 251, 107 S. W. 1177.

22. See 1 STANDARD PROC. 29.

[a] *Contra*, *Lynch v. Schemmel*, 176 Iowa 499, 155 N. W. 1019, the fact that the notes did not fall due until after the commencement of the action might subject the plaintiff to costs but would not abate his action.

[b] **The objection must be raised by answer before pleading to the merits, if the defect is not apparent on the complaint.** *Fiore v. Ladd*, 29 Ore. 528, 46 Pac. 144.

23. *Franklin Sav. Institution v. Reed*, 125 Mass. 365. *Contra*, *Norris v. Scott*, 6 Ind. App. 18, 32 N. E. 103, 865.

24. *Iselin v. Simon*, 62 Minn. 128, 64 N. W. 143. See also *Stitzel v. Miller*, 157 Ill. App. 390, and notes immediately following.

25. See *Landis v. Morrissey*, 69 Cal. 83, 10 Pac. 258; *Stitzel v. Miller*, 157 Ill. App. 390.

[a] **The defense that the money sued for was not due at the commencement of the action is available under the general issue unless its non-maturity is the result of an agreement extending the original time of payment.** *Stitzel v. Miller*, 157 Ill. App. 390.

26. *Freeman v. Hedrington*, 204 Mass. 238, 90 N. E. 519; *Wilder v. Colby*, 134 Mass. 377; *Reed v. Scituate*,

7 Allen (Mass.) 141. See 7 STANDARD PROC. 97.

[a] **When there is a sale on credit and where under a general denial the plaintiff to recover is required to prove the debt is due and payable at the time of the commencement of the action, and his proof shows it is not, there is a fatal variance and he cannot recover.** *Wilder v. Colby*, 134 Mass. 377. See also *Reed v. Scituate*, 7 Allen (Mass.) 141.

[b] **When the plaintiff alleges a sale of goods payable on demand, (1) evidence to prove a sale on credit which had not expired at the time of the commencement of suit is not new matter and is admissible under a general denial.** *Landis v. Morrissey*, 69 Cal. 83, 10 Pac. 258. (2) In *Iselin v. Simon*, 62 Minn. 128, 64 N. W. 143, the plaintiff alleged a sale of goods for which the defendant promised to pay, etc. The defendant pleaded a general denial and attempted to prove a sale on credit not expired when the action was brought. The court held the denial went only to the facts alleged not to the legal implication therefrom that the purchase price was payable on demand. Consequently the offer of proof made by the defendant constituted new matter to be specially pleaded as it admitted the facts alleged and set up matter in avoidance.

27. *Iselin v. Simon*, 62 Minn. 128, 64 N. W. 143.

28. *Rodgers v. Wise*, 106 Ark. 310, 153 S. W. 253, 43 L. R. A. (N. S.) 1009; *State ex rel. Merz v. Judge*, Man. Unrep. Cas. (La.) 406. And see *supra*, III, B, 1.

29. *Bush v. Hanson*, 70 Ill. 480.

30. *Winston v. Miller*, 12 Smed. & M. (Miss.) 550.



law will not bar the action,<sup>31</sup> unless it covers the statutory period,<sup>32</sup> or unless the doctrine of estoppel can be invoked.<sup>33</sup> In equity suits, however, delay amounting to laches precludes relief.<sup>34</sup>

**D. HOW AND WHEN ACTION IS COMMENCED.**—1. **Generally.**—A suit or action is commenced when the power or authority of the court is invoked by the plaintiff in some appropriate manner.<sup>35</sup>

**Suits by the government** are governed by the same rules as suits between private persons, when determining the time of their commencement.<sup>36</sup>

2. **At Common Law.**—The usual rule, in the absence of statute, is that an action is begun by the suing out of the writ with the intention of having it served,<sup>37</sup> the date or teste of the writ being regarded as the time of commencement.<sup>38</sup>

3. **In Equity.**—The first step in bringing a suit in equity is to file a petition or bill.<sup>39</sup> This in common parlance is denoted the commencement of the suit;<sup>40</sup> and it governs in a majority of the cases because there is no delay in issuing and serving the subpoena.<sup>41</sup> But it has been held that so far as it relates to the defendant, the suing out of a subpoena is the commencement of the suit,<sup>42</sup> and that for the purpose of tolling the statute of limitations the delivery of the writ must be followed either by a service thereof or by a bona fide attempt to

31. *Thomas v. Holmes*, 142 Iowa 288, 120 N. W. 636; *Doyle v. Burns*, 123 Iowa 488, 99 N. W. 195; *Kremer v. Chicago, M. & St. P. Ry. Co.*, 51 Minn. 15, 52 N. W. 977, 38 Am. St. Rep. 468.

32. *Thomas v. Holmes*, 142 Iowa 288, 120 N. W. 636. See the title "Limitation of Actions."

33. *Thomas v. Holmes*, 142 Iowa 288, 120 N. W. 636; *Doyle v. Burns*, 123 Iowa 488, 99 N. W. 195.

34. See the title "Laches."

35. *Northern Ind. R. Co. v. Lincoln Nat. Bank*, 47 Ind. App. 98, 109, 92 N. E. 384.

**Manner of acquiring jurisdiction over the plaintiff**, see 17 STANDARD PROC. 676.

**Acts constituting commencement of suit**, see *infra*, this section.

**Jurisdiction as essential to commencement of suit**, see *supra*, I. A.

36. *United States v. American Lumber Co.*, 85 Fed. 827, 29 C. C. A. 431.

37. **U. S.**—*Bentley v. Reid*, 133 Fed. 698, 66 C. C. A. 528. **N. J.**—*Margaret County v. Pacific Coast Borax Co.*, 67 N. J. L. 48, 50 Atl. 906; *Lynch v. New York, E. & W. R. Co.*, 57 N. J. L. 4, 30 Atl. 187. **N. Y.**—*Ross v. Luther*, 4 Cow. 158, 15 Am. Dec. 341. Compare present statute in New York. **W. Va.**

*Geiser Mfg. Co. v. Chewing*, 52 W. Va. 523, 533, 44 S. E. 193; *United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342.

[a] **The commencement of a civil suit, at common law, involved the concurrent action of the attorney who purchased the writ on behalf of his client and of the clerk who issued it on behalf of the court.** *Margaret County v. Pacific Coast Borax Co.*, 67 N. J. L. 48, 50 Atl. 906.

38. *Spinning v. Ohio L. Ins. & Tr. Co.*, 2 Disney (Ohio) 336, 13 Ohio Dec. 206.

39. **U. S.**—*Humane Bit Co. v. Barnett*, 117 Fed. 316. **Ill.**—*Warner v. Mettler*, 260 Ill. 416, 103 N. E. 259. **Ky.**—*Pindell v. Maydwell*, 7 B. Mon. 314. **Miss.**—*Maddux v. Jones*, 51 Miss. 531.

**In mechanics' lien suits**, see 19 STANDARD PROC. 631, note 86.

40. See *International Paper Co. v. Com. (Mass.)*, 121 N. E. 510; *Fitch v. Smith*, 10 Paige (N. Y.) 9.

41. *International Paper Co. v. Com. (Mass.)*, 121 N. E. 510.

42. **Ky.**—*Pindell v. Maydwell*, 7 B. Mon. 314. **Mass.**—*International Paper Co. v. Com.*, 121 N. E. 510. **W. Va.**—*United States Blowpipe Co. v. Spencer*, 46 W. Va. 590, 33 S. E. 342, referring to English practice.

serve it.<sup>43</sup> In reference to the rights of strangers, the *lis pendens* begins from the service of the subpoena after the bill is filed.<sup>44</sup> Under the codes,<sup>45</sup> and statutes in some states,<sup>46</sup> equity suits are commenced in the same manner as law actions.<sup>47</sup>

**4. Under Statute.** — a. *Generally.* — The time when actions are deemed commenced and the manner of their commencement are generally regulated by statutes in the various states.<sup>48</sup> Not only do the statutes differ considerably, from each other, but the time when an action is deemed to have been commenced may vary for different purposes.<sup>49</sup> With occasional modifications, the statutes fall into three general classes,<sup>50</sup> providing either that the action is commenced by the filing of a declaration, petition, or complaint,<sup>51</sup> or by the issuance of pro-

**43. U. S.**—United States *v.* American Lumber Co., 85 Fed. 827, 29 C. C. A. 431. **N. J.**—Delaware River Q. & C. Co. *v.* Board of Freeholders, 88 N. J. Eq. 506, 103 Atl. 18. **N. Y.**—Fitch *v.* Smith, 10 Paige 9; Hayden *v.* Bucklin, 9 Paige 512.

**44.** Lyle *v.* Bradford, 7 B. Mon. (Ky.) 111; Hayden *v.* Bucklin, 9 Paige (N. Y.) 512, 515; Murray *v.* Ballou, 1 Johns. Ch. (N. Y.) 566.

**45.** Coggan *v.* Reeves, 3 Ore. 275. And see *infra*, IV, F.

**46.** Geiser Mfg. Co. *v.* Chewning, 52 W. Va. 523, 533, 44 S. E. 193; United States Blowpipe Co. *v.* Spencer, 46 W. Va. 590, 33 S. E. 342.

**47.** See *infra*, III, E, 4.

**48.** See the statutes and *infra*, this section. See also McGrath *v.* St. Louis, K. C. & C. Ry. Co., 128 Mo. 1, 30 S. W. 329.

**49.** Northern Ind. R. Co. *v.* Lincoln Nat. Bank, 47 Ind. App. 98, 92 N. E. 384.

[a] Thus the time when an action is deemed commenced may differ from the general rule prevailing in the state when a question as to the bar of the statute of limitations arises, or when a question arises as to the time for suing out a writ of attachment or garnishment. See *infra*, this section.

[b] Although the statute is found in the chapter relating to limitation of actions, it should be applied to other enactments where the statute is general in terms, unless a contrary intent is shown or such an application would subvert the purposes of the legislature. Northern Ind. R. Co. *v.* Lincoln Nat. Bank, 47 Ind. App. 98, 92 N. E. 384.

**50.** Bentley *v.* Reid, 133 Fed. 698, 66 C. C. A. 528.

**51. U. S.**—Mound City Co. *v.* Castleman, 187 Fed. 921, 110 C. C. A. 55; Bentley *v.* Reid, 133 Fed. 698, 66 C. C. A. 528. **Ala.**—Farmers' Oil & Mfg. Co. *v.* Melton, 159 Ala. 469, 49 So. 225. **Cal.**—Tinn *v.* United States Dist. Atty., 148 Cal. 773, 84 Pac. 153, 113 Am. St. Rep. 354; Collins *v.* Gray, 3 Cal. App. 723, 86 Pac. 983. **Colo.**—Flint *v.* Powell, 18 Colo. App. 425, 72 Pac. 60. **Ga.** Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912. **Idaho.**—Idaho Trust & S. Bank *v.* Nampa & M. Irr. Dist., 29 Idaho 658, 161 Pac. 872; Bates *v.* Capital State Bank, 21 Idaho 141, 121 Pac. 561; Shaw *v.* Martin, 20 Idaho 168, 117 Pac. 853. **Mich.**—See *infra*, this section. **Miss.**—Stewart *v.* Pettitt, 94 Miss. 769, 48 So. 5; Christian *v.* O'Neal, 46 Miss. 669; Dilworth *v.* Mayfield, 36 Miss. 40, 52. **Mont.**—State *ex rel.* Gatton *v.* District Court, 39 Mont. 134, 101 Pac. 961; Clark *v.* Oregon Short Line R. R. Co., 38 Mont. 177, 184, 99 Pac. 298; Haupt *v.* Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698. **Nev.**—Higley *v.* Pollock, 21 Nev. 198, 27 Pac. 895; Hunter & Co. *v.* Truckee Lodge No. 14, 14 Nev. 24. **Ore.**—Kelsay *v.* Taylor, 56 Ore. 13, 107 Pac. 609; Dutro *v.* Ladd, 50 Ore. 120, 91 Pac. 459 (except as against the statute of limitations); Title Guarantee & Tr. Co. *v.* Wrenn, 35 Ore. 62, 56 Pac. 271, 76 Am. St. Rep. 454; Coggan *v.* Reeves, 3 Ore. 275. **Tex.**—Buchner *v.* Wait (Tex. Civ. App.), 137 S. W. 383; Webb *v.* Allen, 15 Tex. Civ. App. 605, 610, 40 S. W. 342. **Utah.**—Salt Lake C. & S. Co. *v.* District Court, 44 Utah 411, 140 Pac. 666; Keyser *v.* Pollock, 20 Utah 371, 59 Pac. 87.

In admiralty, see 1 STANDARD PROC. 424.

cess,<sup>52</sup> or by service thereof on defendant.<sup>53</sup> Some statutes provide that actions are commenced by filing a complaint, or petition, and causing

**Necessity of issuance and service of process,** see *infra*, III, E, 4, g.

**Sufficiency of complaint as affecting,** see *infra*, III, E, 4, i.

**What constitutes filing,** see the title "Filing."

[a] **The file mark is the only competent evidence** (1) of the date of the filing of the petition. *Chapman v. Currie*, 51 Mo. App. 40, 43. See *Smith v. Day*, 39 Ore. 531, 537, 64 Pac. 812, 65 Pac. 1055. (2) If the record on appeal does not show the date of filing, the omission cannot be supplied by the date of the writ. *Dilworth v. Mayfield*, 36 Miss. 40.

52. III.—*Stitzel v. Miller*, 157 Ill. App. 390 (the filing of the praecipe and the issuance of the first summons are the commencement); *Schmidt v. Balling*, 91 Ill. App. 388. Compare *Collins v. Manville*, 170 Ill. 614, 48 N. E. 914, the issuance of summons and delivery to the officer is the commencement. Ind.—See *infra*, this section. Neb.—*Pickens v. Polk*, 42 Neb. 267, 60 N. W. 566; *Davis v. Ballard*, 38 Neb. 830, 57 N. W. 527. But with reference to the statute of limitations the action is commenced at the date of the summons which is served on the defendant. *Reliance Trust Co. v. Atherton*, 67 Neb. 305, 93 N. W. 150, 96 N. W. 218. In such case, the action is not deemed commenced until the summons is served, although after service, the commencement may relate back to the date of the summons. *Davis v. Ballard*, 38 Neb. 830, 57 N. W. 527. N. J.—*Hermann v. Mexican Petroleum Corp.*, 85 N. J. Eq. 367, 96 Atl. 492; *Margaret County v. Pacific Coast Borax Co.*, 67 N. J. L. 48, 50 Atl. 906; *Wheeler v. Almond*, 46 N. J. L. 161; *Whitaker v. Turnbull*, 18 N. J. L. 172. N. C.—*Smith v. Cashie & C. R. & Lumb. Co.*, 142 N. C. 26, 54 S. E. 788, 5 L. E. A. (N. S.) 439; *Carolina & N. W. R. Co. v. Pennearden Lumber & Mfg. Co.*, 132 N. C. 644, 44 S. E. 358; *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699. Okla.—*Greenmeyer v. Coate*, 12 Okla. 452, 72 Pac. 377; *Schnell v. Jay*, 4 Okla. 157, 46 Pac. 598. R. I.—*Cross v. Barber*, 16 R. I. 266, 15 Atl. 69. Tenn.—*Macklin v.*

*Dunn*, 130 Tenn. 350, 170 S. W. 588; *Ragon v. Howard*, 97 Tenn. 334, 37 S. W. 136. Tex.—*Brown v. Been* (Tex. Civ. App.), 54 S. W. 779; *Moore v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.), 46 S. W. 388. Va.—*Noell v. Noell*, 93 Va. 433, 25 S. E. 242. Vt. *Randall v. Bacon*, 49 Vt. 20, 24 Am. Rep. 100; *Hall v. Peck & Co.*, 10 Vt. 474, for the purpose of the statute of limitations. W. Va.—*The Geiser Mfg. Co. v. Chewning*, 52 W. Va. 523, 533, 44 S. E. 193; *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. 431.

See 21 STANDARD PROC. 689, note 38.

**Process must be valid,** see *infra*, III, D, 4, h.

**When process is issued,** see *infra*, III, D, 4, f.

**Necessity of service.** see *infra*, III, D, 4, g.

[a] **The subsequent filing of the bill or declaration relates back to the issuance of the writ.** *Love v. Southern Ry. Co.*, 108 Tenn. 104, 65 S. W. 475, 55 L. R. A. 471; *Geiser Mfg. Co. v. Chewning*, 52 W. Va. 523, 535, 44 S. E. 193.

[b] **The summons issued must be the summons served on the defendant under a statute providing that the action is commenced at the date of the summons which is served.** *Reliance Trust Co. v. Atherton*, 67 Neb. 305, 93 N. W. 150, 96 N. W. 218.

53. Ia.—*Hueston v. Preferred Acc. Ins. Co.*, 168 N. W. 150; *Jones & Magee Lumber Co. v. Boggs*, 63 Iowa 589, 19 N. W. 678, actions are commenced by serving the notice or by delivering the same to the sheriff with intent to serve immediately. But it is only for the purpose of the statute of limitations that the latter is deemed service. *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 101 Iowa 514, 70 N. W. 761; *Proska v. McCormick*, 56 Iowa 318, 9 N. W. 289. For some purposes an action has been held to be begun when petition is filed. See *Smith v. Callanan*, 103 Iowa 218, 72 N. W. 513, 42 L. R. A. 482; *Hagan v. Burch*, 8 Iowa 309. Minn.—*Seeger v. Young*, 127 Minn. 416, 149 N. W. 735; *H. L. Spencer Co. v. Koell*, 91 Minn. 226, 97 N. W. 974; *Falconer v. Cochran*, 68 Minn. 405, 71 N. W. 336. But the be-



a summons to be issued or a warning order to be made thereon,<sup>54</sup> by the filing of the complaint and serving summons,<sup>55</sup> or by the filing of a

ginning of the action dates from the delivery of the summons to the officer in two classes of cases; those in which service is made within the period of limitation and those in which it is made or first publication is had within sixty days after delivery. This statute applies not only to the statute of limitations but to all cases. *McCormick v. Robinson*, 139 Minn. 483, 167 N. W. 271; *Bond v. Pennsylvania R. Co.*, 124 Minn. 195, 144 N. W. 942. **Neb.**—See Nebraska cases in next preceding note. **N. Y.**—Code, §416; *Martens v. O'Neill*, 131 App. Div. 123, 115 N. Y. Supp. 260; *Wiggin v. Orser*, 5 Duer 118. *Compare Burdick v. Green*, 18 Johns. 14. But an attempt to commence the action by delivery of the summons is equivalent to a service as against the defense of the statute of limitations. *Wiggin v. Orser*, 5 Duer 118. **S. C.** *Baker-Jennings Hdw. Co. v. Culp*, 105 S. C. 418, 90 S. E. 26; *Jordan v. Wilson*, 69 S. C. 256, 48 S. E. 224. **S. D.** *Mars v. Oro Fino Min. Co.*, 7 S. D. 605, 616, 65 N. W. 19. **Vt.**—*Stanley v. Turner*, 68 Vt. 315, 35 Atl. 321 (except for the purpose of interrupting the running of the statute of limitations); *Randall v. Bacon*, 49 Vt. 20, 24 Am. Rep. 100; *Hall v. J. & J. H. Peck & Co.*, 10 Vt. 474. **Wis.**—*Prentice v. Stefan*, 72 Wis. 151, 39 N. W. 364.

Process must be valid, see *infra*, III, D, 4, h.

[a] If personal service without the state is defective, the action is not commenced and any attachment falls. *Conklin v. Federal Trust Co.*, 176 App. Div. 572, 163 N. Y. Supp. 570.

[b] This method is not exclusive, as the defendant may appear voluntarily in which case service is not required. *McCormick v. Robinson*, 139 Minn. 483, 167 N. W. 271.

[c] But in actions in rem, the rule might be somewhat different. *Randall v. Bacon*, 49 Vt. 20, 24 Am. Rep. 100.

54. **Ark.**—*Railway Co. v. Shelton*, 57 Ark. 459, 21 S. W. 876; *State Bank v. Brown*, 12 Ark. 94; *State Bank v. Cason*, 10 Ark. 479. **Ind.**—"A civil action shall be commenced by filing . . . a complaint and causing a summons to issue thereon; and the action

shall be deemed to be commenced from the time of issuing the summons." *Burns Ann. St. 1914*, §317. *McGeath v. Starr*, 157 Ind. 320, 61 N. E. 664. The action is not commenced until the summons is delivered to the sheriff. *Marshall v. Matson*, 171 Ind. 238, 86 N. E. 339; *Alexandria Gas Co. v. Irish*, 152 Ind. 535, 53 N. E. 762. But for purposes of garnishment the action is deemed commenced at the filing of the complaint. *Northern Ind. R. Co. v. Lincoln Nat. Bank*, 47 Ind. App. 98, 92 N. E. 384. So also for the purpose of mechanics' liens. See 19 *STANDARD PROC.* 631, note 86. **Kan.**—*Ex parte Sharp*, 87 Kan. 504, 124 Pac. 532, Ann. Cas. 1913E, 460; *Barnett v. Schad*, 73 Kan. 414, 85 Pac. 411, 91 Pac. 539; *Dunlap v. McFarland*, 25 Kan. 488, when the petition and praecipe are filed, and the summons is issued, the action is commenced. **Ky.**—*Smith v. Dungey*, 178 Ky. 702, 199 S. W. 777; *Redwine v. Underwood*, 101 Ky. 190, 40 S. W. 462; *Kellar v. Stanley*, 86 Ky. 240, 5 S. W. 477; *Hoffman v. Brungs*, 83 Ky. 400. **Mo.**—*Emory v. Arnold*, 184 Mo. App. 99, 168 S. W. 320. But see *McGrath v. St. Louis, K. C. & C. Ry. Co.*, 128 Mo. 1, 30 S. W. 329, holding the action is commenced when the petition is filed, as this is an order on the clerk to issue the writ. *Followed in State ex rel. Brown v. Wilson*, 216 Mo. 215, 292, 115 S. W. 549. **Okla.**—*Drummond v. Drummond*, 49 Okla. 649, 154 Pac. 514.

[a] The joint act of filing the declaration and issuance of process constitutes the commencement of the action. *State Bank v. Cason*, 10 Ark. 479.

[b] Until the summons is issued, the action is not commenced. *Barnett v. Schad*, 73 Kan. 414, 85 Pac. 411, 91 Pac. 539; *Kellar v. Stanley*, 86 Ky. 240, 5 S. W. 477. But see *McGrath v. St. Louis, K. C. & C. Ry. Co.*, 128 Mo. 1, 30 S. W. 329.

When process is issued, see *infra*, III, D, 4, f.

55. *Dutro v. Ladd*, 50 Ore. 120, 91 Pac. 459, this statute applies only when the statute of limitations is invoked.

complaint "or" by the service of process.<sup>56</sup>

Where process is issued in blank and filled up by the attorney, the action is deemed commenced when the writ is filled out with the intention of service.<sup>57</sup> But in case of a substantial alteration of the writ after making and before service, the suit is deemed commenced at the time of the alterations.<sup>58</sup>

In Michigan actions at law may be commenced by original writ or by filing a declaration upon which is endorsed a notice of suit.<sup>59</sup>

b. *Where Service Is by Publication.*<sup>60</sup> — Where service by publication is had, statutes sometimes provide that the action is deemed commenced at the time the warning order is made,<sup>61</sup> or at the date of the first publication,<sup>62</sup> or at the date of the delivery of process to the officer.<sup>63</sup> But in the absence of such a statute, it has been held that an action so commenced is not deemed commenced until the completion of the publication,<sup>64</sup> unless an attachment is sooner levied,<sup>65</sup> or unless

56. *Martin v. Ewing*, 92 Wash. 525, 159 Pac. 755; *Bliun v. Grindle*, 71 Wash. 120, 127 Pac. 840; *McPhee v. Nida*, 60 Wash. 619, 111 Pac. 1049.

Service within a specified time after filing, see *infra*, III, D, 4, g.

57. *Me.*—*Larrabee v. Southard*, 95 Me. 385, 50 Atl. 20 ("when the writ is actually made, with the intention of service"); *Biddeford Sav. Bank v. Mosher*, 79 Me. 242, 9 Atl. 614. *Mass.* *Bunker v. Shed*, 8 Met. 150; *Gardner v. Webber*, 17 Pick. 407. *N. H.*—*Anderson v. Aetna L. Ins. Co.*, 75 N. H. 375, 74 Atl. 1051, 28 L. R. A. (N. S.) 730 (when the writ is filled out with the intention of having it served); *Mason v. Cheney*, 47 N. H. 24. *Compare* *Clindenin v. Allen*, 4 N. H. 385.

[a] Although writs are issued in blank and are filled up by the attorneys at home, the writ and declaration in contemplation of law must be considered as issuing from the clerk's office. *Clindenin v. Allen*, 4 N. H. 385.

[b] The date of the writ, therefore, is *prima facie* the date of the commencement of the action. *Bunker v. Shed*, 8 Mete. (Mass.) 150. See *infra*, III, D, 4, f.

58. *Larrabee v. Southard*, 95 Me. 385, 50 Atl. 20; *Mason v. Cheney*, 47 N. H. 24, and therefore the alterations are not forgeries.

59. *Menominee v. Judge*, 81 Mich. 577, 46 N. W. 23; *Gordon v. Tyler*, 53 Mich. 629, 19 N. W. 560, 20 N. W. 70; *Wetherbee v. Kusterer*, 41 Mich. 359, 2 N. W. 45; *Ellis v. Fletcher*, 40 Mich. 321.

[a] When begun by writ, the suit

is not commenced until the writ is delivered to an officer with a bona fide intention of having it served. *People ex rel. McCallum v. Gebhardt*, 154 Mich. 504, 118 N. W. 16.

[b] Service must be made before the suit commenced by filing a declaration, can be considered "duly commenced." *Detroit Free Press Co. v. Bagg*, 78 Mich. 650, 44 N. W. 149, decided under a statute requiring filing and service, and followed in *Boyle v. Detroit*, 152 Mich. 248, 115 N. W. 1056. But compare the present statute.

60. When service is deemed complete, see the title "Service of Process and Papers."

61. *Kellar v. Stanley*, 86 Ky. 240, 5 S. W. 477; *Hoffman v. Brungs*, 83 Ky. 400.

62. *Ind.*—*Wood v. Bissell*, 108 Ind. 229, 9 N. E. 425; *Schaffner v. Voss*, 46 Ind. App. 551, 93 N. E. 235. *Minn.* *H. L. Spencer Co. v. Koell*, 91 Minn. 226, 97 N. W. 974. *Neb.*—*Becker v. Linton*, 80 Neb. 655, 114 N. W. 928, 127 Am. St. Rep. 795.

63. *McCormick v. Robinson*, 139 Minn. 483, 167 N. W. 271. This statute applies when constructive service is made within the period of limitation, and when first publication is had afterwards but within sixty days of delivery of the process to the officer.

64. *Slater v. Roche*, 148 Iowa 413, 126 N. W. 925, 28 L. R. A. (N. S.) 702; *Littlejohn v. Bulles*, 136 Iowa 150, 113 N. W. 756.

As to when service by publication is complete, see generally the title "Service of Process and Papers."

65. *Slater v. Roche*, 148 Iowa 413,

the defendant appears.<sup>66</sup>

c. *Attempt To Commence*.—As against the defense of the statute of limitations, an attempt to commence the action by delivery of the process to the officer with the intention that it be served, is sometimes declared to be equivalent to the commencement of the action.<sup>67</sup>

d. *On Appearance of the Defendant*.—If service of process is essential to the commencement of suit, but is not made, the date of the appearance of the defendant, should he appear, and not the date of the process previously issued is the time of commencement.<sup>68</sup>

e. *Where There Are Several Parties*.—Where there are several parties defendant, statutes sometimes provide that the action is deemed commenced as to each at the date of the summons which is served on him,<sup>69</sup> or on a co-defendant who is a joint contractor or is otherwise united in interest with him.<sup>70</sup>

126 N. W. 925, 28 L. R. A. (N. S.) 702.

66. See *infra*, this note.

[a] **When the defendant appears in the action**, the action is deemed commenced from the time of receipt of the notice sent by mail, at least as against a mortgage stay law. *Diedrichs v. Stronach*, 9 Wis. 548.

67. **U. S.**—*Michigan Ins. Bk. v. Eldred*, 130 U. S. 693, 9 Sup. Ct. 690, 32 L. ed. 1080, under Wisconsin statute. **Ia.**—*Proska v. McCormick*, 56 Iowa 318, 9 N. W. 289. **Kan.**—*Dunlap v. McFarland*, 25 Kan. 488; *German Ins. Co. v. Wright*, 6 Kan. App. 611, 49 Pac. 704. **Minn.**—See *McCormick v. Robinson*, 139 Minn. 483, 167 N. W. 271. **N. Y.**—*Hamilton v. Royal Ins. Co.*, 156 N. Y. 327, 50 N. E. 863, 42 L. R. A. 485; *Littlejohn v. Leffingwell*, 34 App. Div. 185, 54 N. Y. Supp. 536; *Wiggin v. Orser*, 5 Duer 118. **Okla.**—*Richardson v. Carr*, 171 Pac. 476. **Ore.**—*Lane v. Ball*, 83 Ore. 404, 160 Pac. 144, 163 Pac. 975. **S. D.**—*Mars v. Oro Fino Min. Co.*, 7 S. D. 605, 617, 65 N. W. 19.

[a] **Statute applies to a limitation contained in the contract** sued on. *Hamilton v. Royal Ins. Co.*, 156 N. Y. 327, 50 N. E. 863, 42 L. R. A. 485.

[b] **But a manual delivery to the officer in person is not required**. It is sufficient to leave the process on the marshal's desk or other place in the marshal's office so that he will understand that it is left for service. *Michigan Ins. Bk. v. Eldred*, 130 U. S. 693, 9 Sup. Ct. 690, 32 L. ed. 1080.

[c] **A delivery by mail with a bona fide intention of having the**

process served. *Burdick v. Green*, 18 Johns. (N. Y.) 14, *quoted in Jackson v. Brooks*, 14 Wend. (N. Y.) 649.

[d] **A delivery to a person not an officer who does not serve it on a proper person is not the commencement of the action within the state**. *Lesure Lumber Co. v. Mutual F. Ins. Co.*, 101 Iowa 514, 70 N. W. 761.

68. *Seeger v. Young*, 127 Minn. 416, 149 N. W. 735; *Reliance Trust Co. v. Atherton*, 67 Neb. 305, 93 N. W. 150, 96 N. W. 218; *Hotchkiss v. Aukermann*, 65 Neb. 177, 90 N. W. 949.

69. **Minn.**—*Smith v. Hurd*, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661. **N. Y.**—*Martens v. O'Neill*, 131 App. Div. 123, 115 N. Y. Supp. 260; *Kelsey v. Rourke*, 50 How. Pr. 315. **Ore.**—*Moore v. Chittenden*, 39 Ohio St. 563.

[a] **To petitions in error**, this rule applies by analogy. *Buckingham v. Commercial Bank*, 21 Ohio St. 131.

70. **N. Y.**—*Martens v. O'Neill*, 131 App. Div. 123, 115 N. Y. Supp. 260; *Howell v. Dimock*, 15 App. Div. 102, 44 N. Y. Supp. 271. **Ohio.**—*Moore v. Chittenden*, 39 Ohio St. 563; *Buckingham v. Commercial Bank*, 21 Ohio St. 131. **Wis.**—*Webster v. Pierce*, 108 Wis. 407, 83 N. W. 938.

[a] **A co-defendant united in interest with him**, does not embrace every codefendant in the original action who was a proper or even necessary party to the action. *Moore v. Chittenden*, 39 Ohio St. 563.

[b] **Partners are joint contractors within the rule**. *Howell v. Dimock*, 15 App. Div. 102, 44 N. Y. Supp. 271.

[c] **An owner of the premises and**



f. *When Process Is Deemed Issued.*<sup>71</sup>—Where actions are commenced by the suing out of process, the date of the process is *prima facie* evidence of the date of the commencement of the action.<sup>72</sup> But this presumption is not conclusive,<sup>73</sup> and it is not enough that the writ be filled out and filed.<sup>74</sup> The process must be delivered to the officer charged by law with the service thereof,<sup>75</sup> or to some one who is the medium of transmission to such officer.<sup>76</sup> But it has been held that the filing of the petition is in effect a suing out of the writ.<sup>77</sup>

a contractor are not united in interest or joint contractors as to the subcontractor. *Martens v. O'Neill*, 131 App. Div. 123, 115 N. Y. Supp. 260. See also *Smith v. Hurd*, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661.

71. As to issuance generally, see the title "Process."

72. Ala.—*Alabama Great Southern R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403. Me.—*Biddeford Sav. Bank v. Mosher*, 79 Me. 242, 9 Atl. 614. Mass.—*Finneran v. Graham*, 198 Mass. 385, 84 N. E. 473; *Farrell v. German American Ins. Co.*, 175 Mass. 340, 56 N. E. 572; *Bunker v. Shed*, 8 Metc. 150; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105. N. J.—*Margaret County v. Pacific Coast Borax Co.*, 67 N. J. L. 48, 50 Atl. 906. N. C.—See *Houston v. Thornton*, 122 N. C. 365, 375, 29 S. E. 827, 65 Am. St. Rep. 699, distinguished by *Smith v. Cashie*, etc. Lumb. Co., 142 N. C. 26, 54 S. E. 788, 5 L. R. A. (N. S.) 439. W. Va.—*United States Oil & Gas Well Supply Co. v. Gartlan*, 58 W. Va. 267, 52 S. E. 524; *Geiser Mfg. Co. v. Chewing*, 52 W. Va. 523, 533, 44 S. E. 193; *Lambert v. Ensign Mfg. Co.*, 42 W. Va. 813, 26 S. E. 431; *Ross v. Luther*, 4 Cow. 158, 15 Am. Dec. 341.

73. See cases in next preceding note.

74. *International Paper Co. v. Com.* (Mass.), 121 N. E. 510.

75. U. S.—*United States v. American Lumber Co.*, 85 Fed. 827, 29 C. C. A. 431. Ala.—*West v. Engel*, 101 Ala. 509, 14 So. 333; *Ware v. Swann*, 79 Ala. 330. Ark.—*Wilkins v. Worthen*, 62 Ark. 401, 36 S. W. 21. Ill.—*Collins v. Manville*, 170 Ill. 614, 48 N. E. 914. *Contra*, *Schmidt v. Balling*, 91 Ill. App. 388; *Chicago, B. & Q. R. Co. v. Wilcox*, 12 Ill. App. 42. Ind.—*Marshall v. Matson*, 171 Ind. 238, 86 N. E. 339; *Alexandria Gas Co. v. Irish*, 152 Ind. 535, 53 N. E. 762. Mass.—*International Paper Co. v. Com.*, 121 N. E. 510.

Mich.—*People ex rel. McCallum v. Gebhardt*, 154 Mich. 504, 118 N. W. 16. N. C.—*Smith v. Cashie*, etc. Lumb. Co., 142 N. C. 26, 54 S. E. 788, 5 L. R. A. (N. S.) 439. Tenn.—*East Tennessee Coal Co. v. Daniel*, 100 Tenn. 65, 42 S. W. 1062.

[a] Placing process in a receptacle for the sheriff is a sufficient issuance within the rule. *Blackburn v. Louisville*, 21 Ky. L. Rep. 1716, 55 S. W. 1075.

[b] The return shows when the process is received. *Marshall v. Matson*, 171 Ind. 238, 86 N. E. 339; *Smith v. Cashie & C. R. & L. Co.*, 142 N. C. 26, 54 S. E. 788, 5 L. R. A. (N. S.) 439, and the title "Returns."

[c] When there is no intermediary and the process is delivered by the clerk himself to the officer, the notation of the officer must be the controlling evidence as to when it is issued. But if delivered to a third person for the purpose of being delivered to the sheriff, the presumption that the process was issued when it bears date is not rebutted by the sheriff's indorsement. *Smith v. Cashie*, etc. Lumb. Co., 142 N. C. 26, 54 S. E. 788, 5 L. R. A. (N. S.) 439, distinguished *Houston v. Thornton*, 122 N. C. 365, 375, 29 S. E. 827, 65 Am. St. Rep. 699.

76. *United States v. American Lumber Co.*, 85 Fed. 827, 29 C. C. A. 431.

[a] The delivery of the writ to the wife of the coroner is a sufficient commencement of an action against the sheriff. *Ross v. Luther*, 4 Cow. (N. Y.) 158, 15 Am. Dec. 341, citing *Bronson v. Earl*, 17 Johns. (N. Y.) 63.

77. *State ex rel. Brown v. Wilson*, 216 Mo. 215, 292, 115 S. W. 549; *McGrath v. St. Louis, K. C. & C. Ry. Co.*, 128 Mo. 1, 30 S. W. 329 (as the filing amounts to an order to the clerk to issue process); *First Nat. Bank v. Griffith*, 192 Mo. App. 443, 182 S. W. 505. *Contra*, *Moore v. Gulf, C. & S. F.*

*g. As Dependent on Intention To Issue and Serve Process.*—When the action is commenced by the filing of the petition or complaint, or the issuance of process,<sup>78</sup> the action is not commenced unless there is a bona fide intention that process be at once issued and served.<sup>79</sup> The actual filing of the petition will not be regarded as the commencement of the suit, unless it is followed up by proper service.<sup>80</sup> And if the delay in issuing process is attributable to the plaintiff or was at his request, the statute of limitations will run until citation or process is ordered to issue or is issued.<sup>81</sup> But delay not attributable to the plaintiff will not have this effect.<sup>82</sup>

And some statutes specifically require service to be made within a specified time after the filing of the complaint,<sup>83</sup> or after delivery of

Ry. Co. (Tex. Civ. App.), 46 S. W. 388.

78. See *supra*, III, D, 4, a.

79. **U. S.**—Mound City Co. v. Castleman, 187 Fed. 921, 110 C. C. A. 55. **Me.**—Haskell v. Brewer, 11 Me. 258. **Miss.**—Stewart v. Pettitt, 94 Miss. 769, 48 So. 5. **Mo.**—White v. Reed, 60 Mo. App. 380. **N. H.**—Mason v. Cheney, 47 N. H. 24; Society for Propagating The Gospel v. Whitcomb, 2 N. H. 227. **N. Y.**—Burdick v. Green, 18 Johns. 14. **E. I.**—Cross v. Barber, 16 R. I. 266, 15 Atl. 69. **Tex.**—Tribby v. Wokee, 74 Tex. 142, 11 S. W. 1089; Hoffman v. Cage, 31 Tex. 595; Panhandle & S. F. R. Co. v. Hubbard (Tex. Civ. App.), 190 S. W. 793; Wood v. Mistretta, 20 Tex. Civ. App. 236, 49 S. W. 236, 50 S. W. 135.

[a] The petition must be filed with a bona fide intention, that citation shall at once be issued and served. Wigg v. Dooley, 28 Tex. Civ. App. 61, 66 S. W. 306.

[b] But the court has jurisdiction to make an ex parte order directing service in time for the succeeding term, when the clerk fails to issue process. Bentley v. Reid, 133 Fed. 698, 66 C. C. A. 528.

[c] **Presumption, Evidence.**—The fact the writ was not served or delivered for service until after the time limited for the commencement of the action is evidence on the question of the purpose with which the writ was filled out but it is not conclusive. Anderson v. Aetna L. Ins. Co., 75 N. H. 375, 74 Atl. 1051, 28 L. R. A. (N. S.) 730.

80. Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593; Jordan v. Bosworth, 123 Ga. 879, 51 S. E. 755; Cox v. Strickland, 120

Ga. 104, 47 S. E. 912; Nicholas v. British America Assur. Co., 109 Ga. 621, 34 S. E. 1004.

[a] The mere filing of the declaration, nothing more being done, no service of process being made or waived, would not be the commencement of an action. The statute means that when the suit is perfected by service on or waived by the defendant, its commencement shall date from the filing of the declaration. Bentley v. Reid, 133 Fed. 698, 66 C. C. A. 528; Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593; Cox v. Strickland, 120 Ga. 104, 47 S. E. 912.

81. **U. S.**—United States v. American Lumber Co., 85 Fed. 827, 29 C. C. A. 431. **Ga.**—Jordan v. Bosworth, 123 Ga. 879, 51 S. E. 755. **Miss.**—Stewart v. Pettitt, 94 Miss. 769, 48 So. 5. **Tex.**—Tribby v. Wokee, 74 Tex. 142, 11 S. W. 1089; Maddox v. Humphries, 30 Tex. 494.

[a] The reason is the clerk is merely the bailee when he received the petition with a request not to issue process. Maddox v. Humphries, 30 Tex. 494.

82. Wood v. Gulf, C. & S. F. R. Co., 15 Tex. Civ. App. 322, 40 S. W. 24.

[a] It will not be presumed from mere delay, that the plaintiff ordered citation not to issue. Tribby v. Wokee, 74 Tex. 142, 11 S. W. 1089.

83. McPhee v. Nida, 60 Wash. 619, 111 Pac. 1049, ninety days. See also Stewart v. Pettitt, 94 Miss. 769, 48 So. 5.

[a] **Statute Is Mandatory.**—McPhee v. Nida, 60 Wash. 619, 111 Pac. 1049; Deming Inv. Co. v. Ely, 21 Wash. 102, 57 Pac. 353.

[b] The act of filing becomes a

the process to the officer.<sup>84</sup>

h. *As Affected by Sufficiency of Process.*—Where an action is deemed commenced by the issuance<sup>85</sup> or service<sup>86</sup> of process, the action is not deemed commenced if the process is void, but it is otherwise if it is defective merely and not void.<sup>87</sup>

i. *As Affected by the Sufficiency of the Complaint.*—Although the complaint or petition may be defective in form,<sup>88</sup> may designate the defendant by the wrong name,<sup>89</sup> or by a fictitious name,<sup>90</sup> or may defectively present a valid cause of action,<sup>91</sup> the filing thereof, if in time for the commencement of an action upon the cause stated, and the issuance of process when required by the local practice, constitutes

nullity unless service is made within the time required. If service is made thereafter the commencement of the suit dates from the service and cannot relate back. *McPhee v. Nida*, 60 Wash. 619, 111 Pac. 1049.

84. See the statutes and *McCormick v. Robinson*, 139 Minn. 483, 167 N. W. 271, this applies only where the defendant is not served within the period of limitation.

85. **U. S.**—*United States v. American Lumber Co.*, 85 Fed. 827, 29 C. C. A. 431. **Ky.**—*Kellar v. Stanley*, 86 Ky. 240, 5 S. W. 477. **Tex.**—*August Kern Barber Supply Co. v. Freeze*, 96 Tex. 513, 74 S. W. 303.

86. **Ia.**—*Heuston v. Preferred Acc. Ins. Co.*, 168 N. W. 150; *Jones & Magee Lumber Co. v. Boggs*, 63 Iowa 589, 19 N. W. 678. **Neb.**—*Elmen v. Chicago, B. & Q. R. Co.*, 75 Neb. 37, 105 N. W. 987. **Va.**—*Noell v. Noell*, 93 Va. 433, 438, 25 S. E. 242. **Wis.**—*Mariner v. Waterloo*, 75 Wis. 438, 44 N. W. 512.

[a] If a second notice is effectively served, it institutes the action. *Heuston v. Preferred Acc. Ins. Co. (Iowa)*, 168 N. W. 150.

[b] But the omission of the revenue stamp is not fatal and if there is an intention to serve the writ as it is, although wanting a stamp, the statute of limitations is tolled. But if there is no intention to serve the writ until the stamp is fixed, the action is not commenced until that time. *Mason v. Cheney*, 47 N. H. 24.

87. *State Bank v. Steen*, 13 Ark. 36; *Martinez v. Succession of Vives*, 30 La. Ann. 818. See *White v. McQuillan*, 12 La. 530, where the copy of the petition served was not properly certified.

88. *Dayton v. Hirth*, 121 Ky. 42, 87

S. W. 1136, where the petition was not verified.

89. *Heckman's Admr. v. Louisville & N. R. Co.*, 85 Ky. 631, 638, 4 S. W. 342; *Sentell v. Southern Ry. Co.*, 67 S. C. 229, 45 S. E. 155. See also *American Fire Ins. Co. v. Bland*, 19 Ky. L. Rep. 287, 40 S. W. 670.

90. *Hoffman v. Keeton*, 132 Cal. 195, 64 Pac. 264; *Farris v. Merritt*, 63 Cal. 118.

91. **U. S.**—*Crotty v. Chicago Great W. Ry. Co.*, 169 Fed. 593, 598, 95 C. C. A. 91. **Ariz.**—*Hagenauer v. Detroit Copper Min. Co.*, 14 Ariz. 74, 124 Pac. 803, Ann. Cas. 1914C, 1016. **Cal.**—*Rauer's Law & Coll. Co. v. Leffingwell*, 11 Cal. App. 494, 105 Pac. 427. **Colo.**—*Denver & R. G. R. Co. v. Stinemeyer*, 59 Colo. 396, 148 Pac. 860. **Ga.**—*Shepherd v. Southern Pine Co.*, 118 Ga. 292, 45 S. E. 220. **Ill.**—*New Staunton Coal Co. v. Fromm*, 286 Ill. 254, 121 N. E. 594; *Salmon v. Libby*, 219 Ill. 421, 76 N. E. 573. **Kan.**—*Missouri, K. & T. R. Co. v. Bagley*, 65 Kan. 188, 69 Pac. 189, 3 L. R. A. (N. S.) 259. **Mo.**—*Bricken v. Cross*, 163 Mo. 449, 64 S. W. 99. **Okla.**—*Continental Ins. Co. v. Norman*, 176 Pac. 211. **Ore.**—*Bailey v. Wilson*, 34 Ore. 186, 55 Pac. 973. **Tex.**—*Scoby v. Sweatt*, 28 Tex. 713; *Schmidt v. Brittain (Tex. Civ. App.)*, 84 S. W. 677.

[a] "If it appears from the petition that the defendant is complained of for a valid cause of action, however defectively it may be presented, the statute of limitations in his favor will be stopped." *Scoby v. Sweatt*, 28 Tex. 713, 730.

[b] If an attempt to allege a breach of contract is made, an amendment remedying this defect is a continuation of the action begun on the filing of the original pleading. *Rauer's Law & Coll.*



such a commencement of the action as will toll the statute of limitations. According to the weight of authority, the action is deemed commenced although the original pleading omits some essential averments.<sup>92</sup> There are cases, however, holding that when the original pleading

Co. v. Leffingwell, 11 Cal. App. 494, 105 Pac. 427.

[c] A petition open to attack on special demurrer, but good on general demurrer, stops the running of the statute of limitations. *Schmidt v. Brittain* (Tex. Civ. App.), 84 S. W. 677.

92. U. S.—See *Missouri K. & T. R. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. ed. 355, Ann. Cas. 1914B, 134. Cal.—*Doolittle v. McConnell*, 174 Pac. 305; *Ruiz v. Santa Barbara Gas & E. Co.*, 164 Cal. 188, 128 Pac. 330; *Rauer's Law & C. Co. v. Leffingwell*, 11 Cal. App. 494, 105 Pac. 427. But see *Anderson v. Mayers*, 50 Cal. 525. D. C.—*Neubeck v. Lynch*, 37 App. Cas. 576, 37 L. R. A. (N. S.) 813. Ind.—*Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. 191; *Springfield E. & T. Co. v. Michener*, 23 Ind. App. 130, 55 N. E. 32. Ky.—*Louisville & N. R. Co. v. Pointer's Admr.*, 113 Ky. 952, 960, 69 S. W. 1108. Mont.—*Clark v. Oregon Short Line R. Co.*, 38 Mont. 177, 99 Pac. 298, holding the complaint filed "constituted at least a bona fide attempt to commence an action." Neb.—*Johnson v. American Smelt. & Ref. Co.*, 80 Neb. 250, 114 N. W. 144; *Gourley v. Prokop*, 71 Neb. 607, 99 N. W. 243, 100 N. W. 949; *Burlington & M. R. Co. v. Crockett*, 17 Neb. 570, 24 N. W. 219. Okla.—*Motsenbocker v. Shawnee Gas & E. Co.*, 49 Okla. 304, 152 Pac. 82, L. R. A. 1916B, 910; *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 135 Pac. 383. Tenn.—*Macklin v. Dunn*, 130 Tenn. 342, 352, 170 S. W. 588, Ann. Cas. 1916B, 508; *Love v. Southern Ry. Co.*, 108 Tenn. 104, 65 S. W. 475, 55 L. R. A. 471. Tex.—*Killebrew v. Stockdale*, 51 Tex. 529; *Henderson v. Beggs* (Tex. Civ. App.), 207 S. W. 565; *McCamant v. McCamant* (Tex. Civ. App.), 203 S. W. 118; *Western Union Tel. Co. v. Smith* (Tex. Civ. App.), 133 S. W. 1062, 146 S. W. 332. Vt.—*Geroux's Admr. v. Graves*, 62 Vt. 280, 19 Atl. 987.

See note in 3 L. R. A. N. S. 260.

[a] Provided the Defect Is Cured by Amendment.—*Henderson v. Beggs* (Tex. Civ. App.), 207 S. W. 565.

[b] And any amendments which merely supply the omitted allegations relate back to the original pleading. *Clark v. Oregon Short Line R. Co.*, 38 Mont. 177, 99 Pac. 298. And see cases cited *supra*, this note.

[c] Effect of Omission of Allegation.—Conceding it is necessary to allege a particular matter in order to state a good cause of action, this is but one of the essential elements thereof and does not of itself constitute a complete cause of action apart from the other allegations, so that an omission to allege it results merely in "defectively stating a cause of action." *Motsenbocker v. Shawnee Gas & E. Co.*, 49 Okla. 304, 152 Pac. 82, L. R. A. 1916B, 910. To same effect, see *Neubeck v. Lynch*, 37 App. Cas. (D. C.) 576, 37 L. R. A. (N. S.) 813.

[d] "Where there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment, though made after the expiration of the period of limitation, relates back to the time of the commencement of the action." *Ruiz v. Santa Barbara Gas & E. Co.*, 164 Cal. 188, 194, 128 Pac. 330.

[e] The contention that the rule would allow the filing of any sort of a document designated as a complaint to arrest the running of the statute, even a blank is without foundation as the courts are competent to say whether an alleged pleading is or is not a complaint. "Whether there may not be a distinction between a complaint which merely omits some formal allegation, or is imperfect of statement, and one from which it clearly appears that the plaintiff has no cause of action, or has filed what the court would say is no complaint at all, even though a general demurrer to either would be well taken," query. *Clark v. Oregon Short Line R. R. Co.*, 38 Mont. 177, 180, 99 Pac. 298.

[f] A petition on a promissory note bad on general demurrer for want of an averment of ownership constitutes a sufficient commencement of the ac-

states no cause of action whatsoever,<sup>93</sup> as when it lacks some averment essential to recovery,<sup>94</sup> the statute of limitations is not arrested, but continues to run until a sufficient amended pleading is filed.<sup>95</sup> But even in the latter states, if the omitted allegation is one which is cured by the verdict, the statute of limitations is tolled by the original pleading.<sup>96</sup>

j. *Alias and Pluries Process.*—Where the action is commenced by process, an alias or pluries writ is not the inception of a fresh suit,<sup>97</sup> where the original is continued by the further process without break or interval.<sup>98</sup> But under some circumstances, the issuance of an alias is the commencement of the action.<sup>99</sup>

k. *Where Amendments to Pleading and Parties Are Made.* Where a new cause of action is set up by way of amendment the action as to that cause of action is deemed commenced when the amended pleading is filed.<sup>1</sup> But amendments merely curing defects in the original proceeding and not setting up new causes of action relate back to

tion to toll the statute, and the amendment supplying the omission relates back. *Killebrew v. Stockdale*, 51 Tex. 529. See *McCamant v. McCamant* (Tex. Civ. App.), 203 S. W. 118.

93. *Ariz.*—*Hagenauer v. Detroit Copper Min. Co.*, 14 *Ariz.* 74, 84, 124 *Pac.* 803, *Ann. Cas.* 1914C, 1016. *Ill.* *Carlin v. Chicago*, 262 *Ill.* 564, 104 *N. E.* 905, *Ann. Cas.* 1915B, 213, note; *Doyle v. Sycamore*, 193 *Ill.* 501, 61 *N. E.* 1117; *Illinois Cent. R. Co. v. Campbell*, 170 *Ill.* 163, 49 *N. E.* 314; *Eylenfeldt v. Illinois Steel Co.*, 165 *Ill.* 185, 46 *N. E.* 266; *Phelps v. Illinois C. R. Co.*, 94 *Ill.* 548. *Kan.*—*Missouri, K. & T. R. Co. v. Bagley*, 65 *Kan.* 188, 69 *Pac.* 189, 3 *L. R. A.* (N. S.) 259; *Service v. Farmington Sav. Bank*, 62 *Kan.* 857, 62 *Pac.* 670.

94. *Walters v. Ottawa*, 240 *Ill.* 259, 88 *N. E.* 651 (where notice of injury was not alleged); *Foster v. St. Luke's Hospital*, 191 *Ill.* 94, 60 *N. E.* 803; *Missouri, K. & T. R. Co. v. Bagley*, 65 *Kan.* 188, 69 *Pac.* 189, 3 *L. R. A.* (N. S.) 259, where the plaintiff failed to allege a consideration for his contract.

95. *Hagenauer v. Detroit Copper M. Co.*, 14 *Ariz.* 74, 124 *Pac.* 803, *Ann. Cas.* 1914C, 1016.

96. *Chicago City Ry. Co. v. Cooney*, 196 *Ill.* 466, 63 *N. E.* 1029.

97. *Railway Co. v. Shelton*, 57 *Ark.* 459, 21 *S. W.* 876; *Bovaird & Seyfang Mfg. Co. v. Ferguson*, 215 *Pa.* 235, 64 *Atl.* 513; *McClurg v. Fryer*, 15 *Pa.* 293; *Lynn v. McMillen*, 3 *Pen. & W.* 170.

98. *Ky.*—*Clark v. Kellar*, 3 *Bush*

223. *N. C.*—*Etheridge v. Woodley*, 83 *N. C.* 11. *Pa.*—*Rees v. Clark*, 213 *Pa.* 617, 63 *Atl.* 364; *Lynn v. McMillen*, 3 *Pen. & W.* 170; *In re O'Neill's Est.*, 29 *Pa. Super.* 415. *Tenn.*—*Walker v. Vandiver*, 133 *Tenn.* 423, 181 *S. W.* 310.

99. See *infra*, this note.

[a] Under a statute requiring actions to be brought in the county in which the defendant resides or may be summoned, the action is not properly begun when the petition is filed and summons is issued without the present ability to proceed. But when the process is issued in a county in which the defendant is temporarily present, and he evades service by leaving the county, and when later an alias is issued and served upon him in the county, the issuance of the alias is the commencement of the action. *Davis v. Ballard*, 38 *Neb.* 830, 57 *N. W.* 527.

1. *Ariz.*—*Hagenauer v. Detroit Copper Min. Co.*, 14 *Ariz.* 74, 124 *Pac.* 803, *Ann. Cas.* 1914C, 1016. *Ark.*—*Schiele v. Dillard*, 94 *Ark.* 277, 126 *S. W.* 835; *Buck v. Davis*, 64 *Ark.* 345, 42 *S. W.* 534. *Cal.*—*Valensin v. Valensin*, 73 *Cal.* 106, 14 *Pac.* 397; *Anderson v. Mayers*, 50 *Cal.* 525. *Ill.*—*Carlin v. Chicago*, 262 *Ill.* 564, 104 *N. E.* 905, *Ann. Cas.* 1915B, 213. *Mont.*—*Clark v. Oregon Short Line R. Co.*, 38 *Mont.* 177, 99 *Pac.* 298. *Tenn.*—*Macklin v. Dunn*, 130 *Tenn.* 342, 170 *S. W.* 588, *Ann. Cas.* 1916B, 508. See 1 *STANDARD PROC.* 929.

And the defense of the statute of

the commencement of the action.<sup>2</sup> This is true in most jurisdictions even though the original pleadings failed to state a cause of action.<sup>3</sup>

**Amendments as to Parties.**—If a new party is made defendant, ordinarily the action is deemed commenced as to him when he is brought in by summons,<sup>4</sup> but the original defendants cannot avail themselves of the statute of limitations.<sup>5</sup> The addition of necessary parties plaintiff is not the commencement of a new suit, as to the original parties,<sup>6</sup> unless a new cause of action is introduced thereby.<sup>7</sup> Where there is a

limitations is available against it. See 20 STANDARD PROC. 372.

**As to when a new cause of action is set up,** see the title, "New Cause of Action or Defense."

2. Cal.—*Collins v. Gray*, 3 Cal. App. 723, 86 Pac. 983. Ill.—*Walters v. Ottawa*, 240 Ill. 259, 264, 88 N. E. 651; *Schmidt v. Balling*, 91 Ill. App. 388. Tenn.—*Macklin v. Dunn*, 130 Tenn. 342, 170 S. W. 588, Ann. Cas. 1916B, 508; *Burgie v. Parks*, 11 Lea 84.

See 1 STANDARD PROC. 928.

3. See *supra*, III, D, 4, i.

4. U. S.—*Miller's Heirs v. McIntyre*, 6 Pet. 61, 8 L. ed. 320. Ark.—*Lytle v. State*, 17 Ark. 608. Cal.—*Harrison v. McCormick*, 122 Cal. 651, 55 Pac. 592; *Jeffers v. Cook*, 58 Cal. 147. Conn.—*McEvoy v. Waterbury*, 92 Conn. 664, 104 Atl. 164. Ill.—*United States Insurance Co. v. Ludwig*, 108 Ill. 514; *McCarthy v. Hetzner*, 70 Ill. App. 480; *Mosier v. Flanner-Miller Lumber Co.*, 66 Ill. App. 630. Kan.—*Anderson v. Atchison T. & S. F. R. Co.*, 71 Kan. 453, 80 Pac. 946. Mo.—*Jaicks v. Sullivan*, 128 Mo. 177, 30 S. W. 890. Tex.—*Cable v. Jackson*, 16 Tex. Civ. App. 579, 42 S. W. 136. Wis.—*Levy v. Wilcox*, 96 Wis. 127, 70 N. W. 1109.

See 20 STANDARD PROC. 368.

[a] But when no judgment can be rendered until all persons beneficially interested are before the court, as in cases of will contests, the action is deemed commenced against all from the time it was originally instituted. *Floyd v. Floyd*, 90 Ind. 130; *Bradford v. Andrews*, 20 Ohio St. 208, 5 Am. Rep. 645.

[b] A landlord admitted on his own motion as a defendant in ejectment against his tenant is in the same position as if he were originally a party. *Turner v. White*, 97 Ala. 545, 12 So. 601.

[c] An amendment adding a co-executor is not the commencement of a new litigation so as to render it amen-

able to the plea of the statute of limitations. *Burgie v. Parks*, 11 Lea (Tenn.) 84.

[d] But as to new defendants acquiring their interest in the subject-matter, *pendente lite*, the action is deemed commenced at the time it was begun against the original parties from whom they acquired their interest. *Willingham v. Long*, 47 Ga. 540; *State v. Woodruff*, 81 Miss. 456, 33 So. 78.

5. Cal.—*Harrison v. McCormick*, 122 Cal. 651, 55 Pac. 592. Kan.—*Western Sash & Door Co. v. Heiman*, 65 Kan. 5, 68 Pac. 1080. Mo.—*Jaicks v. Sullivan*, 128 Mo. 177, 30 S. W. 890. Tenn.—*Burgie v. Parks*, 11 Lea 84.

6. Ill.—*Houghland v. Avery Coal & Min. Co.*, 246 Ill. 609, 93 N. E. 40. Kan.—*Hucklebridge v. Atchison, T. & S. F. R. Co.*, 66 Kan. 443, 71 Pac. 814. Okla.—*Motsenbocker v. Shawnee Gas & E. Co.*, 49 Okla. 304, 152 Pac. 82, L. R. A. 1916B, 910. Tenn.—*Hooper v. Atlanta, K. & N. Ry. Co.*, 107 Tenn. 712, 65 S. W. 405.

[a] In an action of wrongful death, an amendment (1) adding a necessary party beneficiary after the lapse of the statutory period, is not the commencement of a new suit and is permissible. *Houghland v. Avery Coal & M. Co.*, 246 Ill. 609, 93 N. E. 40. (2) An amendment adding the mother of the deceased as a plaintiff made after the bar of the statute of limitations is complete, is subject to an exception upon this ground as to the mother as the action in behalf of the other beneficiaries does not stop the running of the statute as to her. But the exception is not well taken as to the original parties. *East Line & R. R. R. Co. v. Culbertson*, 72 Tex. 375, 10 S. W. 706, 13 Am. St. Rep. 805, 3 L. R. A. 567.

Adding parties by amendment, see 20 STANDARD PROC. 952.

7. *Barker v. Anniston, O. & O. St. Ry. Co.*, 92 Ala. 314, 8 So. 466.



substitution of parties by amendment resulting in a change in the cause of action, the action as to the substitute parties is deemed commenced when the substituted parties are brought in.<sup>8</sup> The question of what changes in the parties amounts to a change in the cause of action, is elsewhere discussed.<sup>9</sup>

**IV. FORMS AND KINDS OF ACTIONS.**—A. **GENERALLY.** Actions are divided into two kinds, civil and criminal.<sup>10</sup> Civil actions are classified with reference to their objects and legal attributes, as actions at law and in equity,<sup>11</sup> actions in rem and actions in personam,<sup>12</sup> and remedial and penal;<sup>13</sup> and with reference to their subject matter as real, personal, and mixed.<sup>14</sup> Personal actions with reference to the nature of the cause of action, are in form *ex contractu* and *ex delicto*.<sup>15</sup> With respect to venue, actions are local or transitory.<sup>16</sup>

B. **CIVIL AND CRIMINAL ACTIONS.**—**Civil Action**—The code defines a civil action as one prosecuted by one party against another for the enforcement or protection of a right or the redress or prevention of a wrong.<sup>17</sup> This expression is used in opposition to the term “criminal

See the title “**New Cause of Action or Defense**” and 20 STANDARD PROC. 954, note 22.

8. *Beatty v. Atlanta & W. P. R. Co.*, 100 Ga. 123, 28 S. E. 32. See 20 STANDARD PROC. 366.

9. See the titles “**New Cause of Action or Defense**,” “**Parties**,” and particularly 20 STANDARD PROC. 366, 962.

10. *Ind.*—*Hockemeyer v. Thompson*, 150 Ind. 176, 48 N. E. 1029, 49 N. E. 1059. *Ky.*—*Adams v. Ashby*, 2 Bibb.

96. *Mo.*—*State ex rel. Koehitzky v. Riley*, 203 Mo. 175, 187, 101 S. W. 567, 11 L. R. A. (N. S.) 900. *N. Y.*—*Landers v. Staten Island R. Co.*, 53 N. Y. 450, 14 Abb. Pr. (N. S.) 346. *Ore.*—*Fenstermacher v. State*, 19 Ore. 504, 25 Pac. 142.

11. See *infra*, IV, C.

12. *Frost v. Witter*, 132 Cal. 421, 426, 64 Pac. 705, 84 Am. St. Rep. 53. See the titles, “**Personal Actions**,” “**Proceedings in Rem**,” “**Real and Mixed Actions**.”

13. See the title, “**Penalties, Forfeitures, and Fines**.”

[a] **Actions Contrasted.**—(1) An action is remedial when brought by the party injured, and penal when brought by a common informer. *O’Keefe v. Weber*, 14 Ore. 55, 56, 12 Pac. 74 quoting *Bones v. Booth*, 2 W. Bl. 1226, 96 Eng. Reprint 721. (2) There is no difference respecting its remedial character, between a statute giving single and one giving accumulative

damages. *O’Keefe v. Weber*, 14 Ore. 55, 12 Pac. 74.

[b] A remedial action is brought to obtain indemnity. *Reed v. Northfield*, 13 Pick. (Mass.) 94, 101, 23 Am. Dec. 662.

**Qui Tam Actions**, see the title, “**Penalties, Forfeiture and Fines**.”

14. *Patterson v. Murray*, 53 N. C. 278. See the titles, “**Personal Actions**” and “**Real and Mixed Actions**.”

15. *Clinton Mutual Co. Fire Ins. Co. v. Zeigler*, 201 Ill. 371, 66 N. E. 222. See *infra*, IV, E.

16. See the title “**Venue**” and 5 STANDARD PROC. 8 and 9.

**As to territorial jurisdiction**, see 17 STANDARD PROC. 761.

17. *Ark.*—*Nelson v. Cowling*, 89 Ark. 334, 116 S. W. 890. *Colo.*—See *Greeley v. Hamman*, 12 Colo. 94, 99, 20 Pac. 1. *Ill.*—*McPike v. McPike*, 10 Ill. App. 332. *Ia.*—*Whitney v. Atlantic Southern R. Co.*, 53 Iowa 651, 6 N. W. 32. *Ohio.*—*Pittsburg, C. C. & St. L. Ry. Co. v. Bemis*, 64 Ohio St. 26, 59 N. E. 745. *R. I.*—See *Thrift v. Thrift*, 30 R. I. 357, 75 Atl. 484.

**Civil action under statute relating to change of venue**, see 5 STANDARD PROC. 5.

[a] **Definitions.**—(1) “A civil action is instituted for the purpose of enforcing a private or civil right, or to redress a private wrong, as distinguished from actions instituted to punish crimes which are known as ‘criminal actions’.” *Fenstermacher v.*

action,"<sup>18</sup> and it includes actions at law and in equity,<sup>19</sup> proceedings in admiralty,<sup>20</sup> and it has been held all other judicial controversies in which the rights of property are involved.<sup>21</sup> The term includes actions in which the government is a party as well as those in which private persons are parties.<sup>22</sup>

A criminal action is one prosecuted by the state against a person charged with a public offense committed in violation of a public law.<sup>23</sup> Some actions are regarded as quasi criminal.<sup>24</sup> A penal action is not necessarily a criminal action.<sup>25</sup>

State, 19 Ore. 504, 25 Pac. 142. (2) A civil action is a substitute for all such judicial proceedings as were formerly known as actions at law and suits in equity. *Chinn v. Trustees*, 32 Ohio St. 236.

[b] Other Definitions, see the following: U. S.—*Gruetter v. Cumberland Tel. etc. Co.*, 181 Fed. 248. Ark.—*Jefferson v. Philpot*, 66 Ark. 243, 245, 50 S. W. 453. Conn.—*Pettis v. Pomfret*, 28 Conn. 566. Ga.—*Western Union Tel. Co. v. Taylor*, 84 Ga. 408, 418, 11 S. E. 396, 8 L. R. A. 189. Ind.—*Berry v. Berry*, 147 Ind. 176, 46 N. E. 470; *Evans v. Evans*, 105 Ind. 204, 210, 5 N. E. 24, 768. Ky.—*Combs v. Com.*, 24 Ky. L. Rep. 1310, 71 S. W. 504. Me.—*Bryant v. Glidden*, 36 Me. 36, 44. Mo.—*State ex rel. Kochtitzky v. Riley*, 203 Mo. 175, 187, 101 S. W. 567, 12 L. R. A. (N. S.) 900; *State v. Union Trust Co.*, 70 Mo. App. 311, 317. Mont.—*Deer Lodge v. Kohrs*, 2 Mont. 66. Vt.—*State v. One Bottle of Brandy*, 43 Vt. 297.

[c] "The precise meaning of the descriptive term . . . must be judged by its connections and the manner in which it is used in the particular case." *Howard v. Merrimac River Locks*, 12 Cush. (Mass.) 259, 263.

[d] A proceeding for incorporation of a drainage district is a civil suit under the statute relating to change of venue. *State ex rel. Kochtitzky v. Riley*, 203 Mo. 175, 191, 101 S. W. 567, 12 L. R. A. (N. S.) 900. See also *Bass v. Elliott*, 105 Ind. 517, 5 N. E. 663.

Third party claim as a civil suit, see 16 STANDARD PROC. 125.

Proceedings for violation of ordinances, see 20 STANDARD PROC. 213.

Partition suit is a civil action. See 20 STANDARD PROC. 1005.

Forcible entry and detainer suit is civil, see 8 STANDARD PROC. 1090.

Mandamus is a civil action, see 19 STANDARD PROC. 123, et seq.

[e] Mortgage foreclosure suits are civil actions. *Ingersoll v. Davis*, 14 Wyo. 120, 82 Pac. 867.

18. U. S.—*Green v. United States*, 9 Wall. 655, 19 L. ed. 806; *Gruetter v. Cumberland Telephone & Tel. Co.*, 181 Fed. 248. Fla.—*Curry v. Marvin*, 2 Fla. 411, 417. Ia.—*Kramer v. Rebman*, 9 Iowa 114. Mo.—*State ex rel. Kochtitzky v. Riley*, 203 Mo. 175, 187, 101 S. W. 567, 12 L. R. A. (N. S.) 900. N. Y.—*Landers v. Staten Island R. Co.*, 53 N. Y. 450, 14 Abb. Pr. (N. S.) 346. Ore.—*Fenstermacher v. State*, 19 Ore. 504, 25 Pac. 142.

19. U. S.—*United States v. 10,000 Cigars*, 1 Wool. 123, 28 Fed. Cas. No. 16,451. Conn.—*Ludington v. Merrill*, 81 Conn. 400, 71 Atl. 504. Ia.—*Kramer v. Rebman*, 9 Iowa 114. N. C.—*Tate v. Powe*, 64 N. C. 644. Ohio.—*Chinn v. Trustees*, 32 Ohio St. 236. Okla.—*Hendrickson v. Brown*, 11 Okla. 41, 43, 65 Pac. 935. Ore.—*In re Fenstermacher v. State*, 19 Ore. 504, 25 Pac. 142.

See *infra*, IV, C.

20. *United States v. 10,000 Cigars*, 1 Wool. (U. S.) 123, 28 Fed. Cas. No. 16,451.

21. *United States v. 10,000 Cigars*, 1 Wool. (U. S.) 123, 28 Fed. Cas. No. 16,451, *quot.* in *In re Fenstermacher v. State*, 19 Ore. 504, 25 Pac. 142.

Mandamus as a civil action, see 19 STANDARD PROC. 123.

22. *Green v. United States*, 9 Wall. (U. S.) 655, 658, 19 L. ed. 806; *State v. Steele*, 112 Ga. 39, 37 S. E. 174.

23. Kan.—*In re Burnette*, 73 Kan. 609, 85 Pac. 575. N. C.—*State v. Simons*, 68 N. C. 378. S. C.—*State v. Smalls*, 11 S. C. 262. Wis.—*State v. Hamley*, 137 Wis. 458, 119 N. W. 114.

Prosecutions for violation of city ordinances as criminal actions, see 20 STANDARD PROC. 213.

24. Proceedings for violation of ordinances, see 20 STANDARD PROC. 213.

25. *United States v. Oregon Short*

A case may sometimes partake of the nature of both civil and criminal actions,<sup>26</sup> and certain proceedings are sometimes deemed to be civil and sometimes criminal.<sup>27</sup>

To determine whether an action is civil or criminal, the court should look not so much to the method of procedure to be followed as to the end to be attained.<sup>28</sup> The form of proceeding is not necessarily determinative, as a civil action may in form be a criminal proceeding, or vice versa.<sup>29</sup> Neither the fact that the action is brought in the name of the state,<sup>30</sup> nor the fact that the judgment may be enforced by the arrest and detention of the person,<sup>31</sup> is conclusive of the criminal nature of an action.

**Change of Form.** — A criminal action cannot be converted into an action for damages.<sup>32</sup>

**C. LEGAL AND EQUITABLE ACTIONS. — 1. Generally.**<sup>33</sup> — An action at law is an action stating a legal cause of action and asking only

Line Ry. Co., 180 Fed. 483. See the title, "Penalties, Forfeitures and Fines."

26. *Iowa v. Chicago, B. & Q. R. Co.*, 37 Fed. 497, 3 L. R. A. 554.

[a] A civil action for damages for a tort in which punitive damages is awarded is a civil action although the punitive damages present the element of a punishment of a public wrong. *Iowa v. Chicago, B. & Q. R. Co.*, 37 Fed. 497, 3 L. R. A. 554.

27. See *infra*, this note.

**Bastardy proceedings** are sometimes civil and sometimes criminal. See 4 STANDARD PROC. 56.

**Proceedings for removal of officers**, see 20 STANDARD PROC. 788.

**Proceedings for violation of ordinances**, see 20 STANDARD PROC. 213.

**Proceedings to enforce supersedeas bonds in criminal cases**, are sometimes held to be civil and sometimes criminal. See the title, "Supersedeas and Stay of Proceedings."

28. *Ill.*—*People v. Show*, 13 Ill. 581.

**S. D.**—*State ex rel. Patterson v. Pickering*, 29 S. D. 207, 136 N. W. 105. *Utah.* *Skeen v. Craig*, 31 Utah 20, 86 Pac. 487. *Eng.*—See *Atcheson v. Everitt*, 1 Cowp. 382, 98 Eng. Reprint 1142.

[a] Because the proof of a crime by the adversary is necessary does not make a civil action a criminal proceeding. *In re Leslie*, 119 Fed. 406, 410.

[b] The criterion is the form of the proceeding, not the offense which occasions it. *Atcheson v. Everitt*, 1 Cowp. 382, 386, 98 Eng. Reprint 1142.

Contempt proceeding is in the nature

of a criminal proceeding. See 5 STANDARD PROC. 382.

29. *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746; *Castles v. Welch*, 63 N. H. 369.

[a] A proceeding to forfeit one's goods for an offense against the laws is a criminal case, though it may be civil in form. *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746.

30. *State v. Steele*, 112 Ga. 39, 37 S. E. 174.

[a] A proceeding in the name of the state is not a criminal case unless the judgment rendered might in some contingency result in the loss of liberty of the defendant. *State v. Steele*, 112 Ga. 39, 37 S. E. 174.

31. *Fortune v. Wilburton*, 142 Fed. 114, 73 C. C. A. 338, 4 L. R. A. (N. S.) 782; *In re Walker*, 61 Neb. 803, 86 N. W. 510. See *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 421, 442, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L. R. A. (N. S.) 874; *In re Chadwick*, 109 Mich. 588, 67 N. W. 1071. Compare *State v. Steele*, 112 Ga. 39, 37 S. E. 174.

**Proceedings for violation of municipal ordinances** are civil actions in some states. See 20 STANDARD PROC. 213.

See the titles "Arrest in Civil Cases;" "Bastardy Proceedings;" "Contempt."

As to execution against the person, see 16 STANDARD PROC. 269.

32. *Clader v. Shepowich*, 7 Kulp. (Pa.) 83.

33. **Amendment changing action**



legal relief as contradistinguished from a suit in equity asking equitable relief.<sup>34</sup> The actions are not only had in different forums,<sup>35</sup> except under the reformed procedure,<sup>36</sup> and are subject to different rules as to procedure and trial,<sup>37</sup> but afford different kinds of relief.<sup>38</sup> In the former, redress for injuries already inflicted only can be granted, but in the latter, not only may this character of relief be granted, but relief against threatened injuries may also be afforded.<sup>39</sup>

**2. Determination of Character of Action.**—Whether an action is to be regarded as legal or equitable must be determined from the bill or complaint,<sup>40</sup> and, more particularly, from the facts stated therein and the subject-matter of the action,<sup>41</sup> and from the nature of relief<sup>42</sup>

from law to equity, see 20 STANDARD PROC. 350.

Transfer of cause to proper docket when brought in wrong forum, see the title, "Transfer of Causes."

Election between remedies at law and in equity, see 5 STANDARD PROC. 119.

34. *Smith v. Cowell*, 41 Colo. 178, 186, 92 Pac. 20; *Exchange Bank v. Ford*, 7 Colo. 314, 3 Pac. 449; *Van de Wiele v. Garbade*, 60 Ore. 585, 589, 120 Pac. 752 (defining the term); *Burrage v. Bonanza G. & Q. M. Co.*, 12 Ore. 169, 6 Pac. 766.

Garnishment as a legal or equitable remedy, see 10 STANDARD PROC. 376.

35. See the title, "Equity Jurisdiction and Procedure."

Dismissal of action erroneously brought in equity, see 7 STANDARD PROC. 669.

36. See *infra*, IV, F.

37. See titles dealing with various phases of pleading and practice, such as "Bills and Answers;" "Declaration and Complaint;" "Pleas in Equity;" "Rejoinder and Subsequent Pleadings;" "Parties."

Legal actions are tried by jury, whereas equitable actions are not. See 16 STANDARD PROC. 878; 14 STANDARD PROC. 526.

Equitable defenses in legal actions, see *infra*, IV, G.

38. *Van de Wiele v. Garbade*, 60 Ore. 585, 589, 120 Pac. 752. See the titles, "Decrees;" "Judgments;" "Judgments and Decrees, Enforcement of;" "Injunctions;" "Reformation;" "Rescission and Cancellation;" "Specific Performance."

Legal and equitable relief in the same action, see *infra*, IV, G.

39. See *infra*, this note.

[a] **Contrasting of Legal and Equitable Actions.**—"Legal actions are designed to afford redress for injuries already inflicted and rights of persons or property actually invaded. Equitable actions, however, are not only remedial in their nature, but may also be brought for the purpose of restraining the infliction of contemplated wrongs or injuries and the prevention of threatened illegal action which may be the occasion of serious injury to others." *Thomas v. Musical Mut. Prot. Union*, 121 N. Y. 45, 51, 24 N. E. 24, 8 L. R. A. 175. See also *Worthington v. Waring*, 157 Mass. 421, 32 N. E. 744, 34 Am. St. Rep. 294, 20 L. R. A. 342; *Van de Wiele v. Garbade*, 60 Ore. 585, 589, 120 Pac. 752.

40. **U. S.**—*Motley, Green & Co. v. Detroit Steel & Spring Co.*, 161 Fed. 389. **Idaho.**—*Johansen v. Looney*, 30 Idaho 123, 163 Pac. 303. **N. Y.**—*Welsh v. Darragh*, 52 N. Y. 590.

41. **U. S.**—*Duncan v. Greenwalt*, 10 Fed. 800, 3 McCrary 378. **Ind.**—*Watt v. Barnes*, 41 Ind. App. 466, 84 N. E. 158. **Neb.**—*Stephens v. Harding*, 48 Neb. 659, 67 N. W. 746. **N. Y.**—*E. Clemens Horst Co. v. Stocker*, 134 App. Div. 771, 119 N. Y. Supp. 372. **S. D.**—*Sykes v. Canton First Nat. Bank*, 2 S. D. 242, 258, 49 N. W. 1058.

[a] The court must look to the substance of the issue presented and tried to determine the character of the action. *Lashmett v. Prall*, 93 Neb. 184, 139 N. W. 1048; *Faben v. Muir*, 77 Wash. 460, 137 Pac. 1042.

42. **U. S.**—*Duncan v. Greenwalt*, 10 Fed. 800, 3 McCrary 378. **Cal.**—*Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820. **Idaho.**—*Johansen v. Looney*, 30 Idaho 123, 163 Pac. 303. **Ind.**—*Watt v. Barnes*, 41 Ind. App. 466, 84 N. E. 158.

desired. But the prayer is not the sole determining factor.<sup>43</sup> The relation of the parties may be an element in determining the character of the action when it is such that the action could be brought in equity only.<sup>44</sup> But designating the party as a "complainant" instead of "plaintiff" is not decisive of the question;<sup>45</sup> neither is the name given to the action by the pleader.<sup>46</sup>

If both legal and equitable relief are sought, the character of the action is determined by the principal question or relief, unaffected by other ancillary relief sought.<sup>47</sup>

The character of the defense does not determine the character of the action,<sup>48</sup> and therefore the interposition of an equitable defense<sup>49</sup> in

**Ia.**—*Tilton v. Bader*, 181 Iowa 473, 164 N. W. 871; *Price v. Aetna Ins. Co.*, 80 Iowa 408, 45 N. W. 1053, an issue is not equitable, within the meaning of the statute unless equitable relief is asked. **Neb.**—*Stephens v. Harding*, 48 Neb. 659, 67 N. W. 746. **N. Y.**—*Reubens v. Joel*, 13 N. Y. 488, 493; *E. Clemens Horst Co. v. Stocker*, 134 App. Div. 771, 119 N. Y. Supp. 372; *Rogers v. Maguire*, 75 Hun 133, 27 N. Y. Supp. 276. **Ore.**—*Van de Wiele v. Garbade*, 60 Ore. 585, 120 Pac. 752. **S. D.**—*Redwater Land & Canal Co. v. Jones*, 27 S. D. 194, 130 N. W. 85. **Wis.**—*Gillett v. Treganza*, 13 Wis. 472, 476.

[a] "The most obvious distinction between actions at law and actions in equity consists in the different modes of relief." *Troster v. Dann*, 83 Misc. 399, 145 N. Y. Supp. 56.

[b] Where the statement of facts supports equally an action at law or in equity, leaving no means of determining which view should prevail, the relief sought must solve the doubt. *O'Brien v. Fitzgerald*, 143 N. Y. 377, 38 N. E. 371.

43. **Ark.**—*Rugg v. Lemly*, 78 Ark. 65, 93 S. W. 570, 115 Am. St. Rep. 17. **Ind.**—*Watt v. Barnes*, 41 Ind. App. 466, 84 N. E. 158. **Mo.**—*Geltz v. Amsden*, 125 Mo. App. 592, 102 S. W. 1037. **N. Y.**—*O'Brien v. Fitzgerald*, 143 N. Y. 377, 38 N. E. 371; *E. Clemens Horst Co. v. Stocker*, 134 App. Div. 771, 119 N. Y. Supp. 372; *Rogers v. Maguire*, 75 Hun 133, 27 N. Y. Supp. 276.

[a] **Illustrations.**—A statement of damages does not change an action in equity into one at law, any more than a request for a restraint in an action at law changes it into one solely in equity. *Geltz v. Amsden*, 125 Mo. App. 592, 102 S. W. 1037.

44. *Rogers v. Maguire*, 75 Hun 133, 27 N. Y. Supp. 276, an action between co-executors.

45. *Motley, Green & Co. v. Detroit Steel & Spring Co.*, 161 Fed. 389.

46. *Anderson v. Hunn*, 5 Hun (N. Y.) 79, 83; *Thompson v. Hibbs*, 45 Ore. 141, 76 Pac. 778.

47. **Cal.**—*Haggin v. Kelly*, 136 Cal. 481, 69 Pac. 140. **Colo.**—*Cree v. Lewis*, 49 Colo. 186, 112 Pac. 326. **Ia.**—*Mullen v. Callanan*, 167 Iowa 367, 149 N. W. 516. **Ohio.**—*Raymond v. Toledo, St. L. & K. C. R. Co.*, 57 Ohio St. 271, 287, 48 N. E. 1093. **S. D.**—*Redwater Land & Canal Co. v. Jones*, 27 S. D. 194, 130 N. W. 85. **Wis.**—*Gillett v. Treganza*, 13 Wis. 472.

As affecting right to trial by jury, see 16 STANDARD PROC. 882.

[a] A prayer for damages does not change an equity suit to one at law. **Cal.**—*McLaughlin v. Del Re*, 64 Cal. 472, 2 Pac. 244. **Ia.**—*Mullen v. Callanan*, 167 Iowa 367, 149 N. W. 516. **Mo.**—*Geltz v. Amsden*, 125 Mo. App. 592, 102 S. W. 1037.

[b] An action of ejectment with a prayer for a temporary injunction to restrain waste is one at law. An added prayer that the injunction be made permanent is superfluous. *Haggin v. Kelly*, 136 Cal. 481, 69 Pac. 140.

48. *Joyce v. Murnaghan*, 17 Mo. App. 11.

49. **Cal.**—*Swasey v. Adair*, 88 Cal. 179, 25 Pac. 1119. **Minn.**—*Pierce v. Maetzold*, 126 Minn. 445, 148 N. W. 302. **Mo.**—*Koehler v. Rowland*, 205 S. W. 217; *Pitts v. Pitts*, 201 Mo. 356, 100 S. W. 1047; *Brooks v. Gaffin*, 192 Mo. 228, 244, 90 S. W. 808; *Thompson v. National Bank*, 132 Mo. App. 225, 110 S. W. 681; *Joyce v. Murnaghan*, 17 Mo. App. 11. **N. Y.**—*Welsh v. Daragh*, 52 N. Y. 590; *New York &*

a legal action does not change its character, except when affirmative equitable relief is asked.<sup>50</sup>

Nor will equitable matter in the reply change the character of the action.<sup>51</sup>

An interpleader may have such an effect, but an intervention does not.<sup>52</sup>

**3. Abolition of Distinctions.**—The distinction between actions at law and suits in equity is still preserved in many state courts,<sup>53</sup> and by the federal courts.<sup>54</sup> But the statutes in some states abolish the distinction between legal and equitable procedure.<sup>55</sup> And the codes in many states expressly provide that the distinction between actions at law and suits in equity is abolished.<sup>56</sup> And even in the absence of such an express provision, it has been held the same result is accomplished by a provision that there shall be but one form of action.<sup>57</sup>

Brooklyn Brew. Co. v. Angelo, 144 App. Div. 655, 129 N. Y. Supp. 713. Ohio. Raymond v. Toledo, St. L. & K. C. R. Co., 57 Ohio St. 271, 288, 48 N. E. 1093. S. C.—Chapman v. Lipcomb, 18 S. C. 222, 232. Tex.—Snow v. Gallup, 57 Tex. Civ. App. 572, 123 S. W. 222.

Does not render the cause triable by jury, see 16 STANDARD PROC. 884.

50. Cal.—Estrada v. Murphy, 19 Cal. 248. Mo.—Fleming v. Tatum, 232 Mo. 678, 135 S. W. 61; Brooks v. Gaffin, 192 Mo. 228, 244, 90 S. W. 808; Martin v. Turnbaugh, 153 Mo. 172, 54 S. W. 515; Dunn v. McCoy, 150 Mo. 548, 52 S. W. 21; Thompson v. National Bank, 132 Mo. App. 225, 110 S. W. 681. Ore.—Raymond v. Toledo, St. L. & K. C. R. Co., 57 Ohio St. 271, 288, 48 N. E. 1093.

See 16 STANDARD PROC. 885.

[a] When the facts upon which the legal right is founded are admitted by the answer, and other facts are alleged by way of counterclaim which would constitute an equitable defense in chancery, then no issue arises in a "case at law" entitling the parties to a jury trial. Kenny v. McKenzie, 25 S. D. 485, 493, 127 N. W. 597.

In third party claims, see 16 STANDARD PROC. 125.

51. Raymond v. Toledo, St. L. & K. C. R. Co., 57 Ohio St. 271, 288, 48 N. E. 1093.

52. See 16 STANDARD PROC. 888.

53. See Worthington v. Waring, 157 Mass. 421, 32 N. E. 744, 34 Am. St. Rep. 294, 20 L. R. A. 342 (construing statute); Otto v. Highland Park (Mich.), 169 N. W. 904.

[a] But the courts of law are continually extending their equitable pow-

ers. Kronson v. Lipschitz, 68 N. J. Eq. 367, 60 Atl. 819.

54. Gibson v. Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534; Thompson v. Central Ohio R. Co., 6 Wall. (U. S.) 134, 18 L. ed. 765; Highland Boy Gold Min. Co. v. Strickley, 116 Fed. 852, 54 C. C. A. 186. See United States to Use of Morris v. Richardson, 223 Fed. 1010, 139 C. C. A. 386.

[a] The act of Congress of March 3, 1915 (Judicial Code §274b, Comp. St. 1916, §1251b), allowing equitable defenses in actions at law does not abolish all distinctions between actions at common law and suits in equity and establish one form of civil action for all cases. Keatley v. United States Trust Co., 249 Fed. 296, 161 C. C. A. 304.

55. McCall v. Fry, 120 Ga. 661, 48 S. E. 200.

Effect of statute, see *infra*, IV, F.

56. U. S.—Johns v. Wilson, 180 U. S. 440, 448, 21 Sup. Ct. 445, 45 L. ed. 613, under Arizona practice. Alaska. First Nat. Bank v. Fish, 2 Alaska 344. Idaho.—Coleman v. Jagers, 12 Idaho 125, 85 Pac. 894, 118 Am. St. Rep. 207. N. Y.—Emery v. Pease, 20 N. Y. 62. N. C.—Makuen v. Elder, 170 N. C. 510, 87 S. E. 334; Tate v. Powe, 64 N. C. 644. Okla.—St. Louis & S. F. R. Co. v. Yount, 30 Okla. 371, 375, 120 Pac. 627; Farmers' & Merchants' Nat. Bank v. Hoyt, 29 Okla. 772, 120 Pac. 264. Utah.—Morgan v. Child Cole & Co., 41 Utah 562, 128 Pac. 521. Wis. Joseph Dessert Lumber Co. v. Wadleigh, 103 Wis. 318, 79 N. W. 237; Kollock v. Scribner, 98 Wis. 104, 73 N. W. 776.

Effect of codes, see *infra*, IV, F.

57. Browder v. Phinney, 30 Wash.



But in some code states, the distinction is held to still remain.<sup>58</sup> In Texas no distinction between law and equity is recognized.<sup>59</sup>

**D. COMMON LAW FORMS OF ACTION.**—The common law forms of action are treated under specific titles.<sup>60</sup>

**Abolition and Recognition of Common-law Forms.**—Statutes have sometimes abolished the distinctions between certain of the common-law forms of action.<sup>61</sup> The codes have expressly done so,<sup>62</sup> and in Texas the common-law forms of action were never introduced.<sup>63</sup>

**Effect of Mistake or Error as to Form.**—At common law, a mistake or error of a party as to the proper form of action is fatal if properly objected to.<sup>64</sup> It is ground of abatement,<sup>65</sup> and of demurrer,<sup>66</sup> and advantage may be taken of it under the general issue,<sup>67</sup> or by motion for nonsuit.<sup>68</sup> But if no objection is made, the error is generally cured by the verdict,<sup>69</sup> although some cases have held it ground for arrest,<sup>70</sup> or for reversal on appeal.<sup>71</sup>

74, 70 Pac. 264.

58. *Ia.*—*Searles v. Northwestern Mut. L. Ins. Co.*, 148 Iowa 65, 126 N. W. 801, 29 L. R. A. (N. S.) 405. *Nev.* *Botsford v. Van Riper*, 33 Nev. 156, 196, 110 Pac. 705. *Ore.*—*Le Clare v. Thibault*, 41 Ore. 601, 69 Pac. 552; *Burrage v. Bonanza Gold & Q. M. Co.*, 12 Ore. 169, 6 Pac. 766; *Beacannon v. Liebe*, 11 Ore. 443, 5 Pac. 273.

59. *Smith v. Doak*, 3 Tex. 215; *Robbins' Admr. v. Walters*, 2 Tex. 130; *Georgetown Merc. Co. v. First Nat. Bank* (Tex. Civ. App.), 165 S. W. 73.

60. See the titles, "Assumpsit;" "Case (The Action of Trespass on the);" "Covenant, Action of;" "Debt;" "Detinue;" "Dower, Proceedings To Recover;" "Ejectment;" "Replevin;" "Trespass;" "Trove and Conversion."

61. Between trespass and case, see 4 STANDARD PROC. 616.

62. See *infra*, IV, F.

63. *Banton v. Wilson*, 4 Tex. 400; *Robbins' Admr. v. Walters*, 2 Tex. 130, 136; *Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.* (Tex. Civ. App.), 171 S. W. 1103.

[a] Under the Texas system of pleading, (1) the facts alleged control and determine the character of the action. *Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.* (Tex. Civ. App.), 171 S. W. 1103. (2) The pleader must state his facts; he must state them truly and must prove them as alleged. *Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.* (Tex. Civ. App.), 171 S. W. 1103.

64. *Ky.*—*Wickliffe v. Sanders*, 6 T.

*B. Mon.* 296. *Md.*—*Warfield v. Walter*, 11 Gill & J. 80. *Mass.*—*Agry v. Young*, 11 Mass. 220. *N. H.*—*Woods v. Nashua Mfg. Co.*, 4 N. H. 527. *N. Y.*—*Seneca Road Co. v. Auburn & R. R. Co.*, 5 Hill. 170. *R. I.*—*Conroy v. Equitable Acc. Co.*, 27 R. I. 467, 63 Atl. 356. *Vt.*—*McKay v. Darling*, 65 Vt. 639, 27 Atl. 324.

65. *Md.*—*Warfield v. Walter*, 11 Gill & J. 80. *N. H.*—*Woods v. Nashua Mfg. Co.*, 4 N. H. 527. *N. Y.*—*Seneca Road Co. v. Auburn & R. R. Co.*, 5 Hill 170.

66. *Warfield v. Walter*, 11 Gill & J. 80; *Woods v. Nashua Mfg. Co.*, 4 N. H. 527.

67. *Warfield v. Walter*, 11 Gill & J. (Md.) 80, 86.

68. See 7 STANDARD PROC. 675.

69. Cure by verdict, see 21 STANDARD PROC. 420. But see *Agry v. Young*, 11 Mass. 220.

[a] But if no objection is made to the form of action until the evidence has been introduced, a recovery can be had for a tort under the common counts in assumpsit. *McDonald v. Young*, 198 Mich. 620, 165 N. W. 678.

70. *Wickliffe v. Sanders*, 6 T. B. Mon. (Ky.) 296; *Agry v. Young*, 11 Mass. 220.

71. *Lynch v. Freeland, Sneed* (Ky.) 269.

[a] A verdict and judgment in debt is not supported by a declaration in case, and the judgment will be reversed. *Lynch v. Freeland, Sneed* (Ky.) 269.

**E. CONTRACT AND TORT ACTIONS. — 1. Generally.**<sup>72</sup> — Actions *ex contractu* are actions for breach of contract express or implied,<sup>73</sup> and actions *ex delicto* include actions for the redress of wrongs unconnected with contract,<sup>74</sup> and actions upon causes of action arising from a breach of duty growing out of contract.<sup>75</sup>

**Quasi Contractual Actions.** — Actions are sometimes regarded as quasi *ex contractu* where there is no express contract between the parties.<sup>76</sup>

**2. Determination of Character of Action.** — Broad as the distinction between contract and tort actions is, cases on the border line are difficult of classification,<sup>77</sup> as there is no certain test for determining

**72. Amendment changing action from assumpsit to tort,** see 20 STANDARD PROC. 351.

**73. Ala.**—Myers *v.* Gilbert, 18 Ala. 467; Wilkinson *v.* Moseley, 18 Ala. 288. **Mass.**—Tuttle *v.* George H. Gilbert Mfg. Co., 145 Mass. 169, 174, 13 N. E. 465. **N. Y.**—Busch *v.* Interborough Rapid Transit Co., 187 N. Y. 388, 80 N. E. 197, 10 Ann. Cas. 460. **R. I.** Royce *v.* Oakes, 20 R. I. 418, 421, 39 Atl. 758, 39 L. R. A. 845. **Tex.**—Pecos & N. T. Ry. Co. *v.* Amarillo St. Ry. Co. (Tex. Civ. App.), 171 S. W. 1103.

See 1 Chit. Pl. 97; and also the titles, “Assumpsit;” “Implied and Express Agreements;” “Money Counts;” “Undertakings.”

[a] The expression “actions *ex contractu*” has reference to the nature of the cause of action rather than to the form of the proceeding for its enforcement. It may include actions at law and in equity. Clinton Mutual Co. Fire Ins. Co. *v.* Zeigler, 201 Ill. 371, 66 N. E. 222.

[b] An action to reform an ambiguity in an insurance policy is an action *ex contractu*. Clinton Mutual County Fire Ins. Co. *v.* Zeigler, 201 Ill. 371, 66 N. E. 222.

Actions on judgments are *ex contractu*, see 16 STANDARD PROC. 368.

Breach of promise suit is *ex contractu*. See 4 STANDARD PROC. 547.

**74. Busch v. Interborough Rapid Transit Co.,** 187 N. Y. 388, 391, 80 N. E. 197, 10 Ann. Cas. 460; Pecos & N. T. Ry. Co. *v.* Amarillo St. Ry. Co. (Tex. Civ. App.), 171 S. W. 1103; Wartman *v.* Empire Loan Co., 45 Tex. Civ. App. 469, 101 S. W. 499. See also Fisher *v.* Greensboro Water Supply Co., 128 N. C. 375, 38 S. E. 912.

[a] An action of tort is one in which damages are sought for defamation of character, for wrongful and

forcible taking of property, or for injury to it or to the person. Wartman *v.* Empire Loan Co., 45 Tex. Civ. App. 469, 101 S. W. 499.

[b] If the cause of action is a wrong with resulting injury, the action is *ex delicto*. Shippen *v.* Tankersley, 13 Fed. 537, 4 McCrary 259.

[c] “As a general rule, there must be some active negligence or misfeasance to support tort. There must be some breach of duty distinct from breach of contract.” Tuttle *v.* Gilbert Mfg. Co., 145 Mass. 169, 175, 13 N. E. 465.

[d] The mere violation of a contract when there is no general duty, is not the subject of an action of tort. Schick *v.* Fleischhauer, 26 App. Div. 210, 49 N. Y. Supp. 962.

**75. Myers v. Gilbert,** 18 Ala. 467; Wilkinson *v.* Moseley, 18 Ala. 288; Pecos & N. T. Ry. Co. *v.* Amarillo St. Ry. Co. (Tex. Civ. App.), 171 S. W. 1103.

**76. Walker v. New York,** 129 N. Y. Supp. 1059. See, however, the title “Assumpsit.”

[a] An action to recover salary of a public officer is quasi *ex contractu*. Walker *v.* New York, 129 N. Y. Supp. 1059. As to such actions generally, see 20 STANDARD PROC. 792.

**77. See the following cases:** U. S. Whittenton Mfg. Co. *v.* Memphis & O. River Packet Co., 21 Fed. 896. **Ga.** King *v.* Southern R. Co., 128 Ga. 285, 57 S. E. 507. **Kan.**—Kansas Pac. Ry. Co. *v.* Kunkel, 17 Kan. 145, 166. **Mass.** Tuttle *v.* George H. Gilbert Mfg. Co., 145 Mass. 169, 13 N. E. 465. **N. Y.** Busch *v.* Interborough R. T. Co., 187 N. Y. 388, 391, 80 N. E. 197, 10 Ann. Cas. 460, note; Rich *v.* New York Cent. etc. R. Co., 87 N. Y. 382, 390. **Wis.** W. H. Kiblinger Co. *v.* Sauk Bank, 131 Wis. 595, 111 N. W. 709.

to which class a particular action belongs,<sup>78</sup> and frequently the same facts will sustain either class of action.<sup>79</sup>

The character of the action, whether *ex contractu* or *ex delicto*, must be determined solely from the pleadings.<sup>80</sup> This question must be determined from the allegations of the complaint together with the nature of the relief demanded,<sup>81</sup> and if it appears that a contract is the gravamen of the action, it will be so determined.<sup>82</sup> Neither the

[a] "The dividing line between breaches of contract and torts is often dim and uncertain. There is no definition of either class of defaults which is universally accurate or acceptable. In a general way a tort is distinguished from a breach of contract in that the latter arises under an agreement of the parties, whereas the tort ordinarily is a violation of a duty fixed by law, independent of contract or the will of the parties, although it may sometimes have relation to obligations growing out of or coincident with a contract, and frequently the same facts will sustain either class of action (*Rich v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 382, 390)." *Busch v. Interborough Rapid Transit Co.*, 187 N. Y. 388, 80 N. E. 197, 10 Ann. Cas. 460.

78. *Busch v. Interborough Rapid Transit Co.*, 187 N. Y. 388, 80 N. E. 197, 10 Ann. Cas. 460, note; *Randolph & Co. v. Walker*, 78 S. C. 157, 59 S. E. 856.

79. *Ala.*—*Carpenter v. Walker*, 170 Ala. 659, 54 So. 60, Ann. Qas. 1912D, 863. *Ill.*—*Wallace v. Tanner*, 118 Ill. App. 639, 641. *Ind.*—*American Express Co. v. Lankford*, 1 Ind. Ter. 233, 39 S. W. 817. *Mass.*—*Stock v. Boston*, 149 Mass. 410, 21 N. E. 871, 14 Am. St. Rep. 430. *N. Y.*—*Busch v. Interborough Rapid Transit Co.*, 187 N. Y. 388, 80 N. E. 197, 10 Ann. Cas. 460.

See the titles, "Freight Carriers;" "Passengers."

Election of remedies between actions *ex contractu* and *ex delicto*. See 5 STANDARD PROC. 103.

[a] "A mere breach of contract cannot be sued on as a tort, but for tortious acts, independent of the contract, a man may be sued in tort, though one of the consequences is a breach of his contract." *Stock v. Boston*, 149 Mass. 410, 414, 21 N. E. 871, 14 Am. St. Rep. 430. To same effect see *Haines v. Franklin*, 87 Fed.

139; *Stern v. Farah Bros.*, 17 N. M. 516, 133 Pac. 400.

80. *Atchison, T. & S. F. Ry. Co. v. Long*, 5 Kan. App. 644, 47 Pac. 993. See 20 STANDARD PROC. 118; 10 STANDARD PROC. 222.

[a] The summons cannot be considered. *Haynes v. McKee*, 18 Misc. 361, 41 N. Y. Supp. 553.

81. *Ill.*—*Carter v. White*, 32 Ill. 509. *Ind.*—*Holt Ice & C. S. Co. v. Arthur Jordan Co.*, 25 Ind. App. 314, 57 N. E. 575. *N. Y.*—*McDonough v. Dillingham*, 43 Hun 493, 7 N. Y. St. 137. *Tex.*—*Elder Dempster & Co. v. St. Louis S. W. R. Co.*, 105 Tex. 628, 154 S. W. 975, 987; *Pecos N. T. Ry. Co. v. Amarillo St. Ry. Co.* (Tex. Civ. App.), 171 S. W. 1103. *Eng.*—*Corbett v. Packington*, 6 Barn. & C. 268, 13 E. C. L. 131, 108 Eng. Reprint 451.

[a] But non-issuable and immaterial allegations are not determinative. *Holt Ice & C. S. Co. v. Arthur Jordan Co.*, 25 Ind. App. 314, 57 N. E. 575.

[b] The Allegations Must Be Taken as a Whole.—*Foot v. Ffoulke*, 55 App. Div. 617, 67 N. Y. Supp. 368.

[c] A test is whether or not an allegation that the defendant undertook and promised is necessary. *Booth v. Farmers' & Mechanics' Nat. Bank*, 65 Barb. (N. Y.) 457, 1 Thomp. & C. 45.

[d] Intent To Deceive.—The true test depends upon the averment of an intent to cheat or deceived by the representations alleged to be false. *Lindsay v. Mulqueen*, 26 Hun (N. Y.) 485.

[e] The facts averred are substantially the same whether the contract is stated as an inducement, or whether its breach is counted upon. *Whilden v. Merchants' & P. Nat. Bank*, 64 Ala. 1, 27, 38 Am. Rep. 1.

82. *Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.* (Tex. Civ. App.), 171 S. W. 1103. See 10 STANDARD PROC. 222.



prayer of relief,<sup>83</sup> nor the formal language in which the cause of action is stated,<sup>84</sup> is necessarily decisive. The substance of the whole statement must be considered.<sup>85</sup> Allegations which are peculiar to either action are not necessarily decisive of the question, as they may be unnecessary and may be treated as surplusage,<sup>86</sup> or they may constitute matter of inducement.<sup>87</sup> An action has the markings of an action *ex contractu*, when not only a promise but a consideration also

83. *Thompson v. Strauss*, 29 Hun (N. Y.) 256.

[a] A *replevin* suit is necessarily determined by the demand of relief. *Thompson v. Strauss*, 29 Hun (N. Y.) 256.

[b] **Limitation of Rule.**—The rule that the demand for relief does not necessarily determine the character of relief is too broad, unless it be considered only as applicable where the defendant has answered. *Thompson v. Strauss*, 29 Hun (N. Y.) 256.

[c] Where the measure of recovery prayed for is adapted to only one form of action, the prayer is determinative of the nature of the action. *Whilden v. Merchants' & P. Nat. Bank*, 64 Ala. 1, 27, 38 Am. Rep. 1.

84. *Penoyer v. People*, 105 Ill. App. 481; *Drainage Comrs. v. Shiloh*, 91 Ill. App. 241; *Nirdlinger v. American Dist. Tel. Co.*, 245 Pa. 453, 91 Atl. 883, Ann. Cas. 1915D, 1184; *Livingston v. Cox*, 6 Pa. 360. See cases in next following note, and 20 STANDARD PROC. 118.

85. **III.**—*Penoyer v. People*, 105 Ill. App. 481. **Ind.**—*Flint & Walling Mfg. Co. v. Beckett*, 167 Ind. 491, 504, 79 N. E. 503, 12 L. R. A. (N. S.) 924. **Miss.**—*New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785. **N. Y.**—*Foote v. Ffoulke*, 55 App. Div. 617, 67 N. Y. Supp. 368.

See 10 STANDARD PROC. 222.

[a] A construction giving effect to all the material allegations of the complaint is preferred. *Flint & Walling Mfg. Co. v. Beckett*, 167 Ind. 491, 504, 79 N. E. 503, 12 L. R. A. (N. S.) 924.

86. **Cal.**—*Allsopp v. Joshua Hendy Mach. Wks.*, 5 Cal. App. 228, 231, 90 Pac. 39. **Ky.**—*Louisville & N. R. Co. v. Wathen*, 22 Ky. L. Rep. 82, 49 S. W. 185. **Mo.**—*Gann v. Chicago G. W. Ry. Co.*, 72 Mo. App. 34. **N. Y.**—*Price v. Parker*, 44 Misc. 582, 90 N. Y. Supp. 98. **Va.**—*Jewett v. Ware*, 107 Va. 802,

60 S. E. 131. **Wash.**—*Watson v. Bayliss*, 71 Wash. 499, 128 Pac. 1061.

87. **U. S.**—*Whittenton Mfg. Co. v. Memphis & Ohio River Packet Co.*, 21 Fed. 896. **Ala.**—*Western Union Tel. Co. v. Hill*, 163 Ala. 18, 28, 50 So. 248, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058; *Whilden v. Merchants' & P. Nat. Bank*, 64 Ala. 1, 38 Am. Rep. 1. **Ia.**—*Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 98 N. W. 281, 101 Am. St. Rep. 268, 64 L. R. A. 545. **Mo.**—*W. R. Hall Grain Co. v. Louisville & N. R. Co.*, 148 Mo. App. 308, 128 S. W. 42; *Canaday v. St. Louis United R. Co.*, 134 Mo. App. 282, 288, 114 S. W. 88. **Mont.**—*Nelson v. Great Northern R. Co.*, 28 Mont. 297, 72 Pac. 642. **Okla.**—*Fort Smith & W. R. Co. v. Ford*, 34 Okla. 575, 126 Pac. 745, 41 L. R. A. (N. S.) 745. **Tex.**—*Kansas City So. R. Co. v. Rosebrook-Josey Grain Co.* (Tex. Civ. App.), 114 S. W. 436; *Texarkana & Ft. S. Ry. Co. v. Rosebrook-Josey Grain Co.*, 52 Tex. Civ. App. 156, 114 S. W. 436. **Wis.**—*Rideout v. Milwaukee, L. S. & W. Ry. Co.*, 81 Wis. 237, 51 N. W. 439.

[a] Thus allegations of contractual relations between the parties are often pleaded by way of inducement and are not determinative. *Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 385, 98 N. W. 281, 101 Am. St. Rep. 268, 64 L. R. A. 545. See 10 STANDARD PROC. 222; 12 STANDARD PROC. 718, 720, note 17.

[b] That the contract is set up does not commit the plaintiff to the theory that his action is *ex contractu*. *Flint & Walling Co. v. Beckett*, 167 Ind. 491, 503, 79 N. E. 503, 12 L. R. A. (N. S.) 924. Compare 10 STANDARD PROC. 222; 20 STANDARD PROC. 118, note 10 [a].

[c] The use of the words "agreed," "undertook," or "promised" does not make the declaration one in contract. *Whittenton Mfg. Co. v. Memphis & Ohio River Packet Co.*, 21 Fed. 896; *Bratton v. Chicago R. I. & P. Ry. Co.*, 167 Mo. App. 75, 150 S. W. 1124.

is alleged,<sup>88</sup> but this too is not a matter of controlling consideration.<sup>89</sup>

**Construction Preferred.**—If, from a consideration of the pleading, the cause of action is doubtful or ambiguous, it will be construed to be *ex contractu*,<sup>90</sup> unless the defendant is a common carrier.<sup>91</sup>

**3. Under the code**, the distinction between actions in tort and in contract are as substantial as before.<sup>92</sup>

**F. EFFECT OF THE CODE.**<sup>93</sup>—The code provides that there shall be but one form of action which shall be denominated a civil action.<sup>94</sup> This provision has not changed the substantive rights of the parties.<sup>95</sup> The substance of the common law rules of legal procedure,<sup>96</sup> and the

88. *Whittenton Mfg. Co. v. Memphis & Ohio River Packet Co.*, 21 Fed. 896; *Flint & Walling Mfg. Co. v. Beckett*, 167 Ind. 491, 79 N. E. 503, 12 L. R. A. (N. S.) 924.

In actions against carriers, see 10 STANDARD PROC. 222.

[a] **For the reason** that an allegation of consideration is unnecessary if the action were in tort. *Flint & Walling Mfg. Co. v. Beckett*, 167 Ind. 491, 503, 79 N. E. 503, 12 L. R. A. (N. S.) 924.

89. *Whittenton Mfg. Co. v. Memphis & Ohio River Packet Co.*, 21 Fed. 896; *Flint & Walling Mfg. Co. v. Beckett*, 167 Ind. 491, 503, 79 N. E. 503, 12 L. R. A. (N. S.) 924. See 10 STANDARD PROC. 223, note 23.

[a] **There may be an averment of a consideration** for assuming a duty imposed by law, or a consideration connected with a contract pleaded only as an inducement. *Whittenton Mfg. Co. v. Memphis & Ohio River Packet Co.*, 21 Fed. 896.

90. *Lange v. Schile*, 111 App. Div. 613, 98 N. Y. Supp. 81; *McDonough v. Dillingham*, 43 Hun (N. Y.) 493, 496, 7 N. Y. St. 137; *Carroll v. Sharp*, 122 N. Y. Supp. 694.

91. *Ga.*—*Payton v. Gulf Line R. Co.*, 4 Ga. App. 762, 62 S. E. 469. *Miss.*—*New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785. *Tex.*—*Kansas City So. R. Co. v. Rosebrook-Josey Grain Co.* (Tex. Civ. App.), 114 S. W. 436; *Texarkana & Ft. S. Ry. Co. v. Rosebrook-Josey Grain Co.*, 52 Tex. Civ. App. 156, 164, 114 S. W. 436. See 20 STANDARD PROC. 118 (note 11); 10 STANDARD PROC. 222, note 20.

[a] **The construction most favorable** to the assertion of the cause of action in plaintiff's favor will be given. *Payton v. Gulf Line R. Co.*, 4 Ga. App. 762, 62 S. E. 469.

92. See *infra*, IV, F.

93. **Transfer of cause to proper docket** when wrongfully brought at law or in equity, see the title "Transfer of Causes."

94. Cal. Code Civ. Proc. §307. See the following cases: *Ia.*—*Holloway v. Griffith*, 32 Iowa 409, 7 Am. Rep. 208; *Conyngham v. Smith*, 16 Iowa 471. *Kan.*—*Fitzpatrick v. Gebhart*, 7 Kan. 35, 43. *Ky.*—*Hill v. Barrett*, 14 B. Mon. 83. *Okla.*—*St. Louis & S. F. R. Co. v. Yount*, 30 Okla. 371, 120 Pac. 627; *Casey v. Mason*, 8 Okla. 665, 669, 59 Pac. 252.

See also 6 STANDARD PROC. 656.

95. *Kan.*—*Fitzpatrick v. Gebhart*, 7 Kan. 35. *S. C.*—*Sullivan & Co. v. Sullivan*, 20 S. C. 509. *S. D.*—*Kenny v. McKenzie*, 25 S. D. 485, 127 N. W. 597.

96. *Richmond & L. Tp. Road Co. v. Rogers*, 7 Bush (Ky.) 532; *Parsley & Co. v. Nicholson*, 65 N. C. 207.

[a] **The substantial differences between the common law forms of action** remain as before. *Neb.*—*Hart v. Barnes*, 24 Neb. 782, 40 N. W. 322. *N. Y.*—*Goulet v. Asseler*, 22 N. Y. 225. *Okla.*—*Phelps, Dodge & Palmer Co. v. Halsell*, 11 Okla. 1, 65 Pac. 340. *Ore.*—*Watkins v. Record Photo. Abstract Co.*, 76 Ore. 421, 149 Pac. 478. *Wis.*—*Joseph Dessert Lumber Co. v. Wadleigh*, 103 Wis. 318, 79 N. W. 237.

[b] **The natural classification of actions** according to substance and the distinctions between the character of actions are not dispensed with. *Schroers v. Fisk*, 10 Colo. 599, 16 Pac. 285.

[c] "The legislature cannot abolish the distinction between personal and real actions, nor between actions to enforce a specific performance of a contract or recover a specific article, and those which seek merely a money judgment; nor between actions arising out of tort and those founded upon contract; because the distinction exists in

principles by which the different forms of action were previously governed,<sup>97</sup> still remain as before. As it has been said, the abolition of the common law names has not and cannot change the essential character of judicial remedies.<sup>98</sup> And the common law names are still used in code states for convenience.<sup>99</sup>

The distinctions between actions *ex contractu* and *ex delicto* are as material as before the code,<sup>1</sup> although the forms of action have been abolished.<sup>2</sup>

The distinctions between law and equity are as naked and broad as ever.<sup>3</sup> The distinction between legal and equitable principles,<sup>4</sup> and between legal and equitable causes of action,<sup>5</sup> and legal and equitable remedies and relief,<sup>6</sup> remain as before. If the case and the relief sought be of an equitable nature, then the rules of chancery are applied; if otherwise, those of the common law are applied.<sup>7</sup> And to obtain

fact, and not in mere form." Ricketts v. Dorrel, 55 Ind. 470, 474.

[d] The substance of the common-law actions remains. Watkins v. Record Photo. Abstract Co., 76 Ore. 421, 149 Pac. 478.

97. Cal.—Lubert v. Chauviteau, 3 Cal. 458, 58 Am. Dec. 415. N. Y.—El-  
dridge v. Adams, 54 Barb. 417, 419.  
N. C.—Parsley & Co. v. Nicholson, 65  
N. C. 207, 210. Wis.—Supervisors of  
Kewaunee Co. v. Decker, 30 Wis. 624,  
629.

[a] The courts often, if not univer-  
sally, turn to the common law prece-  
dents. This is not for the purpose of  
maintaining the distinction of the com-  
mon law forms, but to find out what a  
court compelled to recognize distinc-  
tions in forms of pleading has held on  
the same state of facts. St. Louis &  
S. F. R. Co. v. Yount, 30 Okla. 371,  
377, 120 Pac. 627.

98. Milwaukee L. H. & T. Co. v. Ela  
Co., 142 Wis. 424, 125 N. W. 903, 27  
L. R. A. (N. S.) 567.

99. Metropolis Mfg. Co. v. Lynch,  
68 Conn. 459, 469, 36 Atl. 832.

1. U. S.—Whittenton Mfg. Co. v.  
Memphis & Ohio River Packet Co., 21  
Fed. 896. Ind.—Ricketts v. Dorrell, 55  
Ind. 470, 474; Holt Ice & C. S. Co. v.  
Arthur Jordan Co., 25 Ind. App. 314,  
57 N. E. 575. Wis.—Howland v. Need-  
ham, 10 Wis. 495.

[a] Trespass at common law and  
under the statute are the same. Casey  
v. Mason, 8 Okla. 665, 59 Pac. 252.

2. Pecos & N. T. Ry. Co. v. Ama-  
rillo St. Ry. Co. (Tex. Civ. App.), 171  
S. W. 1103.

3. Cal.—Smith v. Rowe, 4 Cal. 6;

De Witt v. Hays, 2 Cal. 463, 56 Am.  
Dec. 352. N. Y.—Reubens v. Joel, 13  
N. Y. 488. Wash.—See Montesano v.  
Carr, 80 Wash. 384, 141 Pac. 894.

4. Mo.—Fowles v. Bentley, 135 Mo.  
App. 417, 115 S. W. 1090. N. Y.—John  
D. Park & Sons Co. v. Hubbard, 134  
App. Div. 468, 119 N. Y. Supp. 347;  
Ireland v. Nichols, 1 Sweeney 208, 37  
How. Pr. 222; Cropsey v. Sweeney, 27  
Barb. 310. N. C.—Makuen v. Elder,  
170 N. C. 510, 87 N. E. 334; John L.  
Roper Lumber Co. v. Wallace, 93 N. C.  
22. Wis.—Bonesteel v. Bonesteel, 23  
Wis. 245.

5. U. S.—Highland Boy Gold Min.  
Co. v. Strickley, 116 Fed. 852, 54 C.  
C. A. 186. Cal.—Murphy v. Crowley,  
140 Cal. 141, 145, 73 Pac. 820. Colo.  
Exchange Bank v. Ford, 7 Colo. 314,  
320, 3 Pac. 449. Ia.—Searles v. North-  
western Mut. L. Ins. Co., 148 Iowa 65,  
126 N. W. 801, 29 L. R. A. (N. S.)  
405.

[a] The distinction is a matter of  
substance and not of form. Highland  
Boy Gold Min. Co. v. Strickley, 116  
Fed. 852, 54 C. C. A. 186.

6. See 6 STANDARD PROC. 666; Reu-  
bens v. Joel, 13 N. Y. 488.

[a] No substantial modification of  
the remedy is brought about. Klonne  
v. Bradstreet, 7 Ohio St. 322.

7. Cal.—Smith v. Rowe, 4 Cal. 6.  
Mich.—Brown v. Kalamazoo Cir. Judge,  
75 Mich. 274, 284, 42 N. W. 827, 13  
Am. St. Rep. 438, 5 L. R. A. 226. Neb.  
Schultz v. Wise, 93 Neb. 718, 141 N.  
W. 813. N. Y.—Carroll v. Bullock, 207  
N. Y. 567, 101 N. E. 438.

[a] An equitable action even now  
must be maintained upon equitable



equitable relief an equitable cause of action or defense must appear in the pleadings.<sup>8</sup>

The change effected by the code extends only to the form of action and pleadings,<sup>9</sup> or to the method of enforcing the substantive rights of the parties.<sup>10</sup> The distinctions as to the manner of bringing actions,<sup>11</sup> as to the manner of bringing the defendant into court,<sup>12</sup> and as to the form and manner of obtaining relief<sup>13</sup> are abolished, and the statutes relating thereto apply to all classes of actions.<sup>14</sup> The technical distinctions involved in the common law rules of pleading, the old forms of action, are abolished,<sup>15</sup> and one form of action is substituted,<sup>16</sup> so that now every action is in effect a special action on the case.<sup>17</sup> Likewise under most codes, there is no such thing technically as a legal or equitable action. In either case the proceeding is a civil action.<sup>18</sup>

grounds or fail, even though a good cause of action at law is proved on the trial. *Loeb v. Supreme Lodge*, 193 N. Y. 180, 187, 91 N. E. 547, *affirming* 126 App. Div. 951, 111 N. Y. Supp. 1128, in which the case had been placed upon the equity calendar for trial without a jury and on failure to establish a ground for equitable relief the complaint was dismissed. But *compare* *Walsh v. McKeen*, 75 Cal. 519, 17 Pac. 673; *Conaughty v. Nichols*, 42 N. Y. 83, and *infra*, this section.

8. See 6 STANDARD PROC. 666.

9. *Smith v. Rowe*, 4 Cal. 6; *De Witt v. Hays*, 2 Cal. 463, 56 Am. Dec. 352; *Klonne v. Bradstreet*, 7 Ohio St. 322.

[a] The change wrought is in the method of administering legal and equitable principles, and in some degree, the extent of the application of them. *John L. Roper Lumber Co. v. Wallace*, 93 N. C. 22, *quoted in* *Makuen v. Elder*, 170 N. C. 510, 87 S. E. 334.

10. *Kenny v. McKenzie*, 25 S. D. 485, 491, 127 N. W. 597.

11. *Minn.—Russell v. Minnesota Outfit*, 1 Minn. 162. *N. Y.—Cole v. Reynolds*, 18 N. Y. 74. *Wash.—Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264.

[a] All the difference which belonged to the external machinery by which a judicial controversy was conducted up to the judgment itself, all the peculiar characteristics of a legal or of an equitable action or of the various kinds of legal actions, except the constitutional requirement as to the jury trial, have been swept away. *Pom. Code Rem.*, 4 ed. §10.

[b] An action commenced as an equity proceeding may be tried as an

action at law. *Surber v. Kittinger*, 6 Wash. 240, 33 Pac. 507.

12. *Overlock v. Shinn*, 28 Wash. 205, 68 Pac. 436. See the titles, "Process;" "Service of Process and Papers."

13. *Russell v. Minnesota Outfit*, 1 Minn. 162; *Branson v. Industrial Workers*, 30 Nev. 270, 95 Pac. 354.

14. *Overlock v. Shinn*, 28 Wash. 205, 68 Pac. 436.

15. *Cal.—Kimball v. Lohmas*, 31 Cal. 154. *Ia.—Shepard v. Ford*, 10 Iowa 502. *Kan.—McGonigle v. Atchison*, 33 Kan. 726, 736, 7 Pac. 550. *Minn.—Holmes v. Campbell*, 12 Minn. 221. *N. Y.—Tyndall v. Beatty*, 57 Misc. 646, 108 N. Y. Supp. 697. *Okla.*

*St. Louis & S. F. R. Co. v. Yount*, 30 Okla. 371, 120 Pac. 627. *Ore.—Burrage v. Bonanza G. & Q. M. Co.*, 12 Ore. 169, 6 Pac. 766.

16. *Lubert v. Chauviteau*, 3 Cal. 458, 58 Am. Dec. 415.

[a] There is now no action of trespass *quare clausum fregit*, or trespass *de bonis asportatis* nor of trover, but there is but one form of action. *McGonigle v. Atchison*, 33 Kan. 726, 7 Pac. 550.

17. *Cal.—Rogers v. Duhart*, 97 Cal. 500, 32 Pac. 570. *N. Y.—Goulet v. Asseler*, 22 N. Y. 225. *Tex.—Carter v. Wallace*, 2 Tex. 206; *Texarkana & Ft. S. Ry. Co. v. Rosebrook-Josey Grain Co.*, 52 Tex. Civ. App. 156, 163, 114 S. W. 436.

18. *Cole v. Reynolds*, 18 N. Y. 74; *Pom. Code Rem.*, 4 Ed. §8. See *supra*. IV, C, 3.

[a] There is no chancery proceeding separate and distinct from legal proceedings. *Houtz v. Gisborn*, 1 Utah 173.

From this it follows, that the formal and technical allegations required at common law are dispensed with,<sup>19</sup> the plaintiff needs only allege the facts relied on for recovery in ordinary language, and demand such relief as he deems himself entitled to.<sup>20</sup> As the form of action is immaterial,<sup>21</sup> the party cannot be said to have mistaken his form of action.<sup>22</sup> And if his complaint states facts which entitle him to any relief whether it be legal or equitable, the pleading will not be dismissed because he prays for relief to which he is not entitled.<sup>23</sup>

[b] **Our Courts Are Now Courts of Law and Equity.**—Bonnell *v.* Allen, 53 Ind. 130.

19. Hill *v.* Barrett, 14 B. Mon. (Ky.) 83; Citizens Bank *v.* Tiger Tail Mill & L. Co., 152 Mo. 145, 53 S. W. 902.

[a] **Legal fictions need not be stated.** Ball *v.* Beaumont, 59 Neb. 631, 81 N. W. 858.

20. Cal.—Hurlbutt *v.* N. W. Spaulding Saw Co., 93 Cal. 55, 28 Pac. 795; Jones *v.* Steamship Cortes, 17 Cal. 487, 79 Am. Dec. 142. Mo.—Crothers *v.* Acock, 43 Mo. App. 318. N. Y.—Millikin *v.* Cary, 5 How. Pr. 272, 3 Code Rep. 250. Utah.—Houtz *v.* Gisborn, 1 Utah 173. Wash.—Browder *v.* Phinney, 30 Wash. 74, 70 Pac. 264.

See 6 STANDARD PROC. 656.

**Legal and equitable relief in the action, see *infra*, IV, G.**

[a] **But the substantial allegations are the same as those at common law, see.** Miller *v.* Van Tassel, 24 Cal. 459; Emmons *v.* Kiger, 23 Ind. 483, and 6 STANDARD PROC. 663.

[b] **Indicating Theory of Action.** But the pleader is still required to so state his cause of action that the court can determine whether it be ex contractu or ex delicto. Joseph Dessert Lumber Co. *v.* Wadleigh, 103 Wis. 318, 320, 79 N. W. 237. See 5 STANDARD PROC. 357, note 23, and *supra*, IV, E, 2. But see Cockrell *v.* Henderson, 81 Kan. 335, 105 Pac. 443, 50 L. R. A. (N. S.) 1; St. Louis & S. F. R. Co. *v.* Yount, 30 Okla. 371, 377, 120 Pac. 627.

[c] **When seeking equitable relief, the facts must be stated in such a manner as to show the plaintiff is entitled to the relief prayed for.** Meyers *v.* Field, 37 Mo. 434, 441. See also Lackland *v.* Garesche, 56 Mo. 267.

21. Froot *v.* Hardin, 56 Ind. 165, 26 Am. Rep. 18.

22. N. Y.—Emery *v.* Pease, 20 N. Y. 62. Ohio.—Hager *v.* Reed, 11 Ohio

St. 626, 635. Wash.—Dunlap *v.* Rauch, 24 Wash. 620, 64 Pac. 807.

[a] "It makes little difference what the cause of action alleged is called." Duff *v.* Blair, 74 App. Div. 364, 77 N. Y. Supp. 444; Anderson *v.* Hunn, 5 Hun (N. Y.) 79, 83.

[b] **Illustration.**—Relief cannot be denied now because of the possible doubt whether under the common law pleading his action would have been ex contractu and not ex delicto. St. Louis & S. F. R. Co. *v.* Yount, 30 Okla. 371, 377, 120 Pac. 627. But see Joseph Dessert Lumb. Co. *v.* Wadleigh, 103 Wis. 318, 79 N. W. 237, *quoted in* 5 STANDARD PROC. 357, note 23.

23. Cal.—Whitehead *v.* Sweet, 126 Cal. 67, 55 Pac. 376; Grain *v.* Aldrich, 38 Cal. 514, 520, 99 Am. Dec. 423. Neb. Alter *v.* Bank of Stockham, 53 Neb. 223, 73 N. W. 667. N. Y.—New York Ice Co. *v.* N. W. Ins. Co., 23 N. Y. 357, 12 Abb. Pr. 414, 21 How. Pr. 296; Emery *v.* Pease, 20 N. Y. 62. S. C. Kickbusch *v.* Ruggles, 105 S. C. 525, 90 S. E. 163. Utah.—Mills *v.* Gray, 167 Pac. 358. Wash.—Dunlap *v.* Rauch, 24 Wash. 620, 64 Pac. 807. Wis.—Leonard *v.* Rogan, 20 Wis. 540.

But see Ming Yue *v.* Coos Bay, R. & E. R. & N. Co., 24 Ore. 392, 33 Pac. 641, and 5 STANDARD PROC. 357, *et seq.*

**Transfer of cause to proper docket where erroneously brought at law, see the title "Transfer of Causes."**

[a] **A party cannot be sent out of court** (1) because his facts entitle him to relief at law, or relief in equity as the case may be. He can only be sent out of court when he is entitled to no relief either at law or in equity. Walsh *v.* McKeen, 75 Cal. 519, 17 Pac. 673; Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423. (2) But where, because the complaint makes a case for equitable relief, the case is set for trial at the equity term and is tried without

In granting relief, the court must look to the substance<sup>24</sup> rather than to the form of the action,<sup>25</sup> and must pronounce such judgment as the facts require whether it be legal or equitable, or ex contractu or ex delicto.<sup>26</sup>

The right to a trial by jury does not exist in actions for equitable relief even under the code.<sup>27</sup>

**Effect on Rules as to Variance.** — The code has not rescinded the rule that the allegations and proof must correspond,<sup>28</sup> or that the judgment must follow the pleadings,<sup>29</sup> except in so far as the strict common law rules on this subject may be affected by the abolition of forms of action.<sup>30</sup>

**G. EQUITABLE AND LEGAL RELIEF IN SAME ACTION. — 1. Generally.** At common law, equitable relief cannot be granted in legal actions,<sup>31</sup> but it is a familiar rule in equity that when it obtains jurisdiction it

a jury, the complaint will be dismissed on failure to establish the equitable grounds for relief though the proof shows a legal cause of action, the plaintiff having refused to acquiesce in the suggestion that the case be sent to the law side for trial. *Loeb v. Supreme Lodge*, 198 N. Y. 180, 91 N. E. 547. See 5 STANDARD PROC. 358, note 24, and the title "**Variance and Failure of Proof.**" (3) However, in *Conaughty v. Nichols*, 42 N. Y. 83, where the complaint after alleging facts showing a right of action on contract, concluded with the allegation "and have converted the same to their own use to the damage," etc., it was held that failure to prove a conversion did not justify a nonsuit. "It does not follow that, because the parties go down to the trial upon a particular theory, which is not supported by the proof, the cause is to be dismissed, when there are facts alleged in the complaint, and sustained by the evidence, sufficient to justify a recovery upon a different theory or form of action. There is no substantial reason why, under such circumstances, a party should be turned out of court and compelled to commence a new action." Compare 5 STANDARD PROC. 357, note 23, et seq.

24. *McGonigle v. Atchison*, 33 Kan. 726, 736, 7 Pac. 550; *Duff v. Blair*, 74 App. Div. 364, 367, 77 N. Y. Supp. 444.

25. *Duff v. Blair*, 74 App. Div. 364, 77 N. Y. Supp. 444; *St. Louis & S. F. R. Co. v. Yount*, 30 Okla. 371, 376, 120 Pac. 627.

[a] The rights of the parties are

not determined by the form of action, but from the facts of the case. *St. Louis & S. F. R. Co. v. Yount*, 30 Okla. 371, 376, 120 Pac. 627.

26. *Cal.*—*Merriman v. Walton*, 105 Cal. 403, 38 Pac. 1108, 45 Am. St. Rep. 50, 30 L. R. A. 786. *Ind.*—*Blair v. Smith*, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593. *N. Y.*—*Conaughty v. Nichols*, 42 N. Y. 83, 88; *Emery v. Pease*, 20 N. Y. 62; *Millikin v. Cary*, 5 How. Pr. 272, 3 Code Rep. 250. *N. C.*—*Reid v. King*, 158 N. C. 85, 73 S. E. 168. *N. D.*—*Gessner v. Horne*, 22 N. D. 60, 132 N. W. 431; *Logan v. Freerks*, 14 N. D. 127, 136, 103 N. W. 426. *Ohio.*—*Hager v. Reed*, 11 Ohio St. 626, 635. *Utah.*—*Morgan v. Child, Cole & Co.*, 41 Utah 562, 128 Pac. 521.

See *infra*, IV, G.

27. See 16 STANDARD PROC. 878, 879; 6 STANDARD PROC. 667, n. 40.

28. *Colo.*—*Exchange Bank v. Ford*, 7 Colo. 314, 3 Pac. 449. *Mo.*—*Crothers v. Acock*, 43 Mo. App. 318. *Tex.*—*Pecos & N. T. Ry. Co. v. Amarillo St. Ry. Co.* (Tex. Civ. App.), 171 S. W. 1103.

See the title "**Variance and Failure of Proof.**"

29. *Exchange Bank v. Ford*, 7 Colo. 314, 3 Pac. 449. See generally 15 STANDARD PROC. 35.

30. See *supra*, this section.

31. *Pensacola State Bank v. Thornberry*, 226 Fed. 611, 141 C. C. A. 367; *Schurmeier v. Connecticut Mut. L. Ins. Co.*, 137 Fed. 42, 69 C. C. A. 22; *Worthington v. Waring*, 157 Mass. 421, 32 N. E. 744, 34 Am. St. Rep. 294, 20 L. R. A. 342.



will administer complete relief, even to the extent of awarding legal relief.<sup>32</sup> In a civil action under the code, the court may award such relief, both legal and equitable, as the facts alleged and proved require,<sup>33</sup> except in so far as the constitutional right of trial by jury would thereby be infringed.<sup>34</sup> But the facts alleged must warrant the particular relief prayed for.<sup>35</sup>

## 2. Equitable and Legal Defenses and Counterclaims in an Action.

a. *At Common Law.*<sup>36</sup>—At common law, equitable defenses and set-offs cannot be set up in legal actions,<sup>37</sup> except in those states where there has never been a separate court of chancery.<sup>38</sup> But the existence of such a defense may furnish ground for equitable relief against the judgment,<sup>39</sup> and for an injunction against the action at law.<sup>40</sup>

32. See 8 STANDARD PROC. 389, note 85, and 6 STANDARD PROC. 773.

33. **U. S.**—*Idaho & Ore. Land Imp. Co. v. Bradbury*, 132 U. S. 509, 10 Sup. Ct. 177, 33 L. ed. 433. **Cal.**—*Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011; *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820; *Hurlbutt v. N. W. Spaulding Saw Co.*, 93 Cal. 55, 28 Pac. 247. **Colo.**—*Adams v. Clark*, 36 Colo. 65, 85 Pac. 642. **Conn.**—*Ludington v. Merrill*, 81 Conn. 400, 71 Atl. 504; *Dresser v. Hartford L. Ins. Co.*, 80 Conn. 681, 70 Atl. 39. **Idaho.**—*Coleman v. Jaggers*, 12 Idaho 125, 85 Pac. 894, 118 Am. St. Rep. 207. **Ind.**—*Michener v. Springfield, etc. Co.*, 142 Ind. 130, 40 N. E. 679, 31 L. R. A. 59. **Minn.**—*Bell v. Mendenhall*, 71 Minn. 331, 73 N. W. 1086. **Mo.**—*Robinson v. Cruzen* (Mo. App.), 202 S. W. 449. **Neb.**—*Hopkins v. Washington*, 56 Neb. 596, 77 N. W. 53. **Nev.**—*Botsford v. Van Riper*, 33 Nev. 156, 110 Pac. 705. **N. M.**—*Kingston v. Walters*, 14 N. M. 368, 93 Pac. 700. **N. Y.**—*Carrol v. Bullock*, 207 N. Y. 567, 101 N. E. 438; *Hahl v. Sugo*, 169 N. Y. 109, 62 N. E. 135, 88 Am. St. Rep. 539, 61 L. R. A. 226; *Anderson v. Hunn*, 5 Hun 79. **N. C.**—*Beaufort Co. Lumber Co. v. Cottingham*, 168 N. C. 544, 84 S. E. 864. **Okla.**—*Farmers' & Merchants' Nat. Bank v. Hoyt*, 29 Okla. 772, 120 Pac. 264. **Tex.**—*Adams v. First Nat. Bank* (Tex. Civ. App.), 178 S. W. 993; *Banks v. Blake* (Tex. Civ. App.), 143 S. W. 1183. **Wash.**—*Durga v. Lincoln Creek Lumb. Co.*, 47 Wash. 477, 92 Pac. 343; *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264.

Legal and equitable causes of action may be joined, see 14 STANDARD PROC. 710.

[a] An accounting may be had in

an action at law against a partnership for services. *Smith v. Bodine*, 74 N. Y. 30.

Equitable relief to the defendant, see *infra*, IV, G.

34. See 16 STANDARD PROC. 882, 884, and *Loeb v. Supreme Lodge*, 198 N. Y. 180, 187, 91 N. E. 547; *Porter v. International Bridge Co.*, 79 App. Div. 358, 79 N. Y. Supp. 434.

35. *Loeb v. Supreme Lodge*, 198 N. Y. 180, 91 N. E. 547; *Niehaus v. Niehaus*, 141 App. Div. 251, 125 N. Y. Supp. 1071; *Porter v. International Bridge Co.*, 79 App. Div. 358, 79 N. Y. Supp. 434; *Black v. Vanderbilt*, 70 App. Div. 16, 74 N. Y. Supp. 1095. See the title "Variance and Failure of Proof."

36. Equitable defenses in the justice's court, see 17 STANDARD PROC. 969.

37. **U. S.**—*United States Fid. & Guar. Co. v. United States*, 189 Fed. 339, 111 C. C. A. 71. **Ala.**—*Hicks v. Meadows*, 193 Ala. 246, 69 So. 432; *Loftin v. Shackelford*, 17 Ala. 455. **D. C.**—*Rathbone v. Hamilton*, 4 App. Cas. 475. **Mich.**—*Rausch v. Briefer*, 138 Mich. 284, 101 N. W. 523; *Harrett v. Kinney*, 44 Mich. 457, 7 N. W. 63. **Miss.**—*Graham v. Warren*, 81 Miss. 330, 33 So. 71.

[a] Equitable set-offs are not permitted. *Platt v. Larter*, 94 Fed. 610.

38. *Highlands v. Philadelphina & R. R. Co.*, 209 Pa. 286, 291, 58 Atl. 560; *Rowand v. Finney*, 96 Pa. 192; *Light v. Stoevers Exrs.*, 12 Serg. & R. (Pa.) 431; *Smith v. Doak*, 3 Tex. 215.

[a] Defense May Be Set Up in Cross-bill.—*De La Vega v. League*, 64 Tex. 205. See 6 STANDARD PROC. 268.

39. See 15 STANDARD PROC. 313.

40. See *infra*, XI, E, 3, a.

An estoppel in pais, although called an equitable estoppel, is cognizable in courts of law.<sup>41</sup>

b. *Under Statute.*—(I.) *Generally.*—Statutes in some states have with varying restrictions permitted the filing of equitable defenses.<sup>42</sup> Usually it is provided that the defendant may plead any matter which would be ground for relief against the judgment on equitable grounds.<sup>43</sup> The equitable matter must be purely defensive under some statutes.<sup>44</sup> A recent federal statute expressly authorizes the interposition of equitable defenses in actions at law, by answer, plea, or replication.<sup>45</sup>

41. **U. S.**—*E. E. Taenzer & Co. v. Chicago, R. I. & P. R. Co.*, 170 Fed. 240, 247, 95 C. C. A. 436; *National Nickel Co. v. Nevada Nickel Syndicate*, 112 Fed. 44, 50 C. C. A. 113. **Md.**—*William J. Lemp Brew. Co. v. Mantz*, 120 Md. 176, 87 Atl. 814. **Mo.**—*Ming v. Olster*, 195 Mo. 460, 92 S. W. 898; *Bank of Neelyville v. Lee*, 193 Mo. App. 537, 182 S. W. 1016. **N. J.**—*La Rosa v. Nichols (N. J. L.)*, 105 Atl. 201.

*Contra*, *Litchfield v. Litchfield Water Supply Co.*, 95 Ill. App. 647, holding estoppels in pais affecting interests in land cannot be involved in ejectment.

42. **U. S.**—*Dotson v. Kirk*, 180 Fed. 14, 103 C. C. A. 368, under Virginia statute. **Fla.**—*Hobbs v. Chamberlain*, 55 Fla. 661, 45 So. 988; *Pensacola Lumber Co. v. Sutherland Innes Co.*, 50 Fla. 244, 39 So. 789; *Marshall v. Bumby*, 25 Fla. 619, 6 So. 480. **Ga.**—*McCall v. Fry*, 120 Ga. 661, 48 S. E. 200; *Radcliffe v. Varner*, 56 Ga. 222. **Me.**—*Aetna L. Ins. Co. v. Tremblay*, 101 Me. 585, 65 Atl. 22. **Md.**—*Morgan v. Cleaver*, 130 Md. 617, 101 Atl. 610; *Nydegger v. Gitt*, 125 Md. 572, 94 Atl. 157; *William J. Lemp Brew. Co. v. Mantz*, 120 Md. 176, 87 Atl. 814. **Mass.**—*Barton v. Radcliffe*, 149 Mass. 275, 21 N. E. 374.

[a] **The defense must be one within the rules and principles of equity jurisprudence.** *Barton v. Radcliffe*, 149 Mass. 275, 21 N. E. 374.

[b] **The Defense Must Be One Recognized by Courts of Equity.**—*Barton v. Radcliffe*, 149 Mass. 275, 21 N. E. 374.

[c] **Defenses available at law cannot be set up as equitable pleas.** *William J. Lemp Brew. Co. v. Mantz*, 120 Md. 176, 87 Atl. 814. See also *Marshall v. Bumby*, 25 Fla. 619, 6 So. 480.

[d] **New equitable defenses are not created by the statute.** *Barton v. Rad-*

*cliffe*, 149 Mass. 275, 21 N. E. 374.

43. **Fla.**—*Smith v. Love*, 49 Fla. 230, 38 So. 376; *Florida Cent. R. Co. v. Bisbee*, 18 Fla. 60, 68. **Me.**—*Thomas v. Hall*, 116 Me. 140, 100 Atl. 502. **Md.**—*Urner v. Sollenberger*, 89 Md. 316, 337, 43 Atl. 810. **Eng.**—*Wodehouse v. Farebrother*, 5 El. & Bl. 277, 85 E. C. L. 277, 119 Eng. Reprint 485.

**Equitable relief against judgments,** see 15 STANDARD PROC. 256.

44. **U. S.**—*Dotson v. Kirk*, 180 Fed. 14, 103 C. C. A. 368, the Virginia statute does not give the law court power to rescind the contract sued on. **Fla.**—*Pensacola Lumber Co. v. Sutherland-Innes Co.*, 50 Fla. 244, 39 So. 789; *Marshall v. Bumby*, 25 Fla. 619, 6 So. 480. **Me.**—*Martin v. Smith*, 102 Me. 27, 65 Atl. 257. **Md.**—*Nydegger v. Gitt*, 125 Md. 572, 94 Atl. 157, as the law court is not given power to cancel or reform contracts.

[a] **The equitable matter must not be a matter of set-off or matter constituting ground for relief in equity apart from and independent of the action at law.** *Martin v. Smith*, 102 Me. 27, 65 Atl. 257.

45. *Keatley v. United States Trust Co.*, 249 Fed. 296, 161 C. C. A. 304; *Illinois Surety Co. v. United States*, 226 Fed. 665, 141 C. C. A. 421; *United States to Use of Morris v. Richardson*, 223 Fed. 1010, 139 C. C. A. 386; *Burroughs Add. Mach. Co. v. Scandinavian-American Bank*, 239 Fed. 179. See also *United States v. Rubin*, 227 Fed. 938. But see *Schurmeier v. Connecticut Mut. L. Ins. Co.*, 137 Fed. 42, 69 C. C. A. 22; *Platt v. Larter*, 94 Fed. 610, decided before the statute.

[a] **The "replication" referred to is a special replication setting up a defense to an answer interposing an equitable defense and asking affirmative relief.** If the answer does not seek affirmative relief, the plaintiff cannot

(II.) Under the Codes. — In the code states,<sup>46</sup> with some exceptions,<sup>47</sup> the defendant may interpose equitable defenses in actions which were formerly actions at law, or he may set up counterclaims whether or not they were formerly denominated legal or equitable.<sup>48</sup>

file a replication interposing an equitable defense. *Keatley v. United States Trust Co.*, 249 Fed. 296, 161 C. C. A. 304, Learned Hand dissenting.

[b] But the mere right of subrogation is no such defense. *Illinois Surety Co. v. United States*, 226 Fed. 665, 141 C. C. A. 421; *Pensacola State Bank v. Thornberry*, 226 Fed. 611, 141 C. C. A. 367.

46. Cal.—*Cadiz v. Majors*, 33 Cal. 288; *Lorraine v. Long*, 6 Cal. 452. Ind.—*Miller v. Jackson Tp. Boone Co.*, 178 Ind. 503, 99 N. E. 102. Ia.—*Ulber v. Dunn*, 143 Iowa 260, 119 N. W. 269. Kan.—*Frazier v. Jeakins*, 9 Kan. App. 850, 62 Pac. 354. Mo.—*Shaffer v. Detie*, 191 Mo. 377, 90 S. W. 131; *Kelly v. Hurt*, 74 Mo. 561. Neb.—*Sutton v. Sutton*, 60 Neb. 400, 83 S. W. 200. N. Y.—*Pitcher v. Hennessey*, 48 N. Y. 415; *Dobson v. Pearce*, 12 N. Y. 156, 168, 1 Abb. Prac. 97, 62 Am. Dec. 152; *Cythe v. La Fontain*, 51 Barb. 186; *Foot v. Sprague*, 12 How. Pr. 355. N. C.—*Bean v. Western N. C. R. Co.*, 107 N. C. 731, 12 S. E. 600. Okla.—*Farmers' & Merchants' Nat. Bank v. Hoyt*, 29 Okla. 772, 120 Pac. 264. S. D.—*Kenny v. McKenzie*, 25 S. D. 485, 494, 127 N. W. 597, *overruling* *Burleigh v. Hecht*, 22 S. D. 301, 117 N. W. 367. Wash.—*Brys v. Pratt*, 55 Wash. 122, 104 Pac. 169; *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264. Wis.—*Washburn v. Lee*, 128 Wis. 312, 107 N. W. 649; *Follett v. Heath*, 15 Wis. 601.

See *supra*, IV, F.

[a] "Any facts constituting a defense under the rules of equity or at law may be pleaded in a civil action." *Kenny v. McKenzie*, 25 S. D. 485, 494, 127 N. W. 597.

[b] An equitable defense is "any state of facts which would entitle the defendant, in a proper case, to the reformation of an instrument, or which would, under the former practice, if set up in a bill for that purpose, invoke the aid of a court of chancery for relief against the claim or title put forward by the plaintiff." *East v. Peden*, 108 Ind. 92, 94, 8 N. E. 722.

[c] Under the head of equitable defenses are included all matters that would before have authorized an application for relief against a legal liability, but which at bar could not be pleaded in bar. *Kelly v. Hurt*, 74 Mo. 561; *Dobson v. Pearce*, 12 N. Y. 156, 1 Abb. Pr. 97, 62 Am. Dec. 152.

[d] Such facts as formerly would support an injunction against further prosecution may be set up. *Washburn v. Lee*, 128 Wis. 312, 107 N. W. 649.

[e] Thus in an action on a judgment, fraud or imposition in the recovery of the judgment may be set up. *Dobson v. Pearce*, 12 N. Y. 156, 1 Abb. Pr. 97, 62 Am. Dec. 152.

47. Ark.—*Nichols v. Shearon*, 49 Ark. 75, 4 S. W. 167, the defendant must make all his defenses in the action in which he is sued, and if some belong to the other forum, he must move for a transfer to the proper docket. Ore.—*Davis v. First Nat. Bank*, 86 Ore. 474, 161 Pac. 93, 168 Pac. 929; *Hirsch v. May*, 75 Ore. 403, 146 Pac. 831; *Cobb v. Klosterman*, 58 Ore. 211, 114 Pac. 96; *Watson v. McLench*, 57 Ore. 446, 110 Pac. 482, 112 Pac. 416; *Fire Assn. v. Allesina*, 45 Ore. 154, 161, 77 Pac. 123.

[a] A statute authorizing the defendant to set forth as many defenses as he may have, does not permit equitable defenses in actions at law. *Cohn v. Wemme*, 47 Ore. 146, 81 Pac. 981.

[b] The equitable defense necessitates the filing of a complaint in equity in the nature of a cross-bill. *Watson v. McLench*, 57 Ore. 446, 110 Pac. 482, 112 Pac. 416; *Beacannon v. Liebe*, 111 Ore. 443, 5 Pac. 273. See *infra*, IV, G, 2, d.

[c] A defendant sued in ejectment may, under statute, use his equitable title defensively, but for no other purpose, by virtue of express statute. *Spaur v. McBee*, 19 Ore. 76, 23 Pac. 818.

48. Dak.—*Suessenbach v. First Nat. Bank*, 5 Dak. 477, 41 N. W. 662. N. Y.—*Wheeler v. Millar*, 90 N. Y. 353, 359. N. C.—*Dempsey v. Rhodes*, 93 N. C. 120. Ohio.—*Peter v. Farrel, etc. Co.*,



**Necessity of Asking Affirmative Relief.**—As a general rule the defendant may plead his equities merely as a defense to defeat the action.<sup>49</sup> He may in a proper case ask affirmative relief by way of counterclaim,<sup>50</sup> and there are authorities holding that in certain cases affirmative relief must be asked for, when necessary to defeat the action,<sup>51</sup> as when a reformation of the contract sued upon is necessary.<sup>52</sup> This latter rule has been applied to ejectment cases where the pleading of the equitable matter merely by way of defense may forever keep the

53 Ohio St. 534, 42 N. E. 690. **Okla.** Farmers' & Merchants' Nat. Bank v. Hoyt, 29 Okla. 772, 120 Pac. 264; Wyman v. Herard, 9 Okla. 35, 60, 59 Pac. 1009. **S. D.**—Kenny v. McKenzie, 25 S. D. 485, 494, 127 N. W. 597. **Tex.** Reeves v. White (Tex. Civ. App.), 161 S. W. 43.

But see Jones v. Moore, 42 Mo. 413.

[a] **Practice.**—When so set up, they assume the character of a suit in equity and it is the proper practice for the court to determine the equitable issues first. Suessenbach v. First Nat. Bank, 5 Dak. 477, 41 N. W. 662, quoted in Kenny v. McKenzie, 25 S. D. 485, 495, 127 N. W. 597.

49. **Ind.**—East v. Peden, 108 Ind. 92, 8 N. E. 722. **Minn.**—Rogers v. Castle, 51 Minn. 428, 53 N. W. 651, holding that a defense of mistake may be set up and an actual reformation of the deed is not necessary. **Mo.** Sachleben v. Heinze, 117 Mo. 520, 24 S. W. 54; Kelly v. Hurt, 74 Mo. 561. **N. Y.**—Chase v. Peck, 21 N. Y. 581; Dobson v. Pearce, 12 N. Y. 156, 168, 1 Abb. Pr. 97, 62 Am. Dec. 152. **Okla.** Farmers' & Merchants' Nat. Bank v. Hoyt, 29 Okla. 772, 120 Pac. 264. **Wis.** Chicago & N. W. R. Co. v. McKeigue, 126 Wis. 574, 105 N. W. 1030. But see Weld v. Johnson Mfg. Co., 86 Wis. 549, 57 N. W. 378. **Wyo.**—Wolbol v. Steinhoff, 25 Wyo. 227, 168 Pac. 251, 170 Pac. 381.

[a] "A defendant is not compelled to become an actor and ask affirmative relief by way of counterclaim. He may rely upon the facts, as an equitable defense to defeat his adversary's claim." East v. Peden, 108 Ind. 92, 94, 8 N. E. 722.

50. See *supra*, this section.

51. Chicago & N. W. R. Co. v. McKeigue, 126 Wis. 574, 105 N. W. 1030.

[a] "The true and logical rule doubtless is that where facts are relied on which in equity simply defeat the plaintiff's cause of action and go

no further, they may be set up by equitable defense . . . but in those cases where the action at law can only be defeated by virtue of an affirmative judgment by a court of equity, such for instance as the reformation of a contract sued on at law, the equitable defense must be made by way of counterclaim. In a word . . . facts which call for affirmative relief in favor of the defendant before the plaintiff's action can be defeated must be set up by counterclaim." Chicago & N. W. R. Co. v. McKeigue, 126 Wis. 574, 105 N. W. 1030.

[b] It may be doubted whether the construction of the statute so as to require a prayer for affirmative relief is not too strict to subserve the purposes of the code. East v. Peden, 108 Ind. 92, 8 N. E. 722.

52. Syenite Trap Rock Co. v. Williams, 167 App. Div. 774, 153 N. Y. Supp. 74; Chicago & N. W. R. Co. v. McKeigue, 126 Wis. 574, 105 N. W. 1030. Compare Rogers v. Castle, 51 Minn. 428, 53 N. W. 651.

[a] When a mistake in a written instrument is relied on, the answer should pray for affirmative relief. King v. Enterprise Ins. Co., 45 Ind. 43; Conger v. Parker, 29 Ind. 380. But compare 19 STANDARD PROC. 833, note 25, [a], and East v. Peden, 108 Ind. 92, 8 N. E. 722; Rogers v. Castle, 51 Minn. 428, 53 N. W. 651.

[b] But a mistake in a deed whereby the lands sued for were not included in the deed may be set up without praying a reformation. The same facts entitling the defendant to a reformation establish his equitable right to the possession and would as effectually defeat the action as would the legal title. King v. Dugan, 150 Cal. 258, 88 Pac. 925; Meeker v. Dalton, 75 Cal. 154, 158, 16 Pac. 764; Hoppough v. Struble, 60 N. Y. 430, 434.

legal and equitable title separate,<sup>53</sup> although it has been held to the contrary, especially where by lapse of time or for any other reason, the right to a decree of affirmative relief to the defendant, is lost.<sup>54</sup>

c. *Necessity of Interposing Defense.*—Although there is authority to the contrary,<sup>55</sup> it is generally held that equitable defenses must be pleaded when permitted by law,<sup>56</sup> and that they cannot be urged afterwards as a ground for enjoining the judgment.<sup>57</sup> It has been held, however, that this rule applies only where the party has an absolute right to set up the defense, and not where it rests in the discretion of the court.<sup>58</sup> Of course, to be availed of in the action, the defense must

53. See *infra*, this note.

[a] In an ejectment suit by the holder of the legal title, (1) a defendant who holds under a contract of purchase must set up his equitable defense by way of counterclaim and obtain specific performance of his contract, for if allowed to set it up by way of defense merely, the legal title and possession might be kept forever separate. A mere judgment that the plaintiff take nothing would be inconsistent with the pleadings as the answer admits the legal title of the plaintiff. *Dewey v. Hoag*, 15 Barb. (N. Y.) 365; *Chicago & N. W. R. Co. v. McKeigue*, 126 Wis. 574, 105 N. W. 1030; *Weld v. Johnson Mfg. Co.*, 86 Wis. 549, 57 N. W. 378; *Lawe v. Hyde*, 39 Wis. 345; *Dupont v. Davis*, 35 Wis. 631; *Lombard v. Cowham*, 34 Wis. 486. See *Sutton v. Sutton*, 60 Neb. 400, 83 N. W. 200 (defendant may show he is the equitable owner and entitled to affirmative relief). (2) The rule has been incorporated in a statute in Wisconsin. Wis. Sts. 1898, §3078.

[b] But the omission of a prayer is waived when the ground of defense is clear and the parties go to trial without objection. *Cythe v. La Fontain*, 51 Barb. (N. Y.) 186, 194.

[c] The rule is peculiar to ejectment and does not affect the rule as to actions generally that equitable matters purely defensive may be pleaded by way of defense. "Mr. Pomeroy, in his work on Code Remedies (4th ed.) at sec. 29 seems to have thought that the rule laid down in these cases applied to all actions; but this is plainly an erroneous idea." *Chicago & N. W. R. Co. v. McKeigue*, 126 Wis. 574, 578, 105 N. W. 1030.

54. *Arguello v. Bours*, 67 Cal. 447, 450, 8 Pac. 49.

[a] In California, a perfect equity,

united to the possession is equivalent for all purposes of defense to a legal title. And the "defendant may plead, as a defense to 'ejectment' that he is in possession under a contract of purchase, the conditions whereof have been fully performed on his part." *Meeker v. Dalton*, 75 Cal. 154, 16 Pac. 764; *Arguello v. Bours*, 67 Cal. 447, 8 Pac. 49, *disapproving* earlier decisions. See also *Morrison v. Wilson*, 13 Cal. 494, 73 Am. Dec. 593. But see *Bruck v. Tucker*, 42 Cal. 346, 353, holding that the essential elements of a bill in equity must be alleged although affirmative relief is not prayed for.

55. *Golson v. Dunlap*, 73 Cal. 157, 165, 14 Pac. 576; *Lorraine v. Long*, 6 Cal. 452, holding the party is not confined to this remedy. He may let the judgment go at law, and file a bill in equity for relief. See 15 STANDARD PROC. 313, 314.

56. Ga.—*McCall v. Fry*, 120 Ga. 661, 48 S. E. 200; *Radeliffe v. Varner*, 56 Ga. 222. Ia.—*Ulber v. Dunn*, 143 Iowa 260, 119 N. W. 269. Ky.—*Thomasson v. Townsend*, 10 Bush 114. Minn. *Fowler v. Atkinson*, 6 Minn. 503. Mo. *Kelly v. Hurt*, 74 Mo. 561. N. Y. *Savage v. Allen*, 54 N. Y. 458; *Winfield v. Bacon*, 24 Barb. 154; *Foot v. Sprague*, 12 How. Pr. 355. N. C. *Tuttle v. Harrill*, 85 N. C. 456.

See 15 STANDARD PROC. 313, 543 (note 27), 544, note 33.

[a] If not interposed, the equitable defense cannot be afterwards sued upon. *Fowler v. Atkinson*, 6 Minn. 503.

57. See 15 STANDARD PROC. 313.

[a] The party cannot enjoin a suit where the relief sought in the injunction suit is a proper defense to the suit to be enjoined. *Savage v. Allen*, 54 N. Y. 458.

58. *Giles v. Austin*, 62 N. Y. 486. See 15 STANDARD PROC. 544, note 33.

be pleaded,<sup>59</sup> except when it is available under a general denial.<sup>60</sup>

d. *Manner of Alleging Equitable Defense.*—Whether alleged as a defense or in a cross-bill or counterclaim with an appropriate prayer for equitable relief, the facts must be alleged as fully as it was formerly necessary to allege them in a bill in equity.<sup>61</sup>

3. **Equitable Matter in Reply.**—In his reply the plaintiff in a legal action may allege equitable matters in some states,<sup>62</sup> but not in others which adhere to the common law practice.<sup>63</sup>

H. **UNDER THE CIVIL LAW.**—Under the civil law in Louisiana actions are divided into civil and criminal actions.<sup>64</sup> Civil actions are divided into real, personal and mixed actions.<sup>65</sup> Personal actions are grounded on one of four causes which give rise to personal obligations, namely, contracts, quasi contracts, offenses and quasi offences.<sup>66</sup> Real actions are subdivided into petitory and possessory actions.<sup>67</sup> A hypothecary action is a real action which the creditor brings against the property which has been hypothecated to him by his debtor in order to have it seized and sold for the payment of his debt.<sup>68</sup>

V. **MERGER AND SUSPENSION OF CIVIL REMEDY WHEN FACTS AMOUNT TO A CRIME.**—All civil remedies at early common law were merged in felonies.<sup>69</sup> This doctrine has been gradually changed,<sup>70</sup> until now, it is a general rule that civil remedies are neither

59. Cal.—*Dondero v. O'Hara*, 3 Cal. App. 633, 86 Pac. 985. Mo.—*Russell v. Whitely*, 59 Mo. 196. N. C.—*Locklear v. Bullard*, 133 N. C. 260, 45 S. E. 580.

60. *East v. Pedin*, 108 Ind. 92, 8 N. E. 722.

61. U. S.—*Gibson v. Chouteau*, 13 Wall. 92, 103, 20 L. ed. 534. Cal.—*Arguello v. Bours*, 67 Cal. 447, 450, 8 Pac. 49; *Miller v. Fulton*, 47 Cal. 146. Minn.—*Freeman v. Brewster*, 70 Minn. 203, 72 N. W. 1068. Mo.—*Maguire v. Vice*, 20 Mo. 429.

62. *Bean v. Western N. C. R. Co.*, 107 N. C. 731, 741, 12 S. E. 600.

63. *Frick v. Clements*, 31 Fed. 542.

64. La. Code Pr., art. 8.

65. La. Code Pr., art. 2. See the titles "Personal Actions;" "Real and Mixed Actions."

66. See La. Code Pr., art. 28.

67. La. Code Pr., art. 4. See the title "Real and Mixed Actions."

68. *Lovell v. Cragin*, 136 U. S. 130, 148, 10 Sup. Ct. 1024, 34 L. ed. 372; La. Code Pr., art. 61; *Gentes v. Blasco*, 20 La. Ann. 403. See 19 STANDARD PROC. 912.

69. *Martin's Exr. v. Martin*, 25 Ala. 201; *Wells v. Abrahams*, L. R. 7 Q. B. 544, 561, 41 L. J. Q. B. 306, 26 L. T. N. S. 326, 20 Wkly. Rep. 659;

*Higgins v. Butcher*, Yelv. 89, 80 Eng. Reprint 61.

[a] The rule is founded upon public policy, and where the public policy ceases to operate, the rule shall cease also. *Stone v. Marsh*, 6 Barn. & C. 551, 564, 13 E. C. L. 252, 108 Eng. Reprint 554.

70. See *Dudley & W. B. Banking Co. v. Spittle*, 1 Johns. & H. 14, 70 Eng. Reprint 642; *Appleby v. Franklin*, 17 Q. B. D. 93.

[a] "The history of the question shows that it has at different times and by different authorities been resolved in three distinct ways. First, it has been considered that the private wrong and injury has been entirely merged and drowned in the public wrong, and therefore no cause of action ever arose or could arise. Secondly, it was thought that although there was no actual merger, it was a condition precedent to the accruing of the cause of action that the public right should have been vindicated by the prosecutor of the felon. Thirdly, it has been said that the true principle of the common law is that there is neither a merger of the civil right, nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon, but that there is a duty



merged in the criminal offense,<sup>71</sup> nor suspended pending criminal prosecutions.<sup>72</sup> Certain traces of the common law rule still exist, however.<sup>73</sup>

**VI. ACTIONS BASED UPON ILLEGAL AND IMMORAL TRANSACTIONS.**<sup>74</sup> — A. GENERALLY. — It is a well-settled rule in equity,<sup>75</sup> as well as at law,<sup>76</sup> that no court will lend its aid to a party who founds his claim upon an immoral or illegal act.<sup>77</sup> No action can

imposed upon the injured person, not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law. In my opinion this last view is the correct one." *Midland Ins. Co. v. Smith*, 6 Q. B. Div. (Eng.) 561, 568.

71. **U. S.**—*Manro v. Almeida*, 10 Wheat. 473, 6 L. ed. 369. **Idaho**.—*State v. Wall*, 18 Idaho 300, 109 Pac. 724. **Ind.**—*Nossaman v. Rickert*, 18 Ind. 350. **Ia.**—*Haines v. M. S. Welker & Co.*, 165 N. W. 1027. **Mo.**—*Gray v. McDonald*, 104 Mo. 303, 16 S. W. 398; *Fezler v. Gibson*, 183 Mo. App. 385, 166 S. W. 1096. **Ohio**.—*Howk v. Minnick*, 19 Ohio St. 462, 2 Am. Rep. 413. **Pa.**—*Stehle v. Jaeger Automatic Mach. Co.*, 220 Pa. 617, 69 Atl. 1116, 14 Ann. Cas. 122.

72. **Cal.**—*Rogers v. Huie*, 1 Cal. 429, 54 Am. Dec. 300. **Ga.**—*Powell v. Augusta & S. R. Co.*, 77 Ga. 192, 3 S. E. 757; *Western & A. R. R. v. Meigs*, 74 Ga. 857. But see cases under an early statute. *Western & A. R. R. v. Sawtell*, 65 Ga. 235; *Allen v. Atlanta, etc. R. Co.*, 54 Ga. 503. **Ind.**—*Robinson v. Skipworth*, 23 Ind. 311; *Lofton v. Vogles*, 17 Ind. 105. **Ia.**—*Barton v. Faherty*, 3 G. Gr. 327, 54 Am. Dec. 503. **Mass.**—*Boston & W. R. Corp. v. Dana*, 1 Gray 83. **N. J.**—*Leeman v. Public Service R. Co.*, 77 N. J. L. 420, 72 Atl. 8; *McBlain v. Edgar*, 65 N. J. L. 634, 48 Atl. 600. **N. Y.**—*Wise v. Teerpenning*, 2 Edm. Sel. Cas. 112. **Ohio**.—*Howk v. Minnick*, 19 Ohio St. 462, 2 Am. Rep. 413. **P. R.**—*O'Kelly v. Uragal*, 5 P. R. Fed. 290.

See 1 STANDARD PROC. 999; 6 STANDARD PROC. 410.

73. **Ala.**—*Ex parte Brooks*, 48 Ala. 423; *Martin's Exrx. v. Martin*, 25 Ala. 201. **Me.**—*Nowlan v. Griffin*, 68 Me. 235, 28 Am. Rep. 45. **R. I.**—*Brady v. Messler*, 27 R. I. 373, 62 Atl. 511; *Crowley v. Burke*, 20 R. I. 793, 38 Atl. 895; *Royce v. Oakes*, 20 R. I. 252, 38 Atl. 371. **Va.**—*Cook v. Darby*, 4 Munf. (18 Va.) 444, 6 Am. Dec. 529, query.

[a] **In Maine**, civil remedies are suspended until disposition of the criminal prosecution only in the case of larcenies and robberies. *Nowlan v. Griffin*, 68 Me. 235, 28 Am. Rep. 45.

74. See the title "Illegality, How Pleaded."

75. **Ala.**—*Treadwell v. Torbert*, 119 Ala. 279, 24 So. 54, 72 Am. St. Rep. 918. **Ill.**—*Halloran v. Halloran*, 137 Ill. 100, 110, 27 N. E. 82. **Eng.**—*In re Cork & Y. Ry.*, L. R. 4 ch. 748.

See cases cited *infra*, this section.

76. *Treadwell v. Torbert*, 119 Ala. 279, 24 So. 54, 72 Am. St. Rep. 918; *Halloran v. Halloran*, 137 Ill. 100, 110, 27 N. E. 82. See cases cited *infra*, this section.

77. **U. S.**—*McMullen v. Hoffman*, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. ed. 1117; *Pullman's P. Car Co. v. Central Transp. Co.*, 171 U. S. 138, 151, 18 Sup. Ct. 808, 43 L. ed. 108; *Collins v. Florida*, 101 U. S. 37, 25 L. ed. 898; *Levy v. Kansas City*, 168 Fed. 524, 93 C. C. A. 523, 22 L. R. A. (N. S.) 862. **Ala.**—*Clark v. Colbert*, 67 Ala. 92. **Conn.**—*Frost v. Plumb*, 40 Conn. 111, 16 Am. Rep. 18. **Ill.**—*Goodrich v. Tenney*, 144 Ill. 422, 430, 33 N. E. 44, 36 Am. St. Rep. 459, 19 L. R. A. 371. **Mass.**—*Welch v. Wesson*, 6 Gray 505; *Babcock v. Thompson*, 3 Pick. 446, 15 Am. Dec. 235. **Mich.**—*McDonald v. Hall*, 193 Mich. 50, 159 N. W. 358. **Neb.**—*Chapman v. Meyers*, 84 Neb. 368, 121 N. W. 245. **N. C.**—*Strider v. Lewey*, 176 N. C. 448, 97 S. E. 398; *Lloyd v. North Carolina R. Co.*, 151 N. C. 536, 66 S. E. 604, 45 L. R. A. (N. S.) 378; *Gaylord v. Gaylord*, 150 N. C. 222, 235, 63 S. E. 1028. **Ore.**—*Phillips v. Thorp*, 10 Ore. 494. **Tex.**—*Wiggins v. Bisso*, 92 Tex. 219, 222, 47 S. W. 637, 71 Am. St. Rep. 837. **Eng.**—*Taylor v. Chester*, L. R. 4 Q. B. 309, 10 B. & S. 237, 38 L. J. Q. B. 225, 21 L. T. N. S. 359; *Holman v. Johnson*, 1 Cowp. 341, 98 Eng. Reprint 1120; *Edgar v. Fowler*, 3 East 222, 102 Eng. Reprint 582.

[a] The maxims are (1) "ex dolo

be maintained which would carry out the terms of an illegal contract,<sup>78</sup> whether the contract is *malum prohibitum*,<sup>79</sup> or *malum in se*.<sup>80</sup> Whether the parties to an illegal transaction may obtain any relief with respect to it depends upon whether they stand in *pari delicto*,<sup>81</sup> and whether the party seeking relief need not rely upon the illegal act.<sup>82</sup>

B. AS AFFECTED BY GUILT OF PARTIES. — The court generally will not aid either party to an illegal transaction when they stand in *pari delicto*,<sup>83</sup> whether the contract has been partially or wholly performed

*malo non oretrur actio*" (*Levy v. Kansas City*, 168 Fed. 524, 93 C. C. A. 523, 22 L. R. A. [N. S.] 862; *Stewart v. Wright*, 147 Fed. 321, 333, 77 C. C. A. 499), and (2) "melior est conditio possidentis." *Goodrich v. Tenney*, 144 Ill. 422, 430, 33 N. E. 44, 36 Am. St. Rep. 459, 19 L. R. A. 371.

[b] The meaning of the maxim "ex dolo malo non oretrur actio," is "that a court will not lend its aid to one who founds his action upon an immoral or illegal act, and the test of its applicability is whether the plaintiff can make out his case otherwise than through the medium and by the aid of such an act to which he himself was a party. Must he have the aid of the illegal transaction in order to recover? Has he founded his action upon it? Is he seeking to recover the avails or the results thereof?" *Stewart v. Wright*, 147 Fed. 321, 331, 77 C. C. A. 499.

[c] No one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim upon his own iniquity; or to acquire property by his own crime. *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188, 12 Am. St. Rep. 819, 5 L. R. A. 340.

[d] A plaintiff who must prove, as part of his cause of action, his own illegal contract or other illegal transaction, cannot recover. *Frost v. Plumb*, 40 Conn. 111, 16 Am. Rep. 18.

78. U. S.—*McMullen v. Hoffman*, 174 U. S. 639, 654, 19 Sup. Ct. 839, 43 L. ed. 1117; *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. ed. 347. Cal.—*Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 73 Am. St. Rep. 31, 45 L. R. A. 420; *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242. Ill.—*Kearney v. Webb*, 278 Ill. 17, 115 N. E. 844; *Goodrich v. Tenney*, 144 Ill. 422, 33 N. E. 44, 36 Am. St. Rep. 459, 19 L. R. A. 371. N. Y.—*Pratt v. Short*, 79 N. Y. 437,

445, 35 Am. Rep. 531. Utah.—*Overholt v. Burbridge*, 28 Utah 408, 79 Pac. 561.

[a] An action for damages for breach of an illegal contract will not lie. *Sykes v. Beadon*, 11 Ch. Div. (Eng.) 170, 48 L. J. Ch. 522, 40 L. T. N. S. 243, 27 Wkly. Rep. 464.

And no action for contribution of the profits realized will lie. See *infra*, VI, E.

79. Cal.—*Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 73 Am. St. Rep. 31, 45 L. R. A. 420; *Swanger v. Mayberry*, 59 Cal. 91. Ind.—*Sandage v. Studebaker Bros. Mfg. Co.*, 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363. N. H.—*Manchester & L. R. R. v. Concord R. R.*, 66 N. H. 100, 131, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689. N. J. *Evans v. Trenton*, 24 N. J. L. 764. N. Y.—*Pratt v. Short*, 79 N. Y. 437, 445, 35 Am. Rep. 531; *United States Title Guar. Co. v. Brown*, 166 App. Div. 688, 692, 150 N. Y. Supp. 470.

80. Cal.—*Swanger v. Mayberry*, 59 Cal. 91. N. H.—*Manchester & L. R. R. v. Concord R. R.*, 66 N. H. 100, 131, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689. N. Y.—*Pratt v. Short*, 79 N. Y. 437, 445, 35 Am. Rep. 531.

81. See *infra*, VI, B.

82. See *infra*, VI, C.

83. U. S.—*Harriman v. Northern Securities Co.*, 197 U. S. 244, 296, 25 Sup. Ct. 493, 49 L. ed. 739; *Stewart v. Wright*, 147 Fed. 321, 77 C. C. A. 499. Ala.—*Treadwell v. Torbert*, 119 Ala. 279, 24 So. 54, 72 Am. St. Rep. 918. Cal.—*Colby v. Title Ins. & Trust Co.*, 160 Cal. 632, 117 Pac. 913, Ann. Cas. 1913A, 515, 35 L. R. A. (N. S.) 813; *Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398; *Martin v. Wade*, 37 Cal. 168. Ill.—*Goodrich v. Tenney*, 144 Ill. 422, 430, 33 N. E. 44, 36 Am. St. Rep. 459, 19 L. R. A. 371; *Halloran v. Halloran*, 137 Ill. 100, 110, 27 N. E. 82. Mich.—*Hess v. Culver*, 77 Mich. 598,

or whether or not the consideration has passed.<sup>84</sup> This principle is embodied in the maxim "in pari delicto potior est conditio defendentis."<sup>85</sup> However, the court may interfere from motives of public policy, even where the parties are in pari delicto.<sup>86</sup> And relief will be granted to a party not in pari delicto,<sup>87</sup> as he proceeds, not in affirmation or reliance, but wholly by way of repudiation of the illegal transaction, and seeks merely a restoration of what was illegally taken from him by fraud or false pretense.<sup>88</sup> The rule extending relief in the latter case is applied to executed as well as executory transactions,<sup>89</sup> but is

601, 43 N. W. 994, 18 Am. St. Rep. 421, 6 L. R. A. 498. **Mo.**—Hobbs v. Boatright, 195 Mo. 693, 715, 93 S. W. 934, 113 Am. St. Rep. 709, 5 L. R. A. (N. S.) 906. **N. Y.**—Bolt v. Rogers, 3 Paige 154. **Ohio.**—Norton v. Blinn, 39 Ohio St. 145, 148. **Pa.**—Smith v. Blachley, 188 Pa. 550, 41 Atl. 619, 68 Am. St. Rep. 887. **Utah.**—Gorringe v. Read, 23 Utah 120, 63 Pac. 902, 90 Am. St. Rep. 692.

[a] The rule is based upon the general principles of public policy, and is not enforced for the sake of the defendant. *Stewart v. Wright*, 147 Fed. 321, 77 C. C. A. 499; *Taylor v. Chester*, L. R. 4 Q. B. 309, 10 B. & S. 237, 38 L. J. Q. B. 225, 21 L. T. N. S. 359.

[b] That the plaintiff acted in good faith without intention to violate the law does not (1) exempt him from the doctrine in pari delicto, as ignorance of the law does not excuse. *Harriman v. Northern Securities Co.*, 197 U. S. 244, 298, 25 Sup. Ct. 493, 49 L. ed. 739. (2) But if the plaintiff's mistake as to the law was induced by the fraudulent representation of the defendant, he may sue. *Goo Yee v. Rosenberg*, 21 Hawaii 513, 520.

But where a locus penitentie remains, see catch line *infra*, this section.

84. *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 73 Am. St. Rep. 31, 45 L. R. A. 420; *Martin v. Wade*, 37 Cal. 168; *Knowlton v. Congress*, etc. Spring Co., 57 N. Y. 518.

85. **U. S.**—*Stewart v. Wright*, 147 Fed. 321, 77 C. C. A. 499. **N. Y.** *Tracy v. Talmage*, 14 N. Y. 162, 181, 67 Am. Dec. 132. **Eng.**—*Taylor v. Chester*, L. R. 4 Q. B. 309, 10 B. & S. 237, 38 L. J. Q. B. 225, 21 L. T. N. S. 359.

86. **U. S.**—*Stewart v. Wright*, 147 Fed. 321, 329, 77 C. C. A. 499. **Fla.** *Bellamy v. Bellamy's Admr.*, 6 Fla. 62,

103. **Haw.**—*Goo Yee v. Rosenberg*, 21 Hawaii 513. **Md.**—*Lester v. Howard Bank*, 33 Md. 558, 3 Am. Rep. 211. **Miss.**—*O'Conner v. Ward*, 60 Miss. 1025, 1037; *Watt v. Conger*, 13 Smed. & M. 412, 421. **Mo.**—Hobbs v. Boatright, 195 Mo. 693, 93 S. W. 934, 113 Am. St. Rep. 709, 5 L. R. A. (N. S.) 906, *quot.* 2 Pom. Eq. Jur., 3rd ed., §941. **N. C.**—*Basket v. Moss*, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842. **W. Va.**—*Horn v. Star Foundry Co.*, 23 W. Va. 522.

[a] Equity will enjoin the enforcement of a mortgage with power of sale based on an immoral transaction. *Basket v. Moss*, 115 N. C. 448, 20 S. E. 733, 44 Am. St. Rep. 463, 48 L. R. A. 842.

87. **U. S.**—*Stewart v. Wright*, 147 Fed. 321, 77 C. C. A. 499. **Cal.**—*Woodham v. Allen*, 130 Cal. 194, 62 Pac. 398. **Haw.**—*Goo Yee v. Rosenberg*, 21 Hawaii 513. **Md.**—*Roman v. Mali*, 42 Md. 513, 532. **N. H.**—*Manchester & L. R. R. v. Concord R. R.*, 66 N. H. 100, 131, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689; *Prescott v. Norris*, 32 N. H. 101. **Eng.**—*Reynell v. Sprye*, 1 De G. M. & G. 660, 679, 42 Eng. Reprint 710; *Osborne v. Williams*, 18 Ves. Jr. 379, 34 Eng. Reprint 360.

[a] The Court Takes Notice of Different Degrees of Culpability.—*Stewart v. Wright*, 147 Fed. 321, 331, 77 C. C. A. 499.

[b] But fine distinctions are not drawn in ascertaining the equality of the wrong. *Hess v. Culver*, 77 Mich. 598, 601, 43 N. W. 994, 18 Am. St. Rep. 421, 6 L. R. A. 498.

88. **National Bank & Loan Co. v. Petrie**, 189 U. S. 423, 23 Sup. Ct. 512, 47 L. ed. 879; *Stewart v. Wright*, 147 Fed. 321, 334, 77 C. C. A. 499; *Taylor v. Chester*, L. R. 4 Q. B. 309, 314, 10 B. & S. 237, 38 L. J. Q. B. 225, 21 L. T. N. S. 359.

89. *Halloran v. Halloran*, 137 Ill.



restricted by some courts to transactions *malum prohibitum* merely.<sup>90</sup>

A party is not in *pari delicto* when he is not a free moral agent and his consent is obtained by fraud, duress, menace, or undue influence,<sup>91</sup> or where a relation of trust and confidence between the parties exists,<sup>92</sup> or when the law prohibiting certain transactions is designed to protect one set of men from another.<sup>93</sup> And the victim of a confidence game is not regarded by some courts as being in *pari delicto* although he may intend to defraud others or to do an illegal act,<sup>94</sup> but other courts deny relief in this case on the ground that his action is based on his own illegal act.<sup>95</sup>

**Where a Locus Penitentiae Remains.**—If the illegal agreement remains executory and if a locus penitentiae remains, the party may rescind and bring an action to recover what he may have parted with.<sup>96</sup> It is immaterial in cases of this class whether the parties are in *pari*

100, 110, 27 N. E. 82; *Tracy v. Talmage*, 14 N. Y. 162, 181, 67 Am. Dec. 132.

90. Cal.—See *Martin v. Wade*, 37 Cal. 168. Mass.—*Lowell v. Boston & L. R. Corp.*, 23 Pick. 24, 34 Am. Dec. 33. N. Y.—*Tracy v. Talmage*, 14 N. Y. 162, 185, 67 Am. Dec. 132.

But see *Hobbs v. Boatright*, 195 Mo. 693, 93 S. W. 934, 113 Am. St. Rep. 709, 5 L. R. A. (N. S.) 906.

91. U. S.—*Colby v. Title Ins. & Trust Co.*, 160 Cal. 632, 117 Pac. 913, Ann. Cas. 1913A, 515, 35 L. R. A. (N. S.) 813. Ia.—*Davidson v. Carter*, 55 Iowa 117, 7 N. W. 466. Md.—*Roman v. Mali*, 42 Md. 513, 532. Mich.—*Hess v. Culver*, 77 Mich. 598, 43 N. W. 994, 18 Am. St. Rep. 421, 6 L. R. A. 498. Mo.—*Kitchen v. Greenabaum*, 61 Mo. 110. N. Y.—*Haynes v. Rudd*, 83 N. Y. 251. Utah.—*Gorringe v. Read*, 23 Utah 120, 63 Pac. 902, 90 Am. St. Rep. 692. Vt.—*Hinsdill v. White*, 34 Vt. 558.

[a] **Compounding Crime.**—When a defendant falsely represents to the plaintiff he has evidence that her son burglarized his house and by means thereof he induces the payment of money for his agreement not to prosecute, the plaintiff is not in *pari delicto* and may sue to recover the money. *Hinsdill v. White*, 34 Vt. 558. See also *Smith v. Blachley*, 188 Pa. 550, 41 Atl. 619, 68 Am. St. Rep. 887; *Gorringe v. Read*, 23 Utah 120, 63 Pac. 902, 90 Am. St. Rep. 692.

92. *Harper v. Harper*, 85 Ky. 160, 3 S. W. 5, 7 Am. St. Rep. 583; *Barnes v. Brown*, 32 Mich. 146.

[a] Rule applies to persons occupying the relation of guardian, trustee,

executor or administrator. *O'Conner v. Ward*, 60 Miss. 1025.

93. U. S.—*Thomas v. Richmond*, 12 Wall. 349, 355, 20 L. ed. 453. Haw. *Goo Yee v. Rosenberg*, 21 Hawaii 513.

Ill.—*Ferguson v. Suptphen*, 8 Ill. 547. Tex.—*Beer v. Landman*, 83 Tex. 450, 31 S. W. 805. Eng.—*Browning v. Morris*, 2 Cowp. 790, 98 Eng. Reprint 1364.

[a] When the statute imposes a penalty on one of the parties, and none on the other, they are not in *pari delicto*. *Jaques v. Golightly*, 2 W. Bl. 1073, 96 Eng. Reprint 632.

94. U. S.—*Stewart v. Wright*, 147 Fed. 321, 77 C. C. A. 499. Ark.—*Lockman v. Cobb*, 77 Ark. 279, 91 S. W. 546. Mo.—*Hobbs v. Boatright*, 195 Mo. 693, 93 S. W. 934, 113 Am. St. Rep. 709, 5 L. R. A. (N. S.) 906. N. C.—*See Webb v. Fulchire*, 25 N. C. 485, 40 Am. Dec. 419.

See also *National Bank & Loan Co. v. Petrie*, 189 U. S. 423, 23 Sup. Ct. 512, 47 L. ed. 879.

[a] **Rule Is Not Limited to Contracts Which Are Not Immoral or Criminal.**—*Hobbs v. Boatright*, 195 Mo. 693, 93 S. W. 934, 113 Am. St. Rep. 709, 5 L. R. A. (N. S.) 906.

95. *Abbe v. Marr*, 14 Cal. 210; *Babcock v. Thompson*, 3 Pick. (Mass.) 446, 15 Am. Dec. 235.

96. U. S.—*Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. ed. 347; *McCutcheon v. Merz Capsule Co.*, 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415. Ill.—*Kearney v. Webb*, 278 Ill. 17, 22, 115 N. E. 844. Me.—*Tyler v. Carlisle*, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep.

delicto,<sup>97</sup> but it has been held the contract must be *malum prohibitum* merely.<sup>98</sup>

C. WHERE RELIANCE ON ILLEGAL ACT IS UNNECESSARY. — When the plaintiff's cause of action can be established without relying on the illegal agreement or transaction connected with it, the action is maintainable.<sup>99</sup> And an agreement will be enforced even if it is incidentally connected with an illegal transaction, provided it is supported by an independent consideration, and the plaintiff does not need the aid of the illegal transaction to make out his case.<sup>1</sup> Thus a principal may

301. **Mass.**—*White v. Franklin Bank*, 22 Pick. 181. **N. Y.**—*Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132. **Eng.**—*Taylor v. Bowers*, 1 Q. B. Div. 291, 45 L. J. Q. B. 163, 34 L. T. N. S. 938, 24 Wkly. Rep. 499.

97. *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. ed. 347; *Tracy v. Talmage*, 14 N. Y. 162, 182, 67 Am. Dec. 132.

98. *Martin v. Wade*, 37 Cal. 168; *Tracy v. Talmage*, 14 N. Y. 162, 181, 67 Am. Dec. 132.

99. **U. S.**—*Wilder Mfg. Co. v. Corn Products Ref. Co.*, 236 U. S. 165, 35 Sup. Ct. 398, 59 L. ed. 520, Ann. Cas. 1916A, 118; *Stewart v. Wright*, 147 Fed. 321, 333, 77 C. C. A. 499; *Primeau v. Granfield*, 180 Fed. 847. **Ala.**—*Johnston v. Smith's Admr.*, 70 Ala. 108; *Yarborough's Admr. v. Avant*, 66 Ala. 526. **Ill.**—*Kearney v. Webb*, 278 Ill. 17, 115 N. E. 844. **N. Y.**—*Logan v. New York Fidelity-Phoenix F. Ins. Co.*, 161 App. Div. 404, 146 N. Y. Supp. 678. **N. C.**—*Gaylord v. Gaylord*, 150 N. C. 222, 235, 63 S. E. 1028. **Pa.** *Swan v. Scott*, 11 Serg. & R. 155. **Eng.** *Taylor v. Chester*, L. R. 4 Q. B. 309, 314, 10 B. & S. 237, 38 L. J. Q. B. 225, 21 L. T. N. S. 359.

[a] The plaintiff, when making out his cause of action without referring to the original contract, cannot refer to one portion only of the contract although that portion set up may be legal. *McMullen v. Hoffman*, 174 U. S. 639, 656, 19 Sup. Ct. 839, 43 L. ed. 1117; *Booth v. Hodgson*, 6 Term. R. 405, 101 Eng. Reprint 619.

[b] When an illegal transaction has been consummated by the parties themselves and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the trans-

action to discover its origin. *Portsmouth Brew. Co. v. Mudge*, 68 N. H. 462, 44 Atl. 600.

[c] Money taken in a raid on a gambling house may be recovered in an action of assumpsit after payment of the fines and conclusion of the prosecution. *Kearney v. Webb*, 278 Ill. 17, 115 N. E. 844.

[d] On diversion to other uses of money placed in the hands of an employe for gambling purposes, the owner, after demand, may sue for money had and received. *Kearney v. Webb*, 278 Ill. 17, 115 N. E. 844.

1. **U. S.**—*Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732; *Armstrong v. Toler*, 11 Wheat. 258. 6 L. ed. 468; *Hoffman v. McMullen*, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410. **Conn.**—*Frost v. Plumb*, 40 Conn. 111, 16 Am. Rep. 18. **Mont.**—*Morrison v. Bennett*, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158. **N. Y.** *Logan v. New York Fid.-Phenix Fire Ins. Co.*, 161 App. Div. 404, 146 N. Y. Supp. 678.

[a] The distinction between the enforcement of the illegal contract and asserting title to money arising therefrom where there is an express contract to pay upon a sufficient consideration, or where collateral circumstances raise an implied promise to pay, is made in practically all the cases. *Goodrich v. Tenney*, 144 Ill. 422, 434, 33 N. E. 44, 36 Am. St. Rep. 459, 19 L. R. A. 371.

[b] "The distinction between a void and valid new contract in relation to the subject matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract, or whether it is based upon a moral obligation growing out of the execution of an agreement which could not be enforced by law, and upon the performance of which the law will

sue for money received by his agent in the course of the illegal transaction,<sup>2</sup> or a party to the contract may sue a depositary with whom money arising from the illegal contract has been deposited.<sup>3</sup>

D. RECOVERY OF MONEY PAID OR PROPERTY CONVEYED.—It is well settled that a party in *pari delicto* cannot maintain an action to recover money paid in pursuance of an illegal contract after the contract has been executed.<sup>4</sup> But where the contract is *malum prohibitum* merely, some courts hold that an action may be maintained independent of the contract, to obtain a restoration of money or property re-

raise no implied promise." Express promises based upon the last class of considerations may be sustained. *Gray v. Hook*, 4 N. Y. 449, *quoted in Morrison v. Bennett*, 20 Mont. 560, 573, 52 Pac. 553, 40 L. R. A. 158. (2) When the advances have been made upon a new contract, remotely connected with the original illegal contract or transaction, and the title or right to recover is not dependent upon that contract, the action is maintainable. *Hoffman v. McMullen*, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410.

[c] **Typical Case.**—A. who receives money to the use of B. on an illegal contract between B. and C. cannot defeat an action by B. for money had and received by a defense of illegality of the contract. **U. S.**—*Hoffman v. McMullen*, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. ed. 1117, 83 Fed. 372, 383, 28 C. C. A. 178, 45 L. R. A. 410. **Conn.** *Wheeler v. Spencer*, 15 Conn. 28. **Eng.** *Tenant v. Elliott*, 1 Bos. & P. 3, 126 Eng. Reprint 744.

2. **Md.**—*State v. Baltimore & O. R. Co.*, 34 Md. 344. **Mich.**—*Willson v. Owen*, 30 Mich. 474. **N. J.**—*Evans v. Trenton*, 24 N. J. L. 764. **Ohio.**—*Norton v. Blinn*, 39 Ohio St. 145. **Vt.** *Baldwin Bros. v. Potter*, 46 Vt. 402. **Eng.**—*Farmer v. Russell*, 1 Bos. & P. 296, 126 Eng. Reprint 913.

[a] Where a partner refuses to pay over profits received on behalf of the partnership. *Brooks v. Martin*, 2 Wall. (U. S.) 70, 17 L. ed. 732. And see the title "**Partnership.**"

3. **U. S.**—*Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. ed. 473. **Ill.** *Goodrich v. Tenney*, 144 Ill. 422, 432, 33 N. E. 44, 36 Am. St. Rep. 459, 19 L. R. A. 371. **Tex.**—*Floyd v. Patterson*, 72 Tex. 202, 10 S. W. 526, 13 Am. St. Rep. 787. **Utah.**—*Overholt v. Burbridge*, 28 Utah 408, 79 Pac. 561. **Wash.**—*McDonald v. Lund*, 13 Wash. 412, 43 Pac. 348.

[a] Thus a stakeholder may be sued. **Ia.**—*Shannon v. Baumer*, 10 Iowa 210. **N. J.**—*Evans v. Trenton*, 24 N. J. L. 764. **N. Y.**—*Vischer v. Yates*, 11 Johns. 23. But compare *Yates v. Foote*, 12 Johns. 1. **Eng.**—*Hastelow v. Jackson*, 8 Barn. & C. 221, 15 E. C. L. 117, 108 Eng. Reprint 1026.

4. **U. S.**—*Harriman v. Northern Securities Co.*, 197 U. S. 244, 296, 25 Sup. Ct. 493, 49 L. ed. 739; *St. Louis Vandalia & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953, 36 L. ed. 748; *Levy v. Kansas City*, 168 Fed. 524, 93 C. C. A. 523, 22 L. R. A. (N. S.) 862. **Cal.**—*Berka v. Woodward*, 125 Cal. 119, 127, 57 Pac. 777, 73 Am. St. Rep. 31, 45 L. R. A. 420. **Haw.**—*Goo Yee v. Rosenberg*, 21 Hawaii 513. **Ill.**—*Goodrich v. Tenney*, 144 Ill. 422, 33 N. E. 44, 36 Am. St. Rep. 459, 19 L. R. A. 371. **Kan.** *Alexander v. Barker*, 64 Kan. 396, 67 Pac. 829. **Ky.**—*Chapman v. Haley*, 117 Ky. 1004, 80 S. W. 190, 4 Ann. Cas. 712; *Kimbrough v. Lane*, 11 Bush 556. **Mass.**—*West Springfield & A. St. R. Co. v. Bodurtha*, 181 Mass. 583, 64 N. E. 414; *White v. Franklin Bank*, 22 Pick. 181. **Neb.**—*Storz v. Finkelstein*, 46 Neb. 577, 65 N. W. 195, 30 L. R. A. 644. **N. Y.**—*Haynes v. Rudd*, 83 N. Y. 251. **Eng.**—*Taylor v. Chester*, L. R. 4 Q. B. 309, 10 B. & S. 237, 38 L. J. Q. B. 225, 21 L. T. N. S. 359; *Taylor v. Bowers*, 1 Q. B. Div. 291, 45 L. J. Q. B. 163, 34 L. T. N. S. 938, 24 Wkly. Rep. 499.

[a] But see *Smith v. Blachley*, 188 Pa. 550, 41 Atl. 619, 68 Am. St. Rep. 887, holding that a person induced to pay money to stifle a criminal prosecution may sue to recover the money on discovering no prosecution was in fact contemplated.

[b] Whether the Contract Is *Malum in Se* or *Malum Prohibitum*.—*Goo Yee v. Rosenberg*, 21 Hawaii 513.



ceived thereunder.<sup>5</sup> A person not in *pari delicto*, however, may sue to recover money paid.<sup>6</sup>

E. DIVISION OF PROFITS.—A division of the profits arising from an illegal contract or transaction cannot be compelled.<sup>7</sup>

**VII. VEXATIOUS SUITS.**—A vexatious suit is one which has been instituted maliciously, and without probable cause, whereby a damage has ensued to the defendant,<sup>8</sup> or which is not brought bona fide, but merely to annoy or embarrass the defendant, or which is not calculated to lead to any practical result.<sup>9</sup> Such a suit may be

5. **U. S.**—Pullman P. Car Co. *v.* Central Transp. Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. ed. 108; Hill *v.* Shaw & Borden Co., 225 Fed. 475, 140 C. C. A. 523. **Kan.**—Concordia *v.* Hagaman, 1 Kan. App. 35, 41 Pac. 133. **N. H.**—Manchester & L. R. R. *v.* Concord R. R., 66 N. H. 100, 133, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689. **N. Y.**—Pratt *v.* Short, 79 N. Y. 437, 35 Am. Rep. 531; United States Title Guar. Co. *v.* Brown, 166 App. Div. 688, 152 N. Y. Supp. 470.

But see Goo Yee *v.* Rosenberg, 21 Hawaii 513. See 10 STANDARD PROC. 81; 3 STANDARD PROC. 201.

[a] **Rule Stated.**—An action of quantum meruit, or for the recovery of property, or in trover, may be maintained where the property has been converted aside from the contract, when the contract is merely *malum prohibitum* and the statute imposes no penalty for its infraction. Hill County *v.* Shaw & Borden Co., 225 Fed. 475, 140 C. C. A. 523.

[b] **Even Though the Parties Are Truly in Pari Delicto.**—Manchester & L. R. R. *v.* Concord R. R., 66 N. H. 100, 132, 20 Atl. 383, 49 Am. St. Rep. 582, 9 L. R. A. 689.

[c] **Money parted with under a contract which is unenforceable but which is not tainted with any immorality, may be recovered.** Storz *v.* Finkelstein, 46 Neb. 577, 65 N. W. 195, 30 L. R. A. 644.

6. See *supra*, VI, B.

7. **U. S.**—McMullen *v.* Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. ed. 1117; Chicago, M. & St. P. R. Co. *v.* Wabash, St. L. & P. Ry. Co., 61 Fed. 993, 9 C. C. A. 659, 27 U. S. App. 1, 4 Int. Con. C. Rep. 578. **Cal.**—Vulcan Powder Co. *v.* Hercules Powder Co., 96 Cal. 510, 31 Pac. 581, 31 Am. St. Rep. 242. **Ill.**—Kearney *v.* Webb, 278 Ill. 17, 22, 115 N. E. 844; Shaffer

*v.* Pinchback, 133 Ill. 410, 24 N. E. 867, 23 Am. St. Rep. 624. **Mass.**—Snell *v.* Dwight, 120 Mass. 9. **Mont.**—Morrison *v.* Bennett, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158. **N. J.**—Wilson *v.* Gregory, 36 N. J. L. 315, 13 Am. Rep. 448; Watson *v.* Murray, 23 N. J. Eq. 257. **Wyo.**—Kennedy *v.* Lonabaugh, 19 Wyo. 352, 117 Pac. 1079, Ann. Cas. 1913E, 133, and note. **Eng.**—Sykes *v.* Beadon, 11 Ch. Div. 170, 48 L. J. Ch. 522, 40 L. T. N. S. 243, 27 Wkly. Rep. 464, explaining Sharp *v.* Taylor, 2 Phil. Ch. 801, 817, 41 Eng. Reprint 1153.

But compare Richardson *v.* Welch, 47 Mich. 309, 11 N. W. 172.

[a] **But if the profits are invested in some legitimate business, the court's aid may be invoked to settle the business.** King *v.* Winants, 71 N. C. 469, 17 Am. Rep. 11.

[b] **If one admits the indebtedness, perhaps an action could be brought.** Hoffman *v.* McMullen, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410, affirmed, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. ed. 1117.

8. Bouv. L. Dict., title "Vexatious Suit."

9. Black's L. Dict. See also the following cases: **U. S.**—Mills *v.* Green, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. ed. 293. **Cal.**—See Truebody *v.* Jacobson, 2 Cal. 82. **Ia.**—Cutcomp *v.* Utt, 60 Iowa 156, 14 N. W. 214. **Va.**—Franklin *v.* Peers, 95 Va. 602, 29 S. E. 321.

[a] **A party who has both the legal and equitable title cannot sue to set aside the judicial sale at which he purchased the equitable title and obtain a new sale.** Truebody *v.* Jacobson, 2 Cal. 82.

[b] **But the fact that a prospective judgment will be worthless is no defense to the action.** Kimber *v.* Gunnell Gold Min. & Mill. Co., 126 Fed. 137, 61 C. C. A. 203.

dismissed<sup>10</sup> or enjoined.<sup>11</sup>

**VIII. DETERMINING ABSTRACT AND MOOT QUESTIONS, AND FICTITIOUS AND COLLUSIVE SUITS.**—The courts are confined in their judicial action to real controversies wherein the legal rights of parties are necessarily involved and can be conclusively determined.<sup>12</sup> And they will not determine moot, speculative and abstract questions of law,<sup>13</sup> declare principles or rules of law which can-

10. See 7 STANDARD PROC. 675. Compare *Place v. Lyon*, Kirby (Conn.) 404, not ground of abatement.

11. See *infra*, XI, E, 5.

Enjoining successive vexatious ejection suits, see 20 STANDARD PROC. 80.

12. **U. S.**—Southern Pac. Co. v. Eshelman, 227 Fed. 928. **Ind.**—Hale v. Berg, 41 Ind. App. 48, 51, 83 N. E. 357. **Ky.**—Owen v. Threlkeld, 28 Ky. L. Rep. 929, 90 S. W. 971. **N. Y.** *In re* Whitman, 225 N. Y. 1, 121 N. E. 479; *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 45, 51, 24 N. E. 24, 8 L. R. A. 175; *In re* Reynolds, 144 App. Div. 458, 129 N. Y. Supp. 629. **Pa.**—Rockwell v. Warren Co., 34 Pa. Super. 581. **Tenn.**—Ward v. Alsop, 100 Tenn. 619, 740, 46 S. W. 573.

13. **U. S.**—Lord v. Veazie, 8 How. 251, 12 L. ed. 1067; *Ex parte* Steele, 162 Fed. 694. **Ala.**—Postal Tel.-Cable Co. v. Montgomery, 193 Ala. 234, 69 So. 428, Ann. Cas. 1918B, 554. **Ga.**—Southern R. Co. v. State, 116 Ga. 276, 42 S. E. 508. **Ill.**—Wendell v. Peoria, 274 Ill. 613, 113 N. E. 918. **Ind.**—Modlin v. Board of Comrs., 55 Ind. App. 239, 103 N. E. 506; Hale v. Berg, 41 Ind. App. 48, 83 N. E. 357. **Ky.**—McCoy v. Carran, 179 Ky. 590, 201 S. W. 463. **La.**—Illinois Cent. R. Co. v. St. Louis & S. F. R. Co., 124 La. 54, 49 So. 976. **Md.**—Wahl v. Brewer, 80 Md. 237, 30 Atl. 654. **Me.**—Morse v. Ballou, 109 Me. 264, 83 Atl. 799. **Mass.**—Johnson v. Foster, 221 Mass. 248, 108 N. E. 928. **Neb.**—State v. Savage, 64 Neb. 684, 705, 90 N. W. 808, 91 N. W. 557. **N. J.**—Funk & Wagnalls Co. v. Stamm, 85 N. J. L. 301, 88 Atl. 1050. **N. Y.**—Hanrahan v. Terminal Station Comm., 206 N. Y. 494, 100 N. E. 414; *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175; *In re* Reynolds, 144 App. Div. 458, 129 N. Y. Supp. 629. **Ore.**—Sherod v. Aitchison, 71 Ore. 446, 142 Pac. 351, Ann. Cas. 1916C, 1151. **Tex.**—Texas Channel &

Dock Co. v. State (Tex. Civ. App.), 133 S. W. 318. **W. Va.**—State v. Lambert, 52 W. Va. 248, 43 S. E. 176.

[a] "Abstract questions cannot be made the subject of an action." Hanrahan v. Terminal Station Comm., 206 N. Y. 494, 504, 100 N. E. 414.

[b] "A moot case is one which seeks (1) to determine an abstract question, which does not rest upon existing facts or rights." Adams v. Union R. Co., 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273, quoted in Postal Tel.-Cable Co. v. Montgomery, 193 Ala. 234, 69 So. 428, Ann. Cas. 1918B, 554. (2) It is one which seeks to get a judgment on a pretended controversy, or a decision in advance about a right before it is actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. *Ex parte* Steele, 162 Fed. 694; *State v. Dolley*, 82 Kan. 533, 108 Pac. 846.

[c] If the claim in suit is extinguished by purchase by one of the litigating parties or otherwise, the case becomes a moot case. *State v. Lambert*, 52 W. Va. 248, 43 S. E. 176.

[d] A merely declaratory action in which no relief is sought but a declaration of a party's rights, cannot be maintained. *Southern R. Co. v. State*, 116 Ga. 276, 42 S. E. 508.

[e] The constitutionality of a statute will not be determined until a concrete case arises in which a decision of such question is unavoidable for the determination of the case itself. *Hanrahan v. Terminal Station Comm.*, 206 N. Y. 494, 504, 100 N. E. 414. See the title "Statutes."

[f] To Determine Costs.—Questions of importance will not be decided after their decision has become useless merely to ascertain who is liable for costs. *Postal Tel.-Cable Co. v. Montgomery*, 193 Ala. 234, 69 So. 428, Ann. Cas. 1918B, 554; *Agee v. Cate*, 180 Ala.

not affect the matter in issue in the case before the court,<sup>14</sup> or lay down rules for the future conduct of persons.<sup>15</sup> Similarly the court will not determine suits which are fictitious<sup>16</sup> or collusive,<sup>17</sup> or which are brought for the sole purpose of affecting the rights of third persons.<sup>18</sup> But if there is an actual bona fide contest as to a legal right, the fact that the action is a test case,<sup>19</sup> or an amicable action<sup>20</sup> is immaterial. And appellate courts are sometimes given jurisdiction to render opinions upon questions propounded by the governor or legislature.<sup>21</sup>

**IX. EFFECT OF MOTIVE IN BRINGING ACTION.**—In equity, as at law,<sup>22</sup> the motive in bringing a suit is immaterial where the plaintiff has a valid cause of action.<sup>23</sup> But in equity when the discretionary

522, 61 So. 900. See also *Modlin v. Board of Comrs.*, 55 Ind. App. 239, 103 N. E. 506.

14. *Hale v. Berg*, 41 Ind. App. 48, 83 N. E. 357.

15. *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175. See *Hanrahan v. Terminal Station Comm.*, 206 N. Y. 494, 504, 100 N. E. 414.

16. *Ill.*—*People ex rel. Roberts v. Leland*, 40 Ill. 118. *Ind.*—*Smith v. Junction R. Co.*, 29 Ind. 546. *Kan.*—*Burdett v. Surdez*, 94 Kan. 494, 146 Pac. 1025; *McConnell v. Hicks*, 64 Kan. 828, 68 Pac. 651. *Tenn.*—*Ward v. Alsup*, 100 Tenn. 619, 740, 46 S. W. 573.

[a] In order that a suit be bona fide, and not fictitious, there must be an actual controversy and adverse interests. *Ward v. Alsup*, 100 Tenn. 619, 740, 46 S. W. 573.

[b] At whatever stage of the action, it appears that the action is fictitious, the court will decline to determine it. *Judson v. Flushing Jockey Club*, 14 Misc. 350, 36 N. Y. Supp. 126.

[c] Proof by affidavit that the action is not fictitious may be required by rule of court when a suit appears to be fictitious. *People ex rel. Roberts v. Leland*, 40 Ill. 118.

[d] The action will be dismissed by the court and the bringing of the suit may be punished as a contempt. *Ward v. Alsup*, 100 Tenn. 619, 740, 46 S. W. 573. See 7 STANDARD PROC. 675.

Motion by *amicus curiae* for a dismissal. See 1 STANDARD PROC. 938.

17. *Texas & P. Ry. Co. v. Gay*, 86 Tex. 571, 604, 26 S. W. 599, 25 L. R. A. 52.

[a] "A suit is said to be collusive when brought by seemingly adverse parties under secret agreement and co-operation, with view to have some legal question decided which is not involved in a real controversy between them; or when so brought with intent to defraud other persons, there being no real controversy between the parties nor purpose to secure some relief, which, as between themselves, would not be conceded without suit." *Texas & P. Ry. Co. v. Gay*, 86 Tex. 571, 604, 26 S. W. 599, 25 L. R. A. 52.

Dismissal of collusive suits, see 7 STANDARD PROC. 675.

18. *Mo.*—*Meeker v. Straat*, 38 Mo. App. 239. *Ore.*—*Sherod v. Aitchison*, 71 Ore. 446, 142 Pac. 351, Ann. Cas. 1916C, 1151. *Tenn.*—*Ward v. Alsup*, 100 Tenn. 619, 46 S. W. 573. *Tex.*—*Texas & P. Ry. Co. v. Gay*, 86 Tex. 571, 604, 26 S. W. 599, 25 L. R. A. 52.

[a] A suit is collusive which is brought for the sole purpose of affecting the rights of third parties. *Meeker v. Straat*, 38 Mo. App. 239, 243.

19. *U. S.*—*Ex parte Steele*, 162 Fed. 694. *Kan.*—*State v. Dolley*, 82 Kan. 533, 108 Pac. 846. *Ore.*—*Pearce v. Roseburg*, 77 Ore. 195, 150 Pac. 855. *R. I.*—*Adams v. Union R. Co.*, 21 R. I. 134, 42 Atl. 515, 44 L. R. A. 273.

20. See 1 STANDARD PROC. 931.

21. See 17 STANDARD PROC. 746.

22. *Ramsey v. Gould*, 57 Barb. (N. Y.) 398, 39 How. Pr. 62, 8 Abb. Pr. (N. S.) 174.

23. *U. S.*—*Dickerman v. Northern Trust Co.*, 176 U. S. 181, 190, 20 Sup. Ct. 311, 44 L. ed. 423; *In re Sully*, 152 Fed. 619, 81 C. C. A. 609. *Cal.*—*Ball v. Tolman*, 119 Cal. 358, 51 Pac. 546; *Pierce v. Pierce*, 16 Cal. App. 375, 117



powers of the court are invoked, motive is sometimes considered.<sup>24</sup> And if the complainant's rights are legal as well as equitable, the question of motive may be considered as bearing upon the question whether he should be remitted to his purely legal rights.<sup>25</sup> Bad or malicious motive as the basis of a cause of action is elsewhere treated.<sup>26</sup>

**X. ABATEMENT OF ACTION.**<sup>27</sup> — It is ground for abatement of a civil action that the plaintiff misconceived his action,<sup>28</sup> that it is prematurely brought,<sup>29</sup> that the original process is defective, or was irregularly issued,<sup>30</sup> or that service of process is irregular or defective,<sup>31</sup>

Pac. 580; *Dalton v. Pacific Electric Ry. Co.*, 7 Cal. App. 510, 94 Pac. 868. **Ind.** Noble *v. Davison*, 177 Ind. 19, 96 N. E. 325; *Lipprant v. Lipprant*, 52 Ind. 273. **Ia.**—*McNamara v. McAllister*, 150 Iowa 243, 130 N. W. 26, Ann. Cas. 1912D, 463, 34 L. R. A. (N. S.) 436; *Rizer v. Tapper*, 133 Iowa 628, 110 N. W. 1038. **La.**—*Rogers v. Morrison*, 21 La. Ann. 455. **Mich.**—*Stansell v. Leavitt*, 51 Mich. 536, 16 N. W. 892; *Edwards v. Allouez Min. Co.*, 38 Mich. 46, 31 Am. Rep. 301. **Neb.**—*Flinn v. Frederickson*, 89 Neb. 563, 131 N. W. 934. **N. H.**—*Brewer v. Hyndman*, 18 N. H. 9. **N. J.**—*Roberts v. Tompkins*, 75 N. J. Eq. 576, 73 Atl. 505; *McInnes v. McInnes Brick Mfg. Co. (N. J. Eq.)*, 38 Atl. 182. **N. Y.**—*Pollitz v. Wabash R. Co.*, 150 App. Div. 715, 135 N. Y. Supp. 789. **Ohio.**—*Hamilton, G. & C. Tract. Co. v. Parish*, 67 Ohio St. 181, 65 N. E. 1011, 60 L. R. A. 531. **Pa.** *Vitagraph Co. v. Swaab*, 248 Pa. 478, 94 Atl. 126, Ann. Cas. 1916C, 311; *Raughley v. West Jersey & S. R. Co.*, 202 Pa. 43, 51 Atl. 597. **Tenn.**—*Macey v. Childress*, 2 Tenn. Ch. 438. **Vt.** *Bates v. Cilley*, 47 Vt. 1. **W. Va.** *Davis v. Spragg*, 72 W. Va. 672, 79 S. E. 652, 48 L. R. A. (N. S.) 173. [a] **Improper Motive or Desire for Revenge Cannot Be Pleaded as a Defense.**—*Macey v. Childress*, 2 Tenn. Ch. 438, 442.

24. *Pollitz v. Wabash R. Co.*, 150 App. Div. 715, 135 N. Y. Supp. 789.

25. *Edwards v. Allouez Min. Co.*, 38 Mich. 46, 31 Am. Rep. 301; *Hodge v. United States Steel Corp.*, 64 N. J. Eq. 111, 115, 53 Atl. 553.

26. See 4 STANDARD PROC. 815.

27. **In criminal prosecutions**, see 1 STANDARD PROC. 30; 2 STANDARD PROC. 888; 12 STANDARD PROC. 627.

**Dissolution of corporation as a ground of abatement**, see the title, "Winding Up Corporations."

**In actions by and against a husband and wife**, see 11 STANDARD PROC. 743, 842.

**As to the effect of marriage of a female party**, see the titles "Revivor," "Survival."

**ChamPERTY as a ground of abatement**, see 4 STANDARD PROC. 969.

**For want of affidavit for arrest in a civil action**, see 2 STANDARD PROC. 970.

28. *Warfield v. Walter*, 11 Gill. & J. (Md.) 80; *Woods v. Nashua Mfg. Co.*, 4 N. H. 527.

[a] **But a plea for this cause is unusual**, for if the mistake appear upon the face of the declaration it is available on demurrer; and if not, advantage of it may be taken under the general issue. *Gould Pl. 289*, quoted in *Warfield v. Walter*, 11 Gill. & J. (Md.) 80.

[b] **Under the code no action will abate for want of form** if sufficient matter of substance is set forth to enable the court to proceed upon the merits of the cause. See 6 STANDARD PROC. 658.

29. See 1 STANDARD PROC. 29.

**Premature commencement**, see *supra*, III, B, 2.

30. See the title, "Process."

31. See the title, "Service of Process and Papers."

**In actions by minors**, see 12 STANDARD PROC. 755.

[a] **False Return.**—(1) The return of the officer showing due execution of summons cannot be contradicted by a plea in abatement, unless it be shown that the plaintiff induced or procured it. *Sutherland v. People's Bank*, 111 Va. 515, 69 S. E. 341; *Talbott v. Southern Oil Co.*, 60 W. Va. 423, 55 S. E. 1009. See also *Tillman v. Davis*, 28 Ga. 494, 73 Am. Dec. 786. (2) The rule is otherwise in some states (*Electric Vehicle Co. v. Craig Toledo Motor Co.*, 157 Fed. 316). (3) In some cases

that the defendant is privileged from service,<sup>32</sup> that the declaration fails to conform to process,<sup>33</sup> that there is a defect of or other objection to parties,<sup>34</sup> that another action is pending,<sup>35</sup> that the cause has been submitted to arbitration,<sup>36</sup> that the action was commenced without the consent of the plaintiff, and was discharged by him,<sup>37</sup> and that the plaintiff has recommenced an action previously dismissed without paying or securing the costs of the former suit.<sup>38</sup> A plea in abatement is sometimes permissible, where there is a misjoinder of causes of action.<sup>39</sup> The death of a party pending the action sometimes abates it.<sup>40</sup> But the insanity of a party pending suit does not.<sup>41</sup>

A plea to jurisdiction differs from a plea in abatement.<sup>42</sup>

That the plaintiff has a remedy in equity which would include the cause of action set up is not a matter of abatement.<sup>43</sup>

The accidental destruction of the plaintiff's pleadings after service of process does not abate the suit, where the loss can be supplied.<sup>44</sup>

Matter amounting to a plea of *res judicata* should be pleaded in bar, not in abatement.<sup>45</sup>

**XI. INJUNCTION AGAINST ACTIONS.**<sup>46</sup> — A. IN GENERAL. Equity has undoubted jurisdiction to enjoin parties<sup>47</sup> from prosecuting

by statute. *Evans v. Smith*, 101 Ga. 86, 28 S. E. 617; *Lamb v. Russell*, 81 Miss. 382, 32 So. 916. See generally the title, "Returns."

32. See the title, "Privilege."

33. See 6 STANDARD PROC. 668.

34. See 20 STANDARD PROC. 990.

Absence of legal entity, see 20 STANDARD PROC. 978.

Absence of remedial interest, see 20 STANDARD PROC. 979.

Want of capacity to sue, see 20 STANDARD PROC. 981.

Misnomer of parties, see 20 STANDARD PROC. 983.

Misjoinder of parties, see 20 STANDARD PROC. 985.

Where an action by an insane person is brought in his own name. See 13 STANDARD PROC. 599.

Where an infant sues in his own name, see 12 STANDARD PROC. 754.

That the party is an alien, see 1 STANDARD PROC. 805.

Nul tiel corporation, see 7 STANDARD PROC. 76. And see 5 STANDARD PROC. 645.

35. See the title, "Another Action Pending."

36. See 1 STANDARD PROC. 30.

37. *Nelson v. Thompson*, 7 Cush. (Mass.) 502, the discharge was not a release or evidence of payment.

38. See 1 STANDARD PROC. 29.

39. See 14 STANDARD PROC. 723.

40. See the titles "Revivor;" "Survival."

41. See 13 STANDARD PROC. 599.

42. See 17 STANDARD PROC. 917.

43. *Glens Falls Nat. Bank v. Cramton*, 72 Fed. 734, this is a matter to be tried in the action on a plea of merits, and not elsewhere.

44. *Suggett v. Kentucky Bank*, 8 Dana (Ky.) 201.

45. *Fields v. Walker*, 23 Ala. 155; *Harvey v. State ex rel. Monticello*, 94 Ind. 159. See 15 STANDARD PROC. 623.

46. Stay of proceedings by application in the action, see the title, "Supersedeas and Stay of Proceedings."

Injunction to restrain proceedings to enforce taxes, see the title "Taxation."

Enjoining municipal suits, see 20 STANDARD PROC. 208.

Jurisdiction and venue, see 12 STANDARD PROC. 1022.

47. See *infra*, this section.

[a] The power proceeds from the authority possessed by courts of equity over persons within its jurisdiction to restrain them from doing anything contrary to equity and good conscience to the injury of others, whether the inequitable conduct consists in the prosecution of an action or in something else. *Jones v. Hughes*, 156 Iowa 684, 137 N. W. 1023, 42 L. R. A. (N.

suits and actions, when sufficient equitable ground therefor exists,<sup>48</sup> and when there is no adequate remedy at law.<sup>49</sup> In exercising this power, a court of equity does not assume any supervisory authority over the court in which the proceeding is pending.<sup>50</sup> It acts in personam,<sup>51</sup> and directs its injunction to the parties, not to the court.<sup>52</sup> The great purpose in assuming jurisdiction in this class of cases is to afford a more plain, adequate, and complete remedy for the wrong complained of than the party can have at law.<sup>53</sup>

Equity will not enjoin an action at law within the state when the result of the injunction would be to compel the party to bring an action in another state.<sup>54</sup>

**B. RELIEF AS AFFECTED BY COURT IN WHICH PROCEEDING IS PENDING.—1. Generally.**—A court of equity may enjoin proceedings in other courts whether of law,<sup>55</sup> equity,<sup>56</sup> probate,<sup>57</sup> or admiralty,<sup>58</sup> and

S.) 502; *Bigelow v. Old Dominion Copper Min. & Smelt. Co.*, 74 N. J. Eq. 457, 71 Atl. 153.

48. See *infra*, XI, E.

[a] **The Equities Must Be Apparent and Strong.**—*Norfolk & N. B. H. Co. v. Arnold*, 143 N. Y. 265, 38 N. E. 271.

49. See *infra*, XI, E, 2.

50. *Jones v. Hughes*, 156 Iowa 684, 137 N. W. 1023, 42 L. R. A. (N. S.) 502.

51. See cases in the next note following.

52. **Ala.**—*Allen v. Buchanan*, 97 Ala. 399, 11 So. 777, 38 Am. St. Rep. 187. **Conn.**—*Tyler v. Hamersley*, 44 Conn. 419, 26 Am. Rep. 479. **Ga.** *Stone v. King-Hodgson*, 140 Ga. 487, 79 S. E. 122. **Ill.**—*Chapman v. American Surety Co.*, 261 Ill. 594, 104 N. E. 247. **Ind.**—*Sandage v. Studebaker Bros. Mfg. Co.*, 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363. **Mass.**—*Moors v. Ladenburg*, 178 Mass. 272, 59 N. E. 676; *Dehon v. Foster*, 4 Allen 545. **Minn.**—*Mann v. Flower*, 26 Minn. 479, 5 N. W. 365. **N. Y.**—*Platt v. Woodruff*, 61 N. Y. 378; *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637, 649. **N. C.**—*Wierse v. Thomas*, 145 N. C. 261, 59 S. E. 58, 122 Am. St. Rep. 446, 15 L. R. A. (N. S.) 1008. **Ohio.** *Snook v. Snetzer*, 25 Ohio St. 516. **W. Va.**—*State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, 94 Am. St. Rep. 932. **Wis.**—*Akerly v. Vilas*, 15 Wis. 401.

Judge need not be a party, see 13 STANDARD PROC. 31.

53. *Glenn v. Fowler*, 8 Gill. & J.

(Md.) 340; *Henwood v. Jarvis*, 27 N. J. Eq. 247.

54. *Davis v. Minneapolis*, St. P. & S. S. M. R. Co., 134 Minn. 455, 159 N. W. 1084.

55. **Ind.**—*Spicer v. Hoop*, 51 Ind. 365. **N. Y.**—*Erie Ry. Co. v. Ramsey*, 45 N. Y. 637, 647. **W. Va.**—*Parsons v. Snider*, 42 W. Va. 517, 26 S. E. 285. And see *infra*, this section.

56. **Ill.**—*Chapman v. American Surety Co.*, 261 Ill. 594, 602, 104 N. E. 247; *Farwell v. Great Western Tel. Co.*, 161 Ill. 522, 44 N. E. 891. **Minn.** *Mann v. Flower*, 26 Minn. 479, 5 N. W. 365. **N. Y.**—*Erie Ry. Co. v. Ramsey*, 45 N. Y. 637, 648.

[a] **Generally, equity will not enjoin a party (1) from prosecuting a suit in equity court** (*Gray v. South & N. A. R. Co.*, 151 Ala. 215, 43 So. 859, 11 L. R. A. (N. S.) 581; *Pond v. Harwood*, 139 N. Y. 111, 34 N. E. 768; *Wallack v. Society*, 67 N. Y. 23; *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637, 647), for the reason (2) that both courts can afford the suitor any remedy to which he is entitled. *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637, 647.

[b] **On grounds available in the first suit**, an equity suit will not be enjoined. *Waymire v. San Francisco & S. M. Ry. Co.*, 112 Cal. 646, 44 Pac. 1086.

57. *La Rue v. Friedman*, 49 Cal. 278; *Moody v. Harper*, 38 Miss. 599. See *Norwood v. Tyson*, 138 Ala. 269, 36 So. 370.

58. *Mann v. Flower*, 26 Minn. 479, 5 N. W. 365, *quot.* 3 Daniells Ch. Pr. 1725.



whether they are courts of coordinate,<sup>59</sup> or inferior<sup>60</sup> jurisdiction. It may even restrain other proceedings in the same court.<sup>61</sup> And a court on its equity side may enjoin its own suitors from proceeding on its law side.<sup>62</sup>

**2. Courts of Coordinate Jurisdiction.**—Equity has jurisdiction to restrain persons from proceeding in courts of coordinate jurisdiction,<sup>63</sup> but due regard for the rights of coordinate tribunals requires that the jurisdiction should be sparingly exercised,<sup>64</sup> and then only when the purposes of justice clearly require it.<sup>65</sup> Since as between courts of coordinate jurisdiction the court which first acquires jurisdiction should continue to exercise it,<sup>66</sup> an injunction against a senior proceeding at law will not be granted for the mere purpose of obtaining exclusive jurisdiction of the cause.<sup>67</sup> Some special equitable ground must appear;<sup>68</sup> and if the case be one which will be more readily and conveniently tried at law, it will be allowed to proceed.<sup>69</sup> Should how-

59. *Platt v. Woodruff*, 61 N. Y. 378. See *infra*, XI, B, 2.

60. *Cal.*—*Gregory v. Diggs*, 113 Cal. 196, 45 Pac. 261. *Del.*—*Butler v. Topkis*, 63 Atl. 646. *Ga.*—*National Bank v. Carlton*, 96 Ga. 469, 23 S. E. 388.

61. *Ill.*—*Farwell v. Great Western Tel. Co.*, 161 Ill. 522, 44 N. E. 891. *Minn.*—*Mann v. Flower*, 26 Minn. 479, 5 N. W. 365. *N. Y.*—*Schuehle v. Reiman*, 86 N. Y. 270; *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637. *Tex.*—*Hammond v. Hoffman* (Tex. Civ. App.), 192 S. W. 362.

62. *Farwell v. Great Western Tel. Co.*, 161 Ill. 522, 44 N. E. 891; *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637, 649.

[a] When the same court is clothed with powers both legal and equitable, the right to restrain proceedings at law is not removed. *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637, 649.

[b] This may be done by a new action upon complaint and affidavits. *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637, 652.

63. See *infra*, this section.

64. *Ala.*—*Gray v. South & N. R. Co.*, 151 Ala. 215, 43 So. 859, 11 L. R. A. (N. S.) 581. *Cal.*—*Wilson v. Baker*, 64 Cal. 475, 2 Pac. 253. *N. Y.*—*Norfolk & N. B. H. Co. v. Arnold*, 143 N. Y. 265, 38 N. E. 271; *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637, 649; *Lown v. Spoon*, 158 App. Div. 900, 143 N. Y. Supp. 275.

65. *Whitaker v. Wickersham*, 5 Del. Ch. 187; *Norfolk & N. B. H. Co. v. Arnold*, 143 N. Y. 265, 38 N. E. 271.

66. See 17 STANDARD PROC. 799.

67. *Ala.*—*Gray v. South & N. A. R. Co.*, 151 Ala. 215, 43 So. 859, 11 L. R.

A. (N. S.) 581; *Williams v. Dismukes*, 106 Ala. 402, 17 So. 620; *Nelson v. Dunn*, 15 Ala. 501. *Ill.*—*Ross v. Buchanan*, 13 Ill. 55. *Mass.*—*Carson v. Dunham*, 149 Mass. 52, 20 N. E. 312, 14 Am. St. Rep. 397, 3 L. R. A. 202. *N. J.* *Standard Roller Bearing Co. v. Crucible Steel Co.*, 71 N. J. Eq. 61, 63 Atl. 546; *Shaw v. Frey*, 69 N. J. Eq. 321, 59 Atl. 811; *Pratt v. Boody*, 55 N. J. Eq. 175, 35 Atl. 1113. *N. Y.*—*Crane v. Bunnell*, 10 Paige 333; *New York & New Haven R. Co. v. Schuyler*, 8 Abb. Pr. 239. *Tenn.*—*Chadwell v. Jordan*, 2 Tenn. Ch. 635. *W. Va.*—*Crawford v. Bosworth*, 72 W. Va. 543, 78 S. E. 623; *Parsons v. Snider*, 42 W. Va. 517, 26 S. E. 285. *Eng.*—*Hoare v. Bremridge*, 42 L. J. Ch. 1, 27 L. T. N. S. 593, 21 Wkly. Rep. 43; *South-Eastern Ry. Co. v. Brogden*, 3 Mac. & G. 8, 23, 42 Eng. Reprint 163. *Irish.*—*Johnston v. Young*, *Irish Rep.* 10 Eq. 403.

68. *Ill.*—*Ross v. Buchanan*, 13 Ill. 55. *Mass.*—*Carson v. Dunham*, 149 Mass. 52, 20 N. E. 312, 14 Am. St. Rep. 397, 3 L. R. A. 202. *N. J.*—*Bigelow v. Old Dominion Copper M. & Smelt. Co.*, 74 N. J. Eq. 457, 475, 71 Atl. 153; *Standard Roller Bearing Co. v. Crucible Steel Co.*, 71 N. J. Eq. 61, 63 Atl. 546. *N. Y.*—*New York & N. H. R. Co. v. Schuyler*, 8 Abb. Pr. 239.

[a] That full and complete justice cannot be had in the earlier action must appear to authorize an injunction. *Pond v. Harwood*, 139 N. Y. 111, 118, 34 N. E. 768; *Savage v. Allen*, 54 N. Y. 458.

69. *Hoare v. Bremridge*, 42 L. J. Ch. 1, 27 L. T. N. S. 593, 21 Wkly. Rep. 43. See *infra*, XI, E.

ever a sufficient ground be shown in such a case, equity may draw the whole matter to the chancery forum for adjudication in one decree,<sup>70</sup> or it may merely restrain the proceedings at law until the equitable elements are disposed of.<sup>71</sup>

**3. Courts of Sister States or Foreign Jurisdictions.**—Courts of equity have jurisdiction to enjoin parties from proceeding in actions in sister states,<sup>72</sup> or in foreign courts,<sup>73</sup> upon sufficient equitable grounds,<sup>74</sup> when the parties are residents of the forum.<sup>75</sup> Jurisdiction to do so is based upon the power of the court to restrain the personal

**70. Md.**—Glenn *v.* Fowler, 8 Gill. & J. 340. **Miss.**—Dreyfus *v.* Gage, 79 Miss. 403, 30 So. 691; Gilliam *v.* Chancellor, 43 Miss. 437, 5 Am. Rep. 498. **N. J.**—Pratt *v.* Boody, 55 N. J. Eq. 175, 35 Atl. 1113.

**71. Pratt v. Boody**, 56 N. J. Eq. 429, 39 Atl. 670 (restraining law action until coming in of the account); Lown *v.* Spoon, 158 App. Div. 900, 143 N. Y. Supp. 275.

[a] **Where injunction is granted for discovery**, the injunction will be dissolved on the coming in of the answer. *Henwood v. Jarvis*, 27 N. J. Eq. 247; *Crane v. Bunnell*, 10 Paige (N. Y.) 333, 340.

**72. Ala.**—Weaver *v.* Alabama G. So. R. Co., 76 So. 364. **Colo.**—O'Haire *v.* Burns, 45 Colo. 432, 101 Pac. 755, 132 Am. St. Rep. 191, 25 L. R. A. (N. S.) 267, note. **Ill.**—Illinois Life Ins. Co. *v.* Prentiss, 277 Ill. 383, 115 N. E. 554; *Royal League v. Kavanagh*, 233 Ill. 175, 84 N. E. 178; *Catherwood v. Hokanson*, 201 Ill. App. 462. **Ind.**—Sandage *v.* Studebaker Bros. Mfg. Co., 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363; *Wilson v. Josephs*, 107 Ind. 490, 8 N. E. 616. **Ia.**—Jones *v.* Hughes, 156 Iowa 684, 137 N. W. 1023, 42 L. R. A. (N. S.) 502; *In re Williams' Estate*, 130 Iowa 553, 107 N. W. 608. **Kan.**—Mason *v.* Harlow, 84 Kan. 277, 114 Pac. 218, 33 L. R. A. (N. S.) 234; *Cole v. Young*, 24 Kan. 435. **Ky.**—Reed's Admx. *v.* Illinois Cent. R. Co., 182 Ky. 455, 206 S. W. 794. **Md.**—Miller *v.* Gittings, 85 Md. 601, 37 Atl. 372, 60 Am. St. Rep. 352, 37 L. R. A. 654. **Mass.**—Carson *v.* Dunham, 149 Mass. 52, 20 N. E. 312, 14 Am. St. Rep. 397, 3 L. R. A. 202. **Minn.**—Hawkins *v.* Ireland, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534. **Mo.**—Kelly *v.* Siefert, 71 Mo. App. 143. **N. J.**—Federal Trust Co. *v.* Conklin, 87 N. J. Eq. 185, 99 Atl. 109; *Kempson v. Kempson*, 58 N. J. Eq. 94, 43

Atl. 97. **N. Y.**—Vail *v.* Knapp, 49 Barb. 299; *Mead v. Merritt*, 2 Paige 402, 404. **Tenn.**—American Express Co. *v.* Fox, 135 Tenn. 489, 187 S. W. 1117, Ann. Cas. 1918B, 1148. **Wash.**—Rader *v.* Stubblefield, 43 Wash. 334, 86 Pac. 560. **Wis.**—Eingartner *v.* Illinois Steel Co., 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503; *Akerly v. Vilas*, 15 Wis. 401.

[a] **The objection that if the courts of one state exercise the power, the courts of the other state may retaliate in like manner by enjoining proceedings in the first, has not commended itself to the judicial mind.** *Cole v. Cunningham*, 133 U. S. 107, 121, 10 Sup. Ct. 269, 33 L. ed. 538.

[b] **The full faith and credit clause is not violated thereby.** *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538.

**73. U. S.**—Gage *v.* Riverside Trust Co., 86 Fed. 984. **Cal.**—Spreckels *v.* Hawaiian Com. & Sugar Co., 117 Cal. 377, 49 Pac. 353. **Mass.**—Carson *v.* Dunham, 149 Mass. 52, 20 N. E. 312, 14 Am. St. Rep. 397, 3 L. R. A. 202; *Dehon v. Foster*, 4 Allen 545. **Minn.**—Davis *v.* Minneapolis St. P. & S. S. M. Ry. Co., 134 Minn. 455, 159 N. W. 1084. **N. J.**—Bigelow *v.* Old Dominion Copper Min. & Smelt. Co., 74 N. J. Eq. 457, 473, 71 Atl. 153. **Eng.**—McHenry *v.* Lewis, L. R. 22 Ch. Div. 397, 52 L. J. Ch. 325, 47 L. T. N. S. 549, 31 Wkly. Rep. 305.

**74. See infra**, XI, E, 12.

**75. Ark.**—Griffith *v.* Langsdale, 53 Ark. 71, 13 S. W. 733, 22 Am. St. Rep. 182. **Ill.**—*Royal League v. Kavanagh*, 233 Ill. 175, 84 N. E. 178. **Kan.**—*Cole v. Young*, 24 Kan. 435. **N. C.**—*Wierse v. Thomas*, 145 N. C. 261, 59 S. E. 58, 122 Am. St. Rep. 446, 15 L. R. A. (N. S.) 1008. **Tex.**—*Lightfoot v. Murphy*, 47 Tex. Civ. App. 112, 104 S. W. 511.

[a] **Where the parties are domiciled in different states, an injunction**

action of a citizen of the state, and upon the control of the court over persons within its jurisdiction.<sup>76</sup> But upon grounds of comity the power to enjoin proceedings in such courts ought to be sparingly exercised, or at least exercised with care and with a just regard to the comity which should prevail between the courts of coordinate sovereignties.<sup>77</sup>

**4. State and Federal Courts.**<sup>78</sup> — As a general rule, a state court cannot stay proceedings in a United States Court.<sup>79</sup> But there are exceptions to this rule.<sup>80</sup> And parties who have voluntarily submitted the whole controversy to a state court may be enjoined from proceeding upon the same cause in the federal courts.<sup>81</sup>

by the court of the complainants state will not be issued, although the defendant be temporarily found within the jurisdiction. *Greer v. Cook*, 88 Ark. 93, 113 S. W. 1009; *Griffith v. Langsdale*, 53 Ark. 71, 13 S. W. 733, 22 Am. St. Rep. 182; *Carpenter, Baggott & Co. v. Hanes*, 162 N. C. 46, 77 S. E. 1101, Ann. Cas. 1915A, 832.

[b] **A nonresident debtor** cannot enjoin a citizen of the state from suing him in another state. *American Express Co. v. Fox*, 135 Tenn. 489, 187 S. W. 1117, Ann. Cas. 1918B, 1148.

[c] **If one of two creditors is domiciled without the state**, an injunction will not be granted against an action brought in the courts of his state. *Greer v. Cook*, 88 Ark. 93, 113 S. W. 1009.

**76. Ga.**—*Engel v. Scheuerman*, 40 Ga. 206, 2 Am. Rep. 573. **Ind.**—*Sandage v. Studebaker Bros. Mfg. Co.*, 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363. **Mass.**—*Dehon v. Foster*, 4 Allen 545. **N. J.**—*Federal Trust Co. v. Conklin*, 87 N. J. Eq. 185, 99 Atl. 109. **N. Y.**—*Vail v. Knapp*, 49 Barb. 299. **Tex.**—*Moton v. Hull*, 77 Tex. 80, 13 S. W. 849, 8 L. R. A. 722. **Wash.**—*Rader v. Stubblefield*, 43 Wash. 334, 86 Pac. 560. **Eng.**—*Lord Portarlington v. Soulbey*, 3 Myl. & K. 104, 40 Eng. Reprint 40.

**77. U. S.**—*Cole v. Cunningham*, 133 U. S. 107, 121, 10 Sup. Ct. 269, 35 L. ed. 538. **Ia.**—*Jones v. Hughes*, 156 Iowa 684, 137 N. W. 1023, 42 L. R. A. (N. S.) 502. **Ky.**—*Reed's Admx. v. Illinois Cent. R. Co.*, 182 Ky. 455, 206 S. W. 794. **N. J.**—*Bigelow v. Old Dominion Copper, etc. Co.*, 74 N. J. Eq. 457, 473, 71 Atl. 153, 160.

[a] **A clear equity** must be made out to authorize relief. *Carson v. Dun-*

*ham*, 149 Mass. 52, 20 N. E. 312, 14 Am. St. Rep. 397, 3 L. R. A. 202.

[b] **The general rule** that as between courts of concurrent jurisdiction, the court which first obtains jurisdiction will usually be allowed to retain it extends upon principles of comity to conflicting suits brought in courts of sister states. *Carson v. Dunham*, 149 Mass. 52, 20 N. E. 312, 14 Am. St. Rep. 397, 3 L. R. A. 202; *Wade v. Crump* (Tex. Civ. App.), 173 S. W. 538. See 17 STANDARD PROC. 830.

**78. Conflicting jurisdiction between state and federal courts**, see 17 STANDARD PROC. 812, et seq.

**79. U. S.**—*Farmers' L. & Tr. Co. v. Lake St. El. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. ed. 667; *Riggs v. Johnson*, 6 Wall. 166, 18 L. ed. 768; *Clapp v. Otoe*, 104 Fed. 473, 45 C. C. A. 579. **Cal.**—*Spreckels v. Hawaiian Com. & S. Co.*, 117 Cal. 377, 49 Pac. 353, statute so provides. **N. J.**—*Shaw v. Frey*, 69 N. J. Eq. 321, 59 Atl. 811. **Va.**—*Dorr's Admr. v. Rohr*, 82 Va. 359, 3 Am. St. Rep. 106. **W. Va.**—*Henderson v. Henrie*, 61 W. Va. 183, 56 S. E. 369, 11 Ann. Cas. 741.

[a] **It cannot enjoin proceedings indirectly** by acting on the parties. *Johnstown Min. Co. v. Morse*, 44 Misc. 504, 90 N. Y. Supp. 107.

**80.** See *infra*, this note.

[a] **A state court may compel discovery** of matters necessary to a fair trial in the federal court and may restrain the prosecution in that court pending discovery, where owing to common citizenship, the federal court cannot grant relief. *Shaw v. Frey*, 69 N. J. Eq. 321, 59 Atl. 811.

**81.** *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238; *Akerly v. Vilas*, 15 Wis. 401, 413. But see *Spreckels v. Hawaiian*



A federal statute provides that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state,<sup>82</sup> except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.<sup>83</sup> This statute does not apply to injunction proceedings incidental to jurisdiction previously acquired by the federal courts,<sup>84</sup> or prevent it from restraining proceedings having the effect of defeating or impairing its jurisdiction,<sup>85</sup> or prevent it from enforcing its own judgments.<sup>86</sup> Nor does it apply to proceedings which have not in fact been commenced but which are threatened.<sup>87</sup>

C. AS AFFECTED BY STAGE OF PROCEEDINGS. — Equity has jurisdiction to enjoin prosecution of actions before the commencement of the proceedings,<sup>88</sup> pending the suit,<sup>89</sup> or after judgment,<sup>90</sup> and after its decision by the highest tribunal.<sup>91</sup> The defendant who has a distinct ground for equitable relief need not wait for the determination of an action at law,<sup>92</sup> unless his defense is purely equitable.<sup>93</sup>

D. SUBMISSION TO JUDGMENT AS A CONDITION TO RELIEF. — If the defenses set up in the bill are the same as those made in the action at law, or are such only as can be made in equity,<sup>94</sup> an injunction will

Com. & S. Co., 117 Cal. 377, 49 Pac. 353.

82. Rev. St. U. S., §720; Hull v. Burr, 234 U. S. 712, 34 Sup. Ct. 892, 58 L. ed. 1557; Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644; Peck v. Jenness, 7 How. (U. S.) 612, 625, 12 L. ed. 841; Stewart v. Wisconsin Cent. R. Co., 117 Fed. 782.

[a] The courts of the District of Columbia are courts of the United States within the statute. Keane v. Chamberlain, 14 App. Cas. (D. C.) 84, 102.

Injunction in aid of removal of causes, see the title, "Removal of Causes."

83. Rev. St. U. S., §720, see 3 STANDARD PROC. 932 and 938. And see the title "Supersedeas and Stay of Proceedings."

84. Union Life Ins. Co. v. Riggs, 123 Fed. 312; Stewart v. Wisconsin Cent. R. Co., 117 Fed. 782; Starr v. Chicago R. I. & P. Ry. Co., 110 Fed. 3.

85. Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. ed. 629; French v. Hay, 22 Wall. 250, 22 L. ed. 857. See 17 STANDARD PROC. 822, note 22.

86. Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. ed. 497.

87. Camden Interstate Ry. Co. v. Catlettsburg, 129 Fed. 421; Rhodes & Jacobs Mfg. Co. v. New Hampshire, 70 Fed. 721.

88. Parker v. Judges, 12 Wheat (U. S.) 561, 6 L. ed. 729; Chapman v. American Surety Co., 261 Ill. 594, 601, 104 N. E. 247.

89. U. S.—Parker v. Judges, 12 Wheat. 561, 6 L. ed. 729. Conn.—Tyler v. Hamersley, 44 Conn. 419, 26 Am. Rep. 479. Ill.—Chapman v. American Surety Co., 261 Ill. 594, 104 N. E. 247.

[a] After verdict, the restraint may be imposed to stay judgment. Tyler v. Hamersley, 44 Conn. 419, 26 Am. Rep. 479.

90. Injunction against judgments and executions, see 15 STANDARD PROC. 256, and 16 STANDARD PROC. 450.

[a] After judgment the restraint may be imposed to stay execution, and after execution to restrain money in the hands of an officer. Tyler v. Hamersley, 44 Conn. 419, 26 Am. Rep. 479.

91. Parker v. Judges, 12 Wheat. (U. S.) 561, 6 L. ed. 729.

92. Robinson v. Braidon, 44 W. Va. 183, 28 S. E. 798.

93. See *infra*, this note.

94. "If the defenses set up in the bill to the defendant's claim are the same as those made in the suit at law, or are only such as can be made in equity, it is clear that no injunction ought to be granted before judgment at law, although the bill may contain matter enough to warrant the granting it. . . . The injunction should be to

not be granted it has been held, unless the legal controversy is closed by giving judgment in the action,<sup>95</sup> and waiving errors,<sup>96</sup> or confessing judgment which is its equivalent.<sup>97</sup> This is for the reason that it would be inequitable to litigate the same matter with the same party in two courts at once.<sup>98</sup> But a confession will not be required, if on the case made in equity, it appears it would be unsafe for the defendant to make such confession,<sup>99</sup> as where the defendant has a legal as well as an equitable defense.<sup>1</sup> The rule is that it is within the discretion of the court whether the complainant will be required to confess judgment in the law action in a given case as a condition to injunctive relief.<sup>2</sup>

stay execution, not trial." Chadwell v. Jordan, 2 Tenn. Ch. 635.

95. Ark.—*Ex parte* Hodges, 24 Ark. 197. Miss.—*Hill v. Billingsly*, 53 Miss. 111. N. J.—*Henwood v. Jarvis*, 27 N. J. Eq. 247. N. Y.—*Ham v. Schuyler*, 2 Johns. Ch. 140, where the complaint had a purely equitable claim. N. C. *Johnson v. McArthur*, 64 N. C. 675 (where the ground of relief was that the plaintiff had an equitable title which he could not set up at law); *Williams v. Sadler*, 57 N. C. 378, 75 Am. Dec. 424; *Justice v. Scott*, 39 N. C. 108. Tenn.—*Reynolds Corp. v. Knoxville Lith. Co.*, 138 Tenn. 287, 197 S. W. 897; *Chadwell v. Jordan*, 2 Tenn. Ch. 635.

[a] That is, the plaintiff in the suit at law, has a right to be placed in such situation, that should the injunction be dissolved, he may, without unnecessary delay, have execution of his judgment. *Ex parte* Hodges, 24 Ark. 197.

[b] An equitable set off is not ground for an injunction until after judgment. *Hough v. Chaffin*, 4 Sneed (Tenn.) 238.

96. *Chadwell v. Jordan*, 2 Tenn. Ch. 635.

[a] "Where the suit at law is upon a bond, note or like instrument signed by the party, the complainant must not only give judgment, but waive errors, or, what is equivalent, confess judgment, which will be a waiver of errors." *Chadwell v. Jordan*, 2 Tenn. Ch. 635, 639.

97. *Ham v. Schuyler*, 2 Johns. Ch. (N. Y.) 140; *Chadwell v. Jordan*, 2 Tenn. Ch. 635.

[a] The better rule is to require the judgment to be confessed before the injunction is granted. *Henley v. Cottrell Real Estate etc. Co.*, 101 Va. 70,

43 S. E. 191. See *Williams v. Sadler*, 57 N. C. 378, 75 Am. Dec. 424.

98. *Williams v. Sadler*, 57 N. C. 378, 75 Am. Dec. 424; *Chadwell v. Jordan*, 2 Tenn. Ch. 635.

99. *Dudley v. Minor's Exr.*, 93 Va. 408, 25 S. E. 100; *Great Falls Mfg. Co. v. Henry's Admr.*, 25 Gratt. (66 Va.) 575.

[a] A defendant who has a legal defense to an action and a distinct ground of equitable relief need not confess judgment as a condition to equitable relief. *Dudley v. Minor's Exr.*, 93 Va. 408, 25 S. E. 100; *Warwick v. Norvell*, 1 Rob. (40 Va.) 308; *Robinson v. Braiden*, 44 W. Va. 183, 28 S. E. 798.

[b] Neither need a defendant confess judgment who denies any indebtedness whatever upon the claim sued on at law, and the right to recover in any forum, either at law or in equity. *Dudley v. Minor's Exr.*, 93 Va. 408, 412, 25 S. E. 100.

1. N. J.—*Henwood v. Jarvis*, 27 N. J. Eq. 247, 256. Tenn.—*Chadwell v. Jordan*, 2 Tenn. Ch. 635. Eng.—*Barnard v. Wallis*, *Craig & Phil.* 85, 41 Eng. Reprint 422.

2. N. J.—*Henwood v. Jarvis*, 27 N. J. Eq. 247. Va.—*Dudley v. Minor's Exrs.*, 93 Va. 408, 25 S. E. 100; *Great Falls Mfg. Co. v. Henry's Admr.*, 25 Gratt. (66 Va.) 575. W. Va.—*Parsons v. Snider*, 42 W. Va. 517, 26 S. E. 285.

[a] The order requiring a confession of judgment should expressly provide that the judgment was thereafter to be dealt with as the equity court might direct. *Dudley v. Minor's Exr.*, 93 Va. 408, 25 S. E. 100; *Thornton v. Thornton*, 31 Gratt. (72 Va.) 212; *Parsons v. Snider*, 42 W. Va. 517, 26 S. E. 285.

[b] If the bill for injunction is dis-

**E. WHEN INJUNCTIVE RELIEF MAY BE HAD.—1. Generally.<sup>3</sup>** There is no occasion for invoking the jurisdiction of equity to enjoin an action at law except when the courts of law are inadequate to give full relief.<sup>4</sup> To warrant an injunction some equitable ground of relief must exist.<sup>5</sup> But no general rule can be laid down as to when equity ought to exercise its injunctive power, as each case must be ruled by its own facts.<sup>6</sup> If these facts show that it is necessary and equitable to exercise the power in the orderly administration of justice, an injunction will be granted, otherwise not.<sup>7</sup> Or as it has been said, relief is granted on the ground that from equitable circumstances, it is against conscience that the party inhibited should proceed in the cause.<sup>8</sup> A person will be enjoined against taking an inequitable advantage of another by an action.<sup>9</sup> Accordingly the rule has been laid down, that

missed, the decree should direct the judgment at law be set aside and the case reinstated as it was when the injunction was granted. *Great Falls Mfg. Co. v. Henry's Admr.*, 25 Gratt. (66 Va.) 575.

**3. In creditor's suits**, see 6 **STANDARD PROC.** 228, 229.

**4. Ga.**—See *Atlantic Coast L. R. Co. v. Jackson*, 146 Ga. 488, 91 S. E. 555. **Ill.**—*Chapman v. American Surety Co.*, 261 Ill. 594, 600, 104 N. E. 247. **Ia.**—*McIntosh v. Brown*, 159 Iowa 41, 139 N. W. 926. **Md.**—*Glenn v. Fowler*, 8 Gill. & J. 340. **Mass.** *American Broaching Mach. Co. v. Marlborough Bd. of Trade*, 121 N. E. 406; *Payson v. Lamson*, 134 Mass. 593, 45 Am. Rep. 348. **Mich.**—*Shaw v. Chambers*, 48 Mich. 355, 12 N. W. 486. **N. Y.** *Burke v. Burke*, 212 N. Y. 303, 106 N. E. 62; *Pond v. Harwood*, 139 N. Y. 111, 118, 34 N. E. 768; *Savage v. Allen*, 54 N. Y. 458. **Ore.**—*Moss Mercantile Co. v. First Nat. Bank*, 47 Ore. 361, 82 Pac. 8, 2 L. R. A. (N. S.) 657. **Vt.**—*Glastenbury v. McDonald's Admr.*, 44 Vt. 450.

**5. Ala.**—*Birmingham R. & E. Co. v. Birmingham Traction Co.*, 121 Ala. 475, 25 So. 777. **Ill.**—*Catherwood v. Hokanson*, 201 Ill. App. 462. **Kan.** *Cole v. Young*, 24 Kan. 435. **Md.** *Glenn v. Fowler*, 8 Gill & J. 340. **Mass.** *Carson v. Dunham*, 149 Mass. 52, 20 N. E. 312, 14 Am. St. Rep. 397, 3 L. R. A. 202. **Vt.**—*Brown v. Brown*, 66 Vt. 81, 28 Atl. 666. **Eng.**—*Hoare v. Bremridge*, 42 L. J. Ch. 1, 27 L. T. N. S. 593, 21 Wkly. Rep. 43.

**6. Minn.**—*Hawkins v. Ireland*, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534. **N. Y.**—*Norfolk & N. B. H. Co. v. Arnold*, 143 N. Y. 265, 38 N. E.

271. **Tenn.**—*American Express Co. v. Fox*, 135 Tenn. 489, 187 S. W. 1117, Ann. Cas. 1918B, 1148. **Tex.**—*Supreme Lodge v. Ray* (Tex. Civ. App.), 166 S. W. 46; *St. Louis S. W. Ry. Co. v. Woldert Grocery Co.* (Tex. Civ. App.), 162 S. W. 1174.

**7. Minn.**—*Hawkins v. Ireland*, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534. **N. J.**—*Long Dock Co. v. Bentley*, 37 N. J. Eq. 15. **N. Y.**—*Cuthbert v. Chauvet*, 60 Hun 577, 14 N. Y. Supp. 385, 20 Civ. Proc. 391, 37 N. Y. St. 941, 38 N. Y. St. 1018. **W. Va.**—See *Rogers v. Rogers*, 37 W. Va. 407, 16 S. E. 633.

**8. Tyler v. Hamersley**, 44 Conn. 419, 26 Am. Rep. 479; *Federal Trust Co. v. Conklin*, 87 N. J. Eq. 185, 99 Atl. 109.

[a] When facts exist not amounting to a defense at law, which renders it against conscience to proceed in the cause. *Stanton v. Embry*, 46 Conn. 595; *Pearce v. Olney*, 20 Conn. 544; *Vennum v. Davis*, 35 Ill. 568, 574; *Elder v. Prussing*, 101 Ill. App. 655.

**9. Oconto Co. v. Lundquist**, 119 Mich. 264, 77 N. W. 950; *Dinsmore v. Neresheimer*, 32 Hun (N. Y.) 204.

[a] A vendee of land with notice of the rights of a prior purchaser will be enjoined from suing for value of timber removed, if the prior purchaser's contract insufficient under the statute of frauds is enforceable by an action for specific performance, as his conduct is unconscionable. *Oconto Co. v. Lundquist*, 119 Mich. 264, 77 N. W. 950.

[b] When the plaintiff at law is using the process of the courts in an inequitable and unconscionable manner. *Federal Trust Co. v. Conklin*, 87 N. J. Eq. 185, 99 Atl. 109; *Standard*



in all cases where by accident, mistake or fraud or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is, therefore, against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained.<sup>10</sup> The object therefore really is to prevent an unfair use being made of the process of a court of law, in order to deprive another party of his just rights or to subject him to some unjust vexation or injury which is wholly irremediable by a court of law.<sup>11</sup>

Equity will not interfere merely because of an apprehension of an erroneous decision by the court in possession of the case,<sup>12</sup> or because

*Roller Bearing Co. v. Crucible Steel Co.*, 71 N. J. Eq. 61, 63 Atl. 546.

[c] **Abuse of Process.**—A court of equity has jurisdiction by bill or petition to restrain an officer from making an illegal use of its process. *Gibbs v. Usher*, Holmes 348, 10 Fed. Cas. No. 5,387.

[d] **To restrain the assertion of doubtful rights in a manner productive of irreparable damage**, and to prevent injury to a person from the doubtful title of others are among the legitimate functions of a court of equity. *Henwood v. Jarvis*, 27 N. J. Eq. 247.

10. **Conn.**—*Tyler v. Hamersley*, 44 Conn. 419, 26 Am. Rep. 479. **Mass.** *Payson v. Lamson*, 134 Mass. 593, 45 Am. Rep. 348. **Tex.**—*Supreme Lodge v. Ray* (Tex. Civ. App.), 166 S. W. 46. **Vt.**—*Ordway v. Farrow*, 79 Vt. 192, 205, 64 Atl. 1116, 118 Am. St. Rep. 951.

See also the following cases: **Cal.** *La Rue v. Friedman*, 49 Cal. 278. **Conn.** *Sacket v. Hillhouse*, 5 Day 551. **Del.** *Whitaker v. Wickersham*, 5 Del. Ch. 187. **Ill.**—*Bishop of Chicago v. Chiniquy*, 74 Ill. 317. **Ia.**—*Butch v. Lash*, 4 Iowa 215. **Mass.**—*Dehon v. Foster*, 4 Allen 545. **Minn.**—*Hawkins v. Ireland*, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534. **N. J.**—*McInnes v. McInnes Brick Mfg. Co.* (N. J. Eq.), 38 Atl. 182. **N. Y.**—*New York City Baptist Mission Soc. v. Potter*, 20 Misc. 191, 44 N. Y. Supp. 1051. **Tenn.** *American Express Co. v. Fox*, 135 Tenn. 489, 187 S. W. 1117, Ann. Cas. 1918B, 1148. **Eng.**—*Carron Iron Co. v. MacLaren*, 5 Clarke's Cas. H. of L. 416, 10 Eng. Reprint 961.

[a] "Where a party by fraud attempts to produce an unjust result in

a pending suit and consequent irreparable injury to his adversary, he may, of course, be enjoined." *Bigelow v. Old Dominion Copper Min. & Smelt. Co.*, 74 N. J. Eq. 457, 480, 71 Atl. 153.

[b] **Reason.**—"It is not upon the ground of want of legal right in the plaintiff at law that equity interferes, but upon the principle of preventing a legal right from being enforced in an inequitable manner or for an inequitable purpose." *Bishop of Chicago v. Chiniquy*, 74 Ill. 317, *quot.* in *Cook County v. Chicago*, 158 Ill. 524, 42 N. E. 67.

[c] **An action for deficiency arising from a mortgage foreclosure** will be enjoined where the mortgagee is estopped from claiming a deficiency by reason of his conduct at the sale, whereby he made arrangements with prospective bidders which prevented them from bidding. *Innes v. Stewart*, 36 Mich. 285.

[d] **Proceeding at law against a surety after an agreement with the principal to enlarge the time for payment** is a fraud which will be enjoined. *Bradshaw v. Combs*, 102 Ill. 428; *Davies v. Stainbank*, 6 De G. M. & G. 679, 696, 43 Eng. Reprint 1397.

11. *Tyler v. Hamersley*, 44 Conn. 419, 26 Am. Rep. 479; 2 Story's Eq. Jur., §1195.

12. **Ala.**—*Robertson v. Montgomery Baseball Assn.*, 141 Ala. 348, 37 So. 388, 109 Am. St. Rep. 30. **Mass.**—*Carson v. Dunham*, 149 Mass. 52, 20 N. E. 312, 14 Am. St. Rep. 397, 3 L. R. A. 202. **N. J.**—*Bigelow v. Old Dominion Copper Min. & Smelt. Co.*, 74 N. J. Eq. 457, 71 Atl. 153. **N. Y.**—*New York City Baptist Mission Soc. v. Potter*, 20 Misc. 191, 44 N. Y. Supp. 1051. **Eng.** *Stannard v. Vestry of Saint Giles*

an individual case would work a hardship,<sup>13</sup> or merely because relief can be afforded in equity more promptly than at law.<sup>14</sup>

**2. Where the Party Has a Defense Available at Law.**—For the reasons above stated,<sup>15</sup> when the matter set up as a basis for the injunction is available as a defense to the action sought to be enjoined, and there is no impediment to pleading it, an injunction will not be issued,<sup>16</sup> even where the courts of equity and law have concurrent

Camberwell, 20 Ch. Div. 190, 51 L. J. Ch. 629, 46 L. T. N. S. 243, 30 Wkly. Rep. 693.

13. *Wierengo v. Mason*, 115 Mich. 646, 74 N. W. 183.

14. *Glenn v. Fowler*, 8 Gill & J. (Md.) 340.

15. See *supra*, XI, E, 1.

16. **U. S.**—*Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. ed. 501; *Dupont v. Gardiner*, 238 Fed. 755, 151 C. C. A. 605; *Pell v. McCabe*, 254 Fed. 356. **Ala.**—*Birmingham Securities Co. v. Hodges*, 193 Ala. 197, 68 So. 980; *Wilson v. Miller*, 143 Ala. 264, 39 So. 178, 111 Am. St. Rep. 42; *South & N. Ala. R. R. Co. v. Alabama Great Southern R. Co.*, 102 Ala. 236, 14 So. 747. **Cal.**—*Waymire v. San Francisco & S. M. Ry. Co.*, 112 Cal. 646, 44 Pac. 1086; *Reay v. Butler*, 69 Cal. 572, 584, 11 Pac. 463; *Smith v. Sparrow*, 13 Cal. 596. **Ga.**—*Reynolds Banking Co. v. Southern Pac. Guano Co.*, 140 Ga. 498, 79 S. E. 132; *Waters v. Waters*, 124 Ga. 349, 52 S. E. 425; *Bryan v. Windsor*, 99 Ga. 176, 25 S. E. 268. **Ill.**—*Cook County v. Chicago*, 158 Ill. 524, 42 N. E. 67; *Ross v. Buchanan*, 13 Ill. 55; *Stocks v. Woodrow-Parker Co.*, 201 Ill. App. 125. **Mass.**—*Corey v. Griffin*, 181 Mass. 229, 63 N. E. 420; *Payson v. Lamson*, 134 Mass. 593, 45 Am. Rep. 348. **Mich.**—*C. J. Huebel Co. v. Mackinnon*, 186 Mich. 617, 152 N. W. 1098; *Shaw v. Chambers*, 48 Mich. 355, 12 N. W. 486. **N. J.**—*Savage v. Edgar*, 86 N. J. Eq. 205, 98 Atl. 407; *United New Jersey R. & Canal Co. v. McCulley*, 68 N. J. Eq. 442, 59 Atl. 229; *Roemer v. Conlon*, 45 N. J. Eq. 234, 19 Atl. 664. **N. Y.**—*Savage v. Allen*, 54 N. Y. 458; *Crane v. Bunnell*, 10 Paige 333, 341; *Aetna Explosives Co. v. Bassick*, 176 App. Div. 577, 163 N. Y. Supp. 917; *Kinnan v. Sullivan County Club*, 26 App. Div. 213, 50 N. Y. Supp. 95. **Ore.**—*Moss Mercantile Co. v. First Nat. Bank*, 47 Ore. 361, 82 Pac. 8, 2 L. R. A. (N. S.) 657. **Tex.**—*Pena v. Baker* (Tex. Civ. App.), 207 S.

W. 426. **Va.**—*Virginia Min. Co. v. Wilkinson*, 92 Va. 98, 22 S. E. 839; *Great Falls Mfg. Co. v. Henry's Admr.*, 25 Gratt. (66 Va.) 575. **Wis.**—*Wolf River Lumber Co. v. Brown*, 88 Wis. 638, 60 N. W. 996.

[a] *But compare Daires v. Stainbank*, 6 De G. M. & G. 679, 696, 43 Eng. Reprint 1397, enjoining an action against a surety after an agreement with the principal extending time for payment. "The mere fact that a court of law if called upon to do so, might possibly exercise concurrent jurisdiction in such a case cannot defeat the jurisdiction of this court to interfere. If, indeed, the matter had been pleaded at law, and the court of law had entertained the plea and adjudicated upon it, the case might have been different; but it is clear that, in this case, the court of law has not entertained the question, and the bill was filed before the trial of the action."

[b] *Where the relief sought in the injunction suit may be obtained by a proper defense in the suit to be enjoined, an injunction will not be granted.* *Savage v. Allen*, 54 N. Y. 458.

[c] *While equity may have jurisdiction, it will decline to exercise it if the defense at law is adequate.* *Payson v. Lamson*, 134 Mass. 593, 598, 45 Am. Rep. 348.

[d] *But the fact that the bar of the statute of limitations is a perfect defense does not preclude relief as parties should not be compelled to plead this defense.* *Hastings v. Belden*, 55 Vt. 273.

[e] *An allegation of usury does not justify an injunction.* *Minturn v. Farmers' Loan & Trust Co.*, 3 N. Y. 498.

[f] *That the suit is groundless and malicious is a perfect defense and is not ground for an injunction.* *Corey v. Griffin*, 181 Mass. 229, 63 N. E. 420.

[g] *Failure to perform the plaintiff's part of the contract does not war-*

jurisdiction,<sup>17</sup> except when the remedy by defense is inadequate or where appreciable injury would result from a denial of the injunction,<sup>18</sup> or when the party is entitled to relief which cannot be afforded by the court of law,<sup>19</sup> or where through fraud, accident or mistake or for some other reason unmixed with negligence or fault of the complainant or his agents, the party was prevented from presenting his defense.<sup>20</sup> Thus as the defenses of fraud,<sup>21</sup> want of consideration,<sup>22</sup> and of an equitable estoppel,<sup>23</sup> for example, are available in the action at law, they do not authorize an injunction unless special circumstances exist. So also an accord and satisfaction after issue joined

grant an injunction when this may set up by way of set-off. *Sugg Fort v. Orndoff*, 7 Heisk. (Tenn.) 167.

**Summary proceedings**, see *infra*, XI, F, 4.

17. *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. (U. S.) 616, 20 L. ed. 501.

18. **U. S.**—*Phoenix Mut. L. Co. v. Bailey*, 13 Wall. 616, 20 L. ed. 501. **Conn.**—*Bissell v. Beckwith*, 33 Conn. 357. **N. Y.**—*Bomeisler v. Forster*, 154 N. Y. 229, 48 N. E. 534, 39 L. R. A. 240.

[a] The party who has a perfect defense at law must show that some injustice would be done him, or that he would be deprived of some legal or equitable right, if his adversary should be permitted to proceed at law. *Mitchell v. Oakley*, 7 Paige (N. Y.) 68.

[b] Thus, although a release is a perfect defense, it would not, in an action at law, prevent the injury that may result should the scandalous matters in the complaint be made public. And an injunction will be granted upon the principle that a specific performance of the defendant's agreement is essential, if he is to have its benefits. *Bomeisler v. Forster*, 154 N. Y. 229, 238, 48 N. E. 534, 39 L. R. A. 240.

[c] **When the Only Witness Who Can Establish the Defense Is Incompetent.**—*Dodgson v. Henderson*, 113 Ill. 360; *Miller v. McCan*, 7 Paige (N. Y.) 451.

[d] Where the instrument sued on is negotiable and may be transferred to an innocent holder and enforced, an injunction will be granted on a showing of circumstances rendering it inequitable to enforce it. *Ferguson v. Fisk*, 28 Conn. 501; *Payson v. Lamson*, 134 Mass. 593, 45 Am. Rep. 348.

19. *Ferguson v. Fisk*, 28 Conn. 501; *Standard Roller Bearing Co. v. Cru-*

cible Steel Co., 71 N. J. Eq. 61, 63 Atl. 546. See *infra*, XI, E, 3.

20. **Ill.**—*Chapman v. American Surety Co.*, 261 Ill. 594, 104 N. E. 247; *Vennum v. Davis*, 35 Ill. 568, 574; *Ellender v. Prussing*, 101 Ill. App. 655. **Mass.**—*Payson v. Lamson*, 134 Mass. 593, 45 Am. Rep. 348. **N. Y.**—*Erie Ry. Co. v. Ramsey*, 45 N. Y. 637, 647; *Norton v. Woods*, 5 Paige 249.

[a] If a nominal plaintiff at law is the only witness by whom the defendant can establish his defense, he may file a bill against the real plaintiff to restrain the proceedings and have the controversy settled in equity, where such nominal plaintiff may be examined as a witness. *Norton v. Woods*, 5 Paige (N. Y.) 249.

[b] **Counterclaim.**—If the defendant in a justice's court action has a counterclaim in excess of the justice's jurisdiction which arises out of the transaction set up in the first action, an injunction may be granted and the whole matter determined in the superior court. If the counterclaim did not arise out of the same transaction the case would be different. *Gregory v. Diggs*, 113 Cal. 196, 45 Pac. 261. But compare *Standhardt v. Hardin*, 145 Ga. 147, 88 S. E. 565.

21. **U. S.**—*Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616, 20 L. ed. 501. **Ill.**—*First Nat. Bank v. Sobosky*, 186 Ill. App. 545. **Ia.**—*Dubuque & S. O. Ry. Co. v. Cedar Falls & M. Ry. Co.*, 76 Iowa 702, 39 N. W. 691. **Mass.**—*Payson v. Lamson*, 134 Mass. 593, 45 Am. Rep. 348. **Tenn.**—*The Sailors v. Woelfle*, 118 Tenn. 755, 102 S. W. 1109, 12 L. R. A. (N. S.) 881.

22. *Anthony v. Valentine*, 130 Mass. 119.

23. *Weber v. Hertzelt*, 230 Fed. 965, 145 C. C. A. 159; *Campbell v. Golden Cycle Min. Co.*, 141 Fed. 610, 73 C. C.



may be pleaded by supplemental answer and will not authorize an injunction.<sup>24</sup>

**3. Where Equitable Relief Is Necessary.**—a. *Generally.*<sup>25</sup>—If the case involves some equitable element which cannot be applied at law and which must be applied in order that complete justice may be done,<sup>26</sup> or if the case discloses that such relief as the party is entitled to cannot be afforded by the court of law,<sup>27</sup> equity will assume jurisdiction, withdraw the question from the law court, and enjoin the proceedings at law, even though the party may have a good defense at law. Thus where a surrender or cancellation of the instrument is sought and an irreparable injury will be suffered by a denial of the injunction, proceedings at law will be restrained, although the facts may constitute a defense to the law action.<sup>28</sup>

A. 260; *Barnard v. German-American Seminary*, 49 Mich. 444, 13 N. W. 811.

24. *Savage v. Edgar*, 86 N. J. Eq. 205, 98 Atl. 407.

25. *Submission to judgment*, see *supra*, XI, D.

26. *Lehman, Durr & Co. v. Shook*, 69 Ala. 486; *Standard Roller Bearing Co. v. Crucible Steel Co.*, 71 N. J. Eq. 61, 63 Atl. 546.

27. *Ala.*—*Carroll v. Henderson*, 191 Ala. 248, 68 So. 1. *Conn.*—*Ferguson v. Fisk*, 28 Conn. 501. *Ill.*—*Mayr v. Chesman & Co.*, 195 Ill. App. 587. *Neb.* *Hallgren v. Becker*, 94 Neb. 415, 143 N. W. 467; *Shevalier v. Stephenson*, 92 Neb. 675, 139 N. W. 233. *N. J.*—*Standard Roller Bearing Co. v. Crucible Steel Co.*, 71 N. J. Eq. 61, 63 Atl. 546; *Crane v. Ely*, 37 N. J. Eq. 564; *Lehigh Valley R. Co. v. Society*, 30 N. J. Eq. 145. *Ohio.*—*Sloane v. Clauss*, 64 Ohio St. 125, 59 N. E. 884.

[a] *Illustration.*—An action in a justice's court by a pawnbroker to recover money loaned will be restrained when the complainant alleges a tender of the amount due, and that the articles pawned have a peculiar value not capable of compensation in money, and that an accounting is necessary. *Sloane v. Clauss*, 64 Ohio St. 125, 59 N. E. 884.

[b] *When a case for marshaling assets* is alleged and facts showing that a complete defense at law cannot be set up are stated, equity will enjoin an action at law. *Brooks v. Raiden*, 113 Ga. 86, 38 S. E. 409.

[c] *Where an accounting is required.* *Mayr v. Chesman & Co.*, 195 Ill. App. 587; *Crane v. Ely*, 37 N. J. Eq. 564. See also *Weber v. Hertzell*, 230 Fed. 965, 145 C. C. A. 159.

28. *U. S.*—*Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. ed. 167; *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. (U. S.) 616, 20 L. ed. 501; *Compare General Film Co. v. Sampliner*, 252 Fed. 443, 164 C. C. A. 367. *Conn.* *Ferguson v. Fisk*, 28 Conn. 501. *Mich.* *New York L. Ins. Co. v. Hamburger*, 174 Mich. 254, 140 N. W. 510; *Fidelity Mut. L. Ins. Co. v. Blain*, 144 Mich. 218, 107 N. W. 877; *John Hancock Mut. L. Ins. Co. v. Dick*, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 566; *Wyckoff v. Victor Sewing Mach. Co.*, 43 Mich. 309, 5 N. W. 405. *N. J.* *Gallagher v. Lembeck & Betz Eagle Brew. Co.*, 86 N. J. Eq. 188, 98 Atl. 461; *O'Brien v. Paterson Brew. & Malt. Co.*, 69 N. J. Eq. 117, 61 Atl. 437; *Metler v. Metler's Admr.*, 19 N. J. Eq. 457. *N. Y.*—*Becker v. Church*, 115 N. Y. 562, 22 N. E. 748; *Sieman v. Austin*, 33 Barb. 9.

[a] *The cases are not entirely harmonious* as to the circumstances under which equity will interfere. *Glastenbury v. McDonald's Admr.*, 44 Vt. 450.

[b] "Perhaps the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper and clear of all suspicion of any design to promote expense and litigation." *Hamilton v. Cummings*, 1 Johns.

b. *Equitable Defenses or Counterclaims Not Available at Law.* So also equity will enjoin actions at law when the complainant has purely equitable defenses not enforceable in the law action,<sup>29</sup> unless, it has been held, the equitable defense becomes of no importance because of another perfect defense to the action.<sup>30</sup> This rule, of course, has no application in those jurisdictions in which equitable defenses can be interposed in law actions.<sup>31</sup>

Oregon has a special statute authorizing the defendant to file a complaint in equity.<sup>32</sup>

#### 4. Protection of Jurisdiction Once Acquired. — Unless the foreign

Ch. (N. Y.) 517, *quoted in* The Sailors v. Woelfle, 118 Tenn. 755, 102 S. W. 1109, 12 L. R. A. (N. S.) 881; Glastenbury v. McDonald's Admr., 44 Vt. 450.

[c] But a suit to cancel a non-negotiable instrument and enjoin an action thereon will not be maintained, unless some substantial reason is shown rendering the defense at law insufficient. The Sailors v. Woelfle, 118 Tenn. 755, 102 S. W. 1109, 12 L. R. A. (N. S.) 881. But see New York L. Ins. Co. v. Hamburger, 174 Mich. 254, 140 N. W. 510 (when cancellation of an insurance policy was sought); John Hancock Mut. L. Ins. Co. v. Dick, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 566.

29. U. S.—Du Pont v. Gardiner, 238 Fed. 755, 151 C. C. A. 605. Ala.—Hicks v. Meadows, 193 Ala. 246, 69 So. 432; Watkins v. Tallassee Falls Mfg. Co., 38 So. 756. Ga.—National Bank v. Carlton, 96 Ga. 469, 23 S. E. 388. Ill. Bishop of Chicago v. Chiniquy, 74 Ill. 317. N. J.—Sweeny v. Williams, 36 N. J. Eq. 627. N. Y.—Hamilton v. Cummings, 1 Johns. Ch. 517. Ohio.—Sloane v. Clauss, 64 Ohio St. 125, 59 N. E. 884.

But see Johnson v. McArthur, 64 N. C. 675.

[a] When there is no adequate remedy at law and the complainant cannot present his side of the question, except in equity where all the parties interested may be heard and complete justice done, a temporary injunction during the pendency of the equitable action may be granted. Lown v. Spoon, 158 App. Div. 900, 143 N. Y. Supp. 275.

[b] Even though the party made an unsuccessful attempt to present the defense at law, he may seek relief in equity. *Ex parte* Hodges, 24 Ark. 197.

[c] Where through mistake a contract of indorsement is made, the endorser may enjoin the suit as the defense is not available at law. King v. Hart, 116 Ill. App. 33.

30. Shaw v. Chambers, 48 Mich. 355, 12 N. W. 486; New York City Baptist Mission Soc. v. Potter, 20 Misc. 191, 44 N. Y. Supp. 1051.

[a] A party who claims the legal title to certain land under a will, cannot enjoin an ejectment suit against him because of facts estopping the plaintiff from maintaining his ejectment suit. The legal title needs no support from the equities, which become important only when the legal title is defective or when it is proposed to assail it. Shaw v. Chambers, 48 Mich. 355, 12 N. W. 486.

31. McCall v. Fry, 120 Ga. 661, 48 S. E. 200; Minturn v. Farmers' Loan & Trust Co., 3 N. Y. 498.

[a] Except when because of special circumstances the defense cannot be set up. Radcliffe v. Varner, 56 Ga. 222.

Equitable defenses in law actions, see *supra*, IV, G, 2.

32. See also *supra*, IV, G, 2.

[a] The statute authorizes the defendant who is entitled to relief arising out of the facts requiring the interposition of a court of equity, and material to his defense, to file a complaint in equity. Oregon L. O. L. §390.

[b] The relief sought must operate as an entire or partial defense to the action at law. The mere fact that the defendant can state a cause of suit against the plaintiff entitling him to equitable relief is not sufficient to authorize filing the complaint. Davis v. First Nat. Bank, 86 Ore. 474, 161 Pac. 93, 168 Pac. 929.

proceedings appear to be more conducive to justice,<sup>33</sup> courts of equity whose jurisdiction has once attached, have general power to restrain parties from commencing and prosecuting subsequent actions in other courts for the same subject, which will interfere with its jurisdiction,<sup>34</sup> which will prevent its effectual determination of the issues and its administration of the rights and remedies in the litigation before it,<sup>35</sup> or which will withdraw or interfere with the legal custody of specific property which it has acquired.<sup>36</sup> Subsequent actions which do not have this effect will not be enjoined.<sup>37</sup>

And after an adverse decision by a court of competent jurisdiction, a party may be enjoined from impleading his adversary touching the same matter in the same or any other court.<sup>38</sup>

**5. Multiplicity of Proceedings and Vexatious Suits.**—Equity will enjoin actions at law to prevent a multiplicity of suits,<sup>39</sup> and some statutes specifically provide that pending judicial proceedings shall not be enjoined unless to prevent a multiplicity of proceedings.<sup>40</sup>

33. *Catherwood v. Hokanson*, 201 Ill. App. 462; *The Carron Iron Co. v. Maclaren*, 5 Clarke's Cas. H. & L. 416, 10 Eng. Reprint 961, July 1855, *quoted* in *Field v. Holbrook*, 3 Abb. Pr. (N. Y.) 377.

34. **U. S.**—*Western Union Tel. Co. v. United States & M. T. Co.*, 221 Fed. 545, 137 C. C. A. 113; *Berliner Gramophone Co. v. Seaman*, 113 Fed. 750, 51 C. C. A. 440; *Monumental Sav. Assn. v. Fentress*, 125 Fed. 812; *Union Life Ins. Co. v. Riggs*, 123 Fed. 312. **Ia.**—*In re Williams' Estate*, 130 Iowa 553, 107 N. W. 608. **Minn.**—*Kanevsky v. National Council K. & L. of Security*, 132 Minn. 422, 157 N. W. 646. **N. Y.** *Schuehle v. Reiman*, 86 N. Y. 270; *Conover v. New York*, 25 Barb. 513, 531, 5 Abb. Pr. 393, 14 How. Pr. 550; *Field v. Holbrook*, 3 Abb. Pr. 377. **W. Va.** *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, 94 Am. St. Rep. 932. **Wis.** *Akerly v. Vilas*, 15 Wis. 401, 412. **Eng.** *Carron Iron Co. v. Maclaren*, 5 Clarke's Cas. H. of L. 416, 10 Eng. Reprint 961.

See *supra*, XI, B, 4.

**Retention of jurisdiction by court first acquiring jurisdiction**, see 17 STANDARD PROC. 797, et seq.

[a] **The withdrawal of a part of the subject-matter of the suit may be enjoined.** *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, 94 Am. St. Rep. 932.

35. *Guardian Trust Co. v. Kansas City So. Ry. Co.*, 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620.

36. *Western Union Tel. Co. v. Uni-*

*ted States & M. T. Co.*, 221 Fed. 545, 553, 137 C. C. A. 113; *Guardian Trust Co. v. Kansas City So. Ry. Co.*, 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620; *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, 94 Am. St. Rep. 932.

[a] **The court which first lawfully acquires dominion over specific property may by injunction protect the property, its decree and the title under that decree from other suits and proceedings in other courts.** *Western Union Tel. Co. v. United States & M. T. Co.*, 221 Fed. 545, 553, 137 C. C. A. 113.

37. *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620; *Ambursen Hydraulic Const. Co. v. Northern C. Co.*, 140 Ga. 1, 78 S. E. 340, 47 L. R. A. (N. S.) 684.

38. **Ala.**—*Nelson v. Dunn*, 15 Ala. 501. **N. Y.**—*Conover v. New York*, 25 Barb. 513, 5 Abb. Pr. 393, 14 How. Pr. 550. **Va.**—*Shanks v. Calvert Mort. & D. Co.*, 119 Va. 239, 243, 89 S. E. 99. **Eng.**—*The Grand Junction Canal Co. v. Dimes*, 17 Simons 38, 60 Eng. Reprint 1041.

39. See 20 STANDARD PROC. 79.

**Enjoining multiplicity of suits to enforce ordinance requiring the payment of license fees**, see *infra*, XII, B, 5.

**Injunction in interpleader suit against other suits relating to the subject-matter**, see 14 STANDARD PROC. 217.

40. See the statutes, and *Spreckels v. Hawaiian Com. & Sugar Co.*, 117 Cal. 377, 49 Pac. 353.



So also equity will sometimes interpose for the exercise of some admitted ground of jurisdiction, and dispose of the whole matter, thus avoiding a multiplicity of suits.<sup>41</sup>

By injunction equity may protect a party from oppressive or vexatious litigation,<sup>42</sup> or from numerous unnecessary suits brought in bad faith to cause annoyance.<sup>43</sup>

**6. Protection of Court Officers.**— Courts of equity may by injunction protect its officers from actions at law arising out of the execution of its process.<sup>44</sup>

**7. To Obtain Discovery in Equity.**— An action at law is sometimes enjoined for discovery in aid of a defense at law.<sup>45</sup>

**8. Another Action Pending.**— A plea of former action pending in a foreign jurisdiction regarding the same cause does not generally authorize an injunction against such action,<sup>46</sup> for the reason that

[a] This does not declare that actions brought subsequent to the injunction suit may not be enjoined for some other reason than the prevention of a multiplicity of suits. *Spreckels v. Hawaiian Com. & Sugar Co.*, 117 Cal. 377, 49 Pac. 353.

41. *Glenn v. Fowler*, 8 Gill & J. (Md.) 340; *Gilliam v. Chancellor*, 43 Miss. 437, 5 Am. Rep. 498. See *supra*, XI, B, 2.

42. **U. S.**—See *General Film Co. v. Sampliner*, 252 Fed. 443, 164 C. C. A. 367. **Ala.**—*Hamilton v. Alabama Power Co.*, 195 Ala. 438, 70 So. 737. **N. Y.** *Bomeisler v. Forster*, 154 N. Y. 229, 239, 48 N. E. 534, 39 L. R. A. 240; *Field v. Holbrook*, 3 Abb. Pr. 377. **Tex.**—*Galveston, H. & S. A. R. Co. v. Dowe*, 70 Tex. 5, 7 S. W. 368; *Simpson v. McGuirk* (Tex. Civ. App.), 194 S. W. 979; *Farthing Lumber Co. v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.), 178 S. W. 725.

But see *Jones v. Hughes*, 156 Iowa 684, 137 N. W. 1023, 42 L. R. A. (N. S.) 502.

**Enjoining subsequent proceedings in another court attended with vexation.** see *supra*, XI, G, 4.

[a] **The commencing of two suits at law on the same cause of action is not such unconscientious or fraudulent conduct as warrants an injunction.** *Sugg Fort v. Orndoff*, 7 Heisk. (Tenn.) 167.

[b] **Successive actions for the same cause against the same parties may be enjoined, where the actions are voluntarily dismissed before brought to trial.** *Shevalier v. Stephenson*, 92 Neb. 675, 139 N. W. 233.

[c] **Successive actions upon an installment contract as each installment falls due are not harassing within the rule where no defense avoiding the policy is shown.** *Rau v. American Nat. Ins. Co.* (Tex. Civ. App.), 154 S. W. 645.

**Enjoining successive garnishments,** see 10 STANDARD PROC. 469, notes 12 and 13.

43. See 20 STANDARD PROC. 80, note 23.

44. **N. Y.**—*Parker v. Browning*, 8 Paige 388, 35 Am. Dec. 717; In the Matter of Merritt, 5 Paige 125. **Vt.** *Peck v. Crane*, 25 Vt. 146. **Eng.** *Bailey v. Devereux*, 1 Vern. 269, 23 Eng. Reprint 463.

[a] **If a receiver takes possession of goods under the express directions of the court, it will not suffer him to be sued at law for taking the goods.** *Parker v. Browning*, 8 Paige (N. Y.) 388, 35 Am. Dec. 717.

45. **Pending discovery,** see 7 STANDARD PROC. 538.

**Dissolution of injunction on perfection of the answer,** see *supra*, XI, B, 2, note 71.

46. *Mut. Life Ins. Co. v. Brune's Assignee*, 96 U. S. 588, 24 L. ed. 737; *Guardian Trust Co. v. Kansas City So. Ry. Co.*, 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620; *Davis v. Minneapolis, St. P. & S. S. M. R. Co.*, 134 Minn. 455, 159 N. W. 1084.

[a] **Infringement Suits.**—Although the pendency of a suit for infringement against the manufacturer is no bar to suits against users of machines bought from him, still, if profits as well as damages are sued for, equity

such a plea will not abate a suit in a domestic tribunal.<sup>47</sup>

**9. Insolvency.**—The insolvency of the plaintiff at law alleged to be indebted to the complainant in equity on other transactions does not authorize an injunction against the action at law.<sup>48</sup>

**10. Void Proceedings.**—Since void proceedings may be resisted anywhere, there is no occasion for injunctive relief, and it is generally held that an injunction will not be granted against them.<sup>49</sup>

**11. Actions Relating to Real Property.**—In accordance with the rules already discussed, an injunction against pending actions to recover land or its possession will not be enjoined unless some equitable case is made to appear.<sup>50</sup> An injunction may be granted where the complainant has an equitable title, which draws to it the legal title,<sup>51</sup> or where facts operating as an estoppel are shown,<sup>52</sup> or when the

may enjoin the suits against the users pending the suit against the manufacturer. *Stebler v. Riverside Heights Orange Growers' Assn.*, 211 Fed. 985; *National C. R. Co. v. Boston C. I. & R. Co.*, 41 Fed. 51. *Compare Gamewell Fire Alarm Tel. Co. v. Star Electric Co.*, 199 Fed. 188.

47. See 1 STANDARD PROC. 1004.

48. *Harrison v. McCrary*, 37 Ala. 687.

[a] The reason is that a creditor at large or before judgment cannot enjoin the debtor from fraudulently disposing of his property. *Harrison v. McCrary*, 37 Ala. 687.

49. *Gray v. Jones*, 178 Ill. 169, 52 N. E. 941. But see *Ward v. Callahan*, 49 Kan. 149, 30 Pac. 176, injunction is a proper remedy to prevent sale of exempt property by probate court.

[a] The fact that the court is without jurisdiction or is exceeding its jurisdiction does not warrant equitable relief. **U. S.**—*Walker v. Robbins*, 14 How. 584, 14 L. ed. 552. **Ala.**—*Birmingham Ry. & E. Co. v. Birmingham Traction Co.*, 121 Ala. 475, 25 So. 777. **Mo.**—*St. Louis, I. M. & S. R. Co. v. Reynolds*, 89 Mo. 146, 1 S. W. 208. **Tex.**—*Jones v. Stallworth*, 55 Tex. 138. But see *Bokee v. Hamersley*, 16 How. Pr. (N. Y.) 461.

50. *Lehman, Durr & Co. v. Shook*, 69 Ala. 486; *Hill v. Billingsley*, 53 Miss. 111.

[a] A person having the legal title to the premises cannot enjoin an ejectment suit against him as this is a perfect defense. *Shaw v. Chambers*, 48 Mich. 355, 12 N. W. 486.

Vexatious ejectment suits repeatedly brought may be enjoined. See 20 STANDARD PROC. 80.

**Actions involving relation of vendor and purchaser**, see the title "Vendor and Purchaser."

[b] Mere apprehension that a law action will cast a cloud on title to real estate does not authorize an injunction. *Edgell v. Clarke*, 76 Miss. 66, 23 So. 358.

[c] Where a deed in the complainant's chain of title is lost, (1) he may invoke equity to ascertain its existence and enjoin an action of ejectment against him. *Lash v. Butch*, 4 Iowa 215. (2) But the loss of a justice's transcript does not authorize an injunction as it may be restored by motion in the law court. *Clingman v. Hopkie*, 78 Ill. 152.

[d] An action on the covenants contained in a defective deed is not an adequate remedy precluding relief. *Segee v. Thomas*, 3 Blatchf. (U. S.) 11, 21 Fed. Cas. No. 12,633.

[e] A nonresident without property in the state will be enjoined from suing for the purchase money when the title is defective. *Richardson v. Williams*, 56 N. C. 116; *Green v. Campbell*, 55 N. C. 446.

[f] Merely to compel payment of charges on the land before the plaintiff at law is let into possession, equity will not grant an injunction. *Hill v. Billingsley*, 53 Miss. 111.

51. **U. S.**—*Camp v. Boyd*, 229 U. S. 530, 33 Sup. Ct. 785, 57 L. ed. 1317. **Ala.**—*Smith v. Spencer*, 73 Ala. 299. **Miss.**—*Hill v. Billingsley*, 53 Miss. 111.

52. *Clio v. Lee* (Ala.), 74 So. 243; *Hill v. Billingsley*, 53 Miss. 111.

[a] But where the complainant has the legal title, an equitable estoppel is of no importance and does not

cancellation of a deed apparently valid on its face is necessary,<sup>53</sup> and where no adequate remedy at law exists.<sup>54</sup>

**12. Actions in Foreign Courts.**—a. *Generally.*—If the averments of the bill make a proper case for enjoining proceedings in a domestic court, it authorizes an injunction against proceedings in a sister state.<sup>55</sup> Thus equity will enjoin suits in other states where there is fraud,<sup>56</sup> oppression,<sup>57</sup> vexation,<sup>58</sup> injustice, or unconscientious

authorize an injunction. *Shaw v. Chambers*, 48 Mich. 355, 12 N. W. 486.

[b] Where a party knows that improvements are being erected on the premises, a party may be estopped to afterwards maintain ejectionment, and will be enjoined from doing so. *South & North Ala. R. Co. v. Alabama Great So. R. Co.*, 102 Ala. 236, 14 So. 747, where a railroad constructed its tracks on complainant's land without previous condemnation proceedings.

[c] An ejectionment suit against a condemnor in possession under a void proceeding in condemnation will be enjoined to give effect to an estoppel by an acceptance of compensation. *Clio v. Lee* (Ala.), 74 So. 243, citing many cases.

53. Ala.—*Lehman, Durr & Co. v. Shook*, 69 Ala. 486. Mich.—*McKibbin v. Bristol*, 50 Mich. 319, 15 N. W. 491. N. Y.—*Sieman v. Austin*, 33 Barb. 9.

See also *supra*, XI, E, 3.

54. *Shaw v. Chambers*, 48 Mich. 355, 12 N. W. 486. And see *supra*, XI, E, 1 and 3.

55. *Moton v. Hull*, 77 Tex. 80, 13 S. W. 849, 8 L. R. A. 722; *Wade v. Crump* (Tex. Civ. App.), 173 S. W. 538.

[a] When the prosecution of the other suit is contrary to equity and good conscience, and to the injury of others, an injunction will be granted. *Federal Trust Co. v. Conklin*, 87 N. J. Eq. 185, 99 Atl. 109.

[b] "On general principles equity will not interfere with the right of any person to bring an action for the redress of grievance—the right preservative of all rights—except for grave reasons, and on grounds of comity the power of one state to interfere with a litigant who is in due course pursuing his rights and remedies in the courts of another state ought to be sparingly exercised. . . . They must be very special circumstances that will justify this court in restraining the prosecution of an equitable

action already pending in a court of such ample jurisdiction. I speak not of any limitation upon the power of this court, but upon the propriety of its exercise in the particular case. Its exercise is not to be properly based upon any theory that this court knows better how to do justice than the court of last resort of that commonwealth; that it can weigh evidence better or more justly apply to the facts any general principle of law or equity, nor upon the ground that this court recognizes different rules of law or of equity from those which obtain in the commonwealth." *Bigelow v. Old Dominion Copper Min. & Smelt. Co.*, 74 N. J. Eq. 457, 71 Atl. 153, quoted in *Jones v. Hughes*, 156 Iowa 684, 137 N. W. 1023, 42 L. R. A. (N. S.) 502.

Former action pending, see *supra*, XI, E, 8.

Evasion of laws of domicile, see *infra*, XI, E, 12, b.

56. Ill.—*Royal League v. Kavanagh*, 233 Ill. 175, 84 N. E. 178; *Catherwood v. Hokanson*, 201 Ill. App. 462. Md.—*Miller v. Gittings*, 85 Md. 601, 37 Atl. 372, 60 Am. St. Rep. 352, 37 L. R. A. 654. N. J.—*Miller v. Miller*, 66 N. J. Eq. 436, 58 Atl. 188; *Kempson v. Kempson*, 58 N. J. Eq. 94, 43 Atl. 97, 63 N. J. Eq. 783, 52 Atl. 360, 625, 92 Am. St. Rep. 682, 58 L. R. A. 484, where the husband went to a distant state and commenced a divorce suit after a few months' residence.

57. *Miller v. Gittings*, 85 Md. 601, 37 Atl. 372, 60 Am. St. Rep. 352, 37 L. R. A. 654.

58. Kan.—*Mason v. Harlow*, 84 Kan. 277, 114 Pac. 218, 33 L. R. A. (N. S.) 234. Ky.—*Reed's Admx. v. Illinois Cent. R. Co.*, 182 Ky. 455, 206 S. W. 794. Md.—*Miller v. Gittings*, 85 Md. 601, 37 Atl. 372, 60 Am. St. Rep. 352, 37 L. R. A. 654.

[a] But see *Greer v. Cook*, 88 Ark. 93, 113 S. W. 1009, holding that the mere fact that the creditor sued in a foreign state for the sole purpose of



advantage.<sup>59</sup> But mere convenience of the parties,<sup>60</sup> or the right of a party to be sued in the county of his residence,<sup>61</sup> or the fact that the party suing in the foreign state would secure some advantage which he would not have in the state of his residence,<sup>62</sup> does not authorize an injunction against proceedings in another state.

b. *Evasion of Laws of Domicile.*—Actions in foreign jurisdictions brought by a resident creditor against another citizen of the state for the purpose of evading the laws of the domicile will be enjoined.<sup>63</sup>

vexation and oppression does not warrant an injunction as the remedy is for the malicious abuse of process.

[b] A suit in another state brought maliciously for the purpose of vexing and harassing another citizen and of interfering with or preventing the free administration of justice in the forum. *Mason v. Harlow*, 84 Kan. 277, 114 Pac. 218, 33 L. R. A. (N. S.) 234.

[c] After adjudication of an action in the courts of one state, an action involving the same matter brought in another state for the purpose of annoying, harassing and vexing will be enjoined when the plaintiff therein is insolvent. *O'Haire v. Burns*, 45 Colo. 432, 101 Pac. 755, 132 Am. St. Rep. 191, 25 L. R. A. (N. S.) 267, note.

[d] Where the foreign suit would subject the defendant to such great inconvenience and expense as to make it appear the foreign forum was selected to vexatiously harass the defendant, it will be enjoined. *Reed's Admx. v. Illinois Cent. R. Co.*, 182 Ky. 455, 206 S. W. 794.

59. **Ky.**—*Reed's Admx. v. Illinois Cent. R. Co.*, 182 Ky. 455, 206 S. W. 794. **Md.**—*Miller v. Gittings*, 85 Md. 601, 37 Atl. 372, 60 Am. St. Rep. 352, 37 L. R. A. 654. **Minn.**—*Hawkins v. Ireland*, 64 Minn. 339, 67 N. W. 73, 58 Am. St. Rep. 534. **N. J.**—*Bigelow v. Old Dominion Copper Min. & Smelt. Co.*, 74 N. J. Eq. 457, 480, 71 Atl. 153; *Standard Roller Bearing Co. v. Crucible Steel Co.*, 71 N. J. Eq. 61, 63 Atl. 546.

[a] A suit in a sister state after a settlement is unconscionable and inequitable and will be enjoined. *Rader v. Stubblefield*, 43 Wash. 334, 86 Pac. 560.

60. **Ill.**—*Illinois Life Ins. Co. v. Prentiss*, 277 Ill. 383, 115 N. E. 554. **Kan.**—*Mason v. Harlow*, 84 Kan. 277, 114 Pac. 218, 33 L. R. A. (N. S.) 234; *Cole v. Young*, 24 Kan. 435. **Vt.**—*Bank*

of *Bellows Falls v. Rutland & B. R. Co.*, 28 Vt. 470.

[a] Simply to compel the party to carry on his litigation at home, an injunction will not be granted. *Cole v. Young*, 24 Kan. 435.

61. *Wade v. Crump* (Tex. Civ. App.), 173 S. W. 538.

62. *Jones v. Hughes*, 156 Iowa 684, 137 N. W. 1023, 42 L. R. A. (N. S.) 502; *Bigelow v. Old Dominion Copper & Min. & Smelt. Co.*, 74 N. J. Eq. 457, 71 Atl. 153.

63. **U. S.**—*Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538. **Ark.**—*Greer v. Cook*, 88 Ark. 93, 113 S. W. 1009; *Griffith v. Langsdale*, 53 Ark. 71, 13 S. W. 733, 22 Am. St. Rep. 182. **Ind.**—*Sandage v. Studebaker Bros. Mfg. Co.*, 142 Ind. 148, 41 N. E. 380, 51 Am. St. Rep. 165, 34 L. R. A. 363; *Wilson v. Josephs*, 107 Ind. 490, 8 N. E. 616. **Ky.**—*Reed's Admx. v. Illinois Cent. R. Co.*, 182 Ky. 455, 206 S. W. 794. **Md.**—*Miller v. Gittings*, 85 Md. 601, 37 Atl. 372, 60 Am. St. Rep. 352, 37 L. R. A. 654; *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448. **Mass.**—*Cunningham v. Butler*, 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657. **Minn.**—*Freick v. Hinkly*, 122 Minn. 24, 141 N. W. 1096, 46 L. R. A. (N. S.) 695. **Miss.**—*Fisher v. Pacific Mut. L. Ins. Co.*, 112 Miss. 30, 72 So. 846. **Mo.**—*Kelly v. Siefert*, 71 Mo. App. 143; *Wyeth Hardware & Mfg. Co. v. H. F. Lang & Co.*, 54 Mo. App. 147. **N. J.**—*Bigelow v. Old Dominion Copper Min., etc. Co.*, 74 N. J. Eq. 457, 71 Atl. 153; *Margarum v. Moon*, 63 N. J. Eq. 586, 53 Atl. 179. **N. Y.**—*Dinsmore v. Neresheimer*, 32 Hun 204. **N. C.**—*Carpenter, Baggott & Co. v. Hanes*, 162 N. C. 46, 77 S. E. 1101, Ann. Cas. 1915A, 832. **Pa.**—*Kendall v. McClure Coke Co.*, 182 Pa. 1, 37 Atl. 823, 61 Am. St. Rep. 688. **Tex.**—*Lightfoot v. Murphy*, 47 Tex. Civ. App. 112, 104 S. W. 511.

Compare *Cole v. Young*. 24 Kan. 435.

But the power should be sparingly exercised,<sup>64</sup> and an injunction will not be granted on the mere ground that the court in which the injunction is sought recognizes different rules of law or equity than those obtaining in the other state.<sup>65</sup>

**F. INJUNCTION AGAINST PARTICULAR PROCEEDINGS. — 1. Enjoining the Pleading of Defenses.** — When the remedy at law is inadequate, equity will restrain a defendant from setting up certain defenses in an action at law on the ground that it would be inequitable to permit them.<sup>66</sup> But in such case, it has been held, the plaintiff will be compelled to abandon the law action and file a new suit in equity.<sup>67</sup>

**2. Evidence.** — Equity will restrain the introduction of evidence in a suit at law, which, although legally admissible, is manifestly contrary to right and justice,<sup>68</sup> and in a proper case it will restrain the taking of a deposition.<sup>69</sup>

[a] **Domicile of Parties.**—In most cases, the party against whom the injunction was issued had either gone himself to the foreign jurisdiction or had sent his claim there for prosecution by his assignee, in order to evade some distinct prohibition of the local law of the common domicile. *Bigelow v. Old Dominion Copper Min. & Smelt. Co.*, 74 N. J. Eq. 457, 485, 71 Atl. 153.

[b] **Where a citizen sues a non-resident corporation doing business in that state,** the rule applies. *Fisher v. Pacific Mut. L. Ins. Co.*, 112 Miss. 30, 72 So. 846.

[c] **A suit by assignee of an insolvent in another state will be enjoined where a judgment therein would defeat the insolvency law by giving him a preference.** *Dehon v. Foster*, 4 Allen (Mass.) 545.

[d] **The fact that the statute of limitations has run in the forum does not authorize an injunction against a suit in a state in which the action is not barred.** *Thorndike v. Thorndike*, 142 Ill. 450, 32 N. E. 510, 34 Am. St. Rep. 90, 21 L. R. A. 71.

**Where action is brought to evade exemption laws,** see 11 STANDARD PROC. 540.

[e] **Although the suit to be enjoined is commenced before the issuance of the injunction, the rule applies.** *Dehon v. Foster*, 4 Allen (Mass.) 545; *Fisher v. Pacific Mut. L. Ins. Co.*, 112 Miss. 30, 72 So. 846.

64. *Carpenter, Baggott & Co. v. Hanes*, 162 N. C. 46, 77 S. E. 1101, Ann. Cas. 1915A, 832.

65. **Mass.**—*Carson v. Dunham*, 149 Mass. 52, 20 N. E. 312, 14 Am. St. Rep. 397, 3 L. R. A. 202. **N. J.**—*Bigelow v. Old Dominion Copper Min. & Smelt. Co.*, 74 N. J. Eq. 457, 71 Atl. 153. **Tenn.**—*American Express Co. v. Fox*, 135 Tenn. 489, 187 S. W. 1117, Ann. Cas. 1918B, 1148.

[a] **But the mere fact that the rules of evidence in the other state are more liberal will not authorize an injunction.** *Edgell v. Clarke*, 19 App. Div. 199, 45 N. Y. Supp. 979.

66. **U. S.**—*Davis v. Wakelee*, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. ed. 578; *Riggs v. Gillespie*, 241 Fed. 311, 154 C. C. A. 191; *Du Pont v. Gardiner*, 238 Fed. 755, 151 C. C. A. 605. **Ala.**—*Tyson v. Weber*, 81 Ala. 470, 2 So. 901. **N. J.**—*Holloway v. Appelget*, 55 N. J. Eq. 583, 40 Atl. 27, 62 Am. St. Rep. 827; *Lamb v. Martin*, 43 N. J. Eq. 34, 9 Atl. 747.

**Enjoining the plea of statute of limitations,** see 18 STANDARD PROC. 1085.

[a] **Release or Receipt Obtained by Fraud.**—*Riggs v. Gillespie*, 241 Fed. 311, 154 C. C. A. 191; *Tyson v. Weber*, 81 Ala. 470, 2 So. 901.

[b] **But the death of the only persons who can rebut a defense does not warrant injunctive relief.** *Dubois v. Campau*, 37 Mich. 248.

67. *Jones v. Ramsey*, 3 Ill. App. 303, quoted in *Tyson v. Weber*, 81 Ala. 470, 2 So. 901.

68. *Rogers v. Rogers*, 37 W. Va. 407, 16 S. E. 633.

69. *Old Line Bankers' L. Ins. Co. v. Witt*, 92 Neb. 743, 139 N. W. 641.

3. **Dismissal.**—Equity may enjoin a dismissal of an action to the prejudice of the real parties in interest.<sup>70</sup>

4. **Summary proceedings** may be enjoined in a proper case.<sup>71</sup>

5. **Mandamus and Prohibition.**—Equity cannot enjoin mandamus proceedings<sup>72</sup> or a writ of prohibition.<sup>73</sup>

G. **PARTIES.**—The rules as to parties to proceedings to enjoin proceedings at law are elsewhere discussed.<sup>74</sup>

H. **PLEADINGS.**—The bill for the injunction should fully detail the facts necessary to enable the court to act,<sup>75</sup> and show the state of the proceeding sought to be enjoined,<sup>76</sup> as well as other matters

70. *Miller v. Coffin*, 19 R. I. 164, 36 Atl. 6, an administrator may be enjoined from dismissing an action.

[a] **A dismissal by the assignor of a claim of an action in his name** brought by the assignee may be enjoined. *Deaver v. Eller*, 42 N. C. 24.

71. *Henwood v. Jarvis*, 27 N. J. Eq. 247; *Crawford v. Kastner*, 26 Hun 440, 63 How. Pr. (N. Y.) 90; *Bokee v. Hamersley*, 16 How. Pr. (N. Y.) 461.

[a] **Summary proceedings will not be enjoined except where there has been fraud or collusion, or where the justice has not obtained jurisdiction by want of the necessary preliminary steps, or other cause, or except where the tenant from the peculiar circumstances of the case is precluded from setting up his defense.** *Bokee v. Hamersley*, 16 How. Pr. (N. Y.) 461.

[b] **The very fact that the proceedings are summary and therefore not as favorable to the mode of making of a defense may be a sufficient reason for the interference of the equity court.** *Henwood v. Jarvis*, 27 N. J. Eq. 247.

72. **Conn.**—*Tyler v. Hamersley*, 44 Conn. 419, 26 Am. Rep. 479. **Fla.** *Columbia County Comrs. v. Bryson*, 13 Fla. 281. **Eng.**—*Montague v. Dudman*, 2 Ves. Sr. 396, 28 Eng. Reprint 253; *York v. Pilkington*, 2 Atk. 302, 9 Mod. 273, 26 Eng. Reprint 584.

[a] **The execution of an attachment for the commitment of a party adjudged guilty of a contempt in disobeying a writ of mandamus cannot be enjoined.** *Tyler v. Hamersley*, 44 Conn. 419, 26 Am. Rep. 479.

73. *Tyler v. Hamersley*, 44 Conn. 419, 26 Am. Rep. 479; *Montague v. Dudman*, 2 Ves. Sr. 396, 28 Eng. Reprint 253.

74. See 13 STANDARD PROC, 17, and 31, and generally the title "**Parties.**"

75. *Chadwell v. Jordan*, 2 Tenn. Ch. 635. See the following cases: **Neb.** *Old Line Bankers' L. Ins. Co. v. Witt*, 92 Neb. 743, 139 N. W. 641, restraining taking of deposition. **S. D.**—*Grant Co. v. Colonial, etc. Co.*, 3 S. D. 390, 53 N. W. 746, restraining mortgage foreclosure sale. **Tex.**—*Moss v. Whitson* (Tex. Civ. App.), 130 S. W. 1034 (restraining search of premises); *Lightfoot v. Murphy*, 47 Tex. Civ. App. 112, 104 S. W. 511, restraining garnishment proceedings in sister state. **W. Va.**—*Kinports v. Rawson*, 29 W. Va. 487, 2 S. E. 85, restraining suit for collection of purchase money.

[a] **The bare allegation that the complainant has no clear and unembarrassed remedy at law, or that the plaintiff's conduct is fraudulent, or that a discovery is necessary, is insufficient where the facts are not stated.** *Sugg Fort v. Orndoff*, 7 Heisk. (Tenn.) 167.

[b] **"The bill must show, in addition to the nature of the suit, the court in which it is pending, the date of its commencement, the steps taken in it, and especially the defenses made, if any, and all the facts to demonstrate that some injustice would be done the complainant, or that he would be deprived of some legal or equitable right, if his adversary were permitted to proceed to judgment in the suit at law."** *Chadwell v. Jordan*, 2 Tenn. Ch. 635, 639.

[c] **An offer to pay the debt is not required in an action to enjoin actions barred by bankruptcy proceedings.** *National Biscuit Co. v. Consolidated Agencies Co.*, 153 Ill. App. 214.

76. *Melick v. Drake*, 6 Paige (N. Y.) 470.



required to be shown in injunction suits generally.<sup>77</sup>

I. PROCESS.—The process follows the rules in other similar cases.<sup>78</sup> A service of subpoena upon the attorney of the plaintiff is sometimes sufficient when the defendant is a nonresident.<sup>79</sup>

J. BOND.—The necessity of giving a bond follows the general rules elsewhere treated.<sup>80</sup>

K. VALIDITY OF PROCEEDINGS IN VIOLATION OF INJUNCTION.—The injunction being directed to the parties and not the court,<sup>81</sup> proceedings had in violation of the injunction are not held to be irregular;<sup>82</sup> but if brought to his attention the judge would doubtless heed the order upon principles of comity.<sup>83</sup>

**XII. INJUNCTION AGAINST CRIMINAL PROCEEDINGS.—A. GENERALLY.**—It is a general rule that courts of equity have no jurisdiction over the prosecution, punishment or the pardon of crimes or misdemeanors,<sup>84</sup> and will not enjoin criminal prosecutions<sup>85</sup> actually

77. See 13 STANDARD PROC. 56, et seq.

78. See 13 STANDARD PROC. 115; 8 STANDARD PROC. 463; and generally the title "Process."

79. See 13 STANDARD PROC. 117, 118.

80. See 13 STANDARD PROC. 160, and 163, note 5.

81. See *supra*, XI, A.

82. *Mich.*—Geddis v. Wayne Circ. Judge, 151 Mich. 122, 114 N. W. 874. *N. Y.*—Platt v. Woodruff, 61 N. Y. 378. *Tenn.*—Burke v. Ellis, 105 Tenn. 702, 58 S. W. 855.

83. *Cal.*—Engels v. Lubeck, 4 Cal. 31. *Mich.*—Geddis v. Wayne Circ. Judge, 151 Mich. 122, 114 N. W. 874. *Miss.*—Fisher v. Pacific Mut. L. Ins. Co., 112 Miss. 30, 72 So. 846. *N. Y.*—Platt v. Woodruff, 61 N. Y. 378. *Tenn.*—See Burke v. Ellis, 105 Tenn. 702, 58 S. W. 855.

84. *Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. ed. 131, Ann. Cas. 1917B, 283, L. R. A. 1916D, 545; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620, 32 Sup. Ct. 605, 56 L. ed. 570; *In re Sawyer*, 124 U. S. 200, 210, 8 Sup. Ct. 482, 31 L. ed. 402.

[a] The original criminal jurisdiction in chancery has long been obsolete. 620 v. Francis, 20 Fed. 567.

85. *U. S.*—*In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. ed. 402; *Evansville Brew. Assn. v. Excise Commission*, 225 Fed. 204; *Seaboard Air Line Ry. Co. v. Raleigh*, 219 Fed. 573. *Ala.*—*Old Dominion Tel. Co. v. Powers*, 140 Ala. 220, 37 So. 195, 1 Ann. Cas.

119, note. *Ark.*—*Ferguson v. Martineau*, 115 Ark. 317, 171 S. W. 472, Ann. Cas. 1916E, 421. *Ga.*—*Carey v. Atlanta*, 143 Ga. 192, 84 S. E. 456, Ann. Cas. 1916E, 1151, L. R. A. 1915D, 684; *Rowland v. Roads & Revenues Comrs.*, 133 Ga. 190, 65 S. E. 404; *Phillips v. Mayor*, 61 Ga. 386. *Ia.*—*Snouffer v. Tipton*, 161 Iowa 223, 231, 142 N. W. 97, L. R. A. 1915B, 173. *Ky.*—*Cohen v. Webb*, 175 Ky. 1, 192 S. W. 828; *Louisville & N. R. Co. v. Barrall*, 25 Ky. L. Rep. 1395, 77 S. W. 1117. *La.*—*State v. Theard*, 48 La. Ann. 1448, 21 So. 28. *Mich.*—*Kleinke v. Oates*, 187 Mich. 548, 153 N. W. 675; *Osborn v. Charlevoix Circ. Judge*, 114 Mich. 655, 72 N. W. 982. *Miss.*—*Crighton v. Dohmer*, 70 Miss. 602, 13 So. 237, 35 Am. St. Rep. 666, 21 L. R. A. 84. *Ore.*—*Sherod v. Aitchison*, 71 Ore. 446, 142 Pac. 351, Ann. Cas. 1916C, 1151. *Pa.*—*Martin v. Baldy*, 249 Pa. 253, 94 Atl. 1091. *Tenn.*—*Kelly & Co. v. Conner*, 122 Tenn. 339, 396, 123 S. W. 622, 25 L. R. A. (N. S.) 201; *Fritz v. Sims*, 122 Tenn. 137, 119 S. W. 63, 135 Am. St. Rep. 867, 19 Ann. Cas. 458, note. *Tex.*—*State ex rel. McNamara v. Clark*, 79 Tex. Crim. 559, 187 S. W. 760; *Denton v. McDonald*, 104 Tex. 206, 135 S. W. 1148, 34 L. R. A. (N. S.) 453. *Wyo.*—*Littleton v. Burgess*, 14 Wyo. 173, 82 Pac. 864, 2 L. R. A. (N. S.) 631. *Eng.*—*Attorney General v. Cleaver*, 18 Ves. Jr. 211, 34 Eng. Reprint 297; *Montague v. Dudman*, 2 Ves. Sr. 396, 28 Eng. Reprint 253; *Holderstaffe v. Saunders*, 6 Mod. 16, 87 Eng. Reprint 780.

pending or threatened, whether brought under statute,<sup>88</sup> or municipal ordinances,<sup>87</sup> for the reason that the complainant has an adequate remedy at law by way of defense to the prosecution.<sup>88</sup> In like manner a court of equity cannot enjoin a grand jury from returning an indictment, if they see fit to do so.<sup>89</sup> Furthermore, an injunction against the proper enforcement of a valid statute is a suit against the state, although it would be otherwise if the statute were unconstitutional.<sup>90</sup>

**B. EXCEPTIONS.—1. Generally.**—There are certain exceptions to this rule, by virtue of the power of courts of equity to protect private property.<sup>91</sup> But the power can be exercised only to prevent the destruction of vested property rights,<sup>92</sup> and when such injury is

**Enjoining police,** see 20 STANDARD PROC. 209.

[a] **Trials by the commissioners of roads and revenues** are within the rule. *Rowland v. Roads & Revenues Comrs.*, 133 Ga. 190, 65 S. E. 404.

[b] **Even though the consequences** to the complainant may be ever so grievous and irreparable, an injunction will not be granted. *Board of Comrs. v. Orr*, 181 Ala. 308, 61 So. 920, 45 L. R. A. (N. S.) 575; *Brown v. Birmingham*, 140 Ala. 590, 37 So. 173.

**86. Ala.**—*Old Dominion Tel. Co. v. Powers*, 140 Ala. 220, 37 So. 195, 1 Ann. Cas. 119, note. **Ill.**—*Chicago v. Chicago City R. Co.*, 222 Ill. 560, 78 N. E. 890. **Tex.**—*State ex rel. McNamara v. Clark*, 79 Tex. Crim. 559, 187 S. W. 760.

**87.** See *infra*, this note.

[a] **No distinction between prosecutions under municipal ordinances and statutes**, see *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523, Ann. Cas. 1917D, 676.

**Injunction against enforcement of municipal ordinances**, see 20 STANDARD PROC. 182, et seq.

**88. U. S.**—*Seaboard Air Line Ry. Co. v. Raleigh*, 219 Fed. 573. **Ala.** *Brown v. Birmingham*, 140 Ala. 590, 37 So. 173. **Mich.**—*Kleinke v. Oates*, 187 Mich. 548, 153 N. W. 675. **N. C.** *Southern Express Co. v. High Point*, 167 N. C. 103, 83 S. E. 254. **Ore.** *Sherod v. Aitchison*, 71 Ore. 446, 142 Pac. 351, Ann. Cas. 1916C, 1151. **Wyo.** *Littleton v. Burgess*, 14 Wyo. 173, 82 Pac. 864, 2 L. R. A. (N. S.) 631.

But compare *Greenwich Ins. Co. v. Carroll*, 125 Fed. 121.

**89.** *State ex rel. McNamara v. Clark*, 79 Tex. Crim. 559, 187 S. W. 760, 766.

**90.** *Harkrader v. Wadley*, 172 U. S.

148, 169, 19 Sup. Ct. 119, 43 L. ed. 399; *Central Consumers' Co. v. Austin*, 238 Fed. 616.

**As to when an action is deemed one against the state**, see the title "States and Territories."

**91. U. S.**—*Weyman-Bruton Co. v. Ladd*, 231 Fed. 898, 146 C. C. A. 94; *Central Consumers' Co. v. Austin*, 238 Fed. 616; *Yee Gee v. San Francisco*, 235 Fed. 757. **Ga.**—*Baldwin v. Atlanta*, 147 Ga. 28, 92 S. E. 630; *Georgia R. & B. Co. v. Atlanta*, 118 Ga. 486, 45 S. E. 256. **Ill.**—*Chicago v. Chicago City R. Co.*, 222 Ill. 560, 78 N. E. 890. **Ia.**—*Snouffer v. Tipton*, 161 Iowa 223, 231, 142 N. W. 97, L. R. A. 1915B, 173. **Kan.**—*Brown v. Nichols*, 93 Kan. 737, 145 Pac. 561, L. R. A. 1915D, 327.

[a] **When equity acts, it ignores the criminal feature**, and (1) exercises jurisdiction solely with reference to the effect of the act upon property or business. *Georgia R. & B. Co. v. Atlanta*, 118 Ga. 486, 45 S. E. 256. (2) Equity merely suspends the criminal proceedings until the property rights can be determined. It does not assume jurisdiction of the criminal action. *Littleton v. Burgess*, 14 Wyo. 173, 82 Pac. 864, 2 L. R. A. (N. S.) 631.

**92. U. S.**—*In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. ed. 402. **Ga.** *Paulk v. Sycamore*, 104 Ga. 24, 30 S. E. 417, 69 Am. St. Rep. 128, 41 L. R. A. 772. **Tex.**—*Austin v. Austin Cemetery Assn.*, 87 Tex. 330, 28 S. W. 528, 47 Am. St. Rep. 114; *State ex rel. McNamara v. Clark*, 79 Tex. Crim. 559, 187 S. W. 760.

[a] **A license is not a vested property right within the rule.** *State ex rel. McNamara v. Clark*, 79 Tex. Crim. 559, 187 S. W. 760; *Lane v. Schultz* (Tex. Civ. App.), 146 S. W. 1009;

direct and not merely consequential.<sup>93</sup>

**2. Interference With Equity Suit.**— If a suit is already pending in equity, a party thereto who attempts to employ a criminal proceeding in interference of the pending suit and to try the same right in issue there may be enjoined.<sup>94</sup>

**3. Unconstitutional Statute.**— Where criminal proceedings based upon an unconstitutional statute invade rights of property, their threatened institution or prosecution may be enjoined at the instance of the party whose property rights are invaded.<sup>95</sup> Equity may do

*Baldacchi v. Goodlet* (Tex. Civ. App.), 145 S. W. 325.

[b] **The right to pursue a profession** is a property right within the rule. *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523, Ann. Cas. 1917D, 676.

93. *Milton Dairy Co. v. Great Northern R. Co.*, 124 Minn. 239, 144 N. W. 764, 49 L. R. A. (N. S.) 951. See *Cobb v. French*, 111 Minn. 429, 127 N. W. 415.

[a] **The injury must be direct**, not consequential. It must be distinct from the proceedings to punish personally for the commission of a crime. *Milton Dairy Co. v. Great Northern R. Co.*, 124 Minn. 239, 144 N. W. 764, 49 L. R. A. (N. S.) 951.

94. **U. S.**—*Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. ed. 778; *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482, 31 L. ed. 402; *Camden Interstate Ry. Co. v. Catlettsburg*, 129 Fed. 421, reviewing authorities. **Ala.**—*Old Dominion Tel. Co. v. Powers*, 140 Ala. 220, 37 So. 195, 1 Ann. Cas. 119, note. **Eng.** *Saull v. Browne*, L. R. 10 Ch. App. Cas. 64.

[a] **Illustration.**— A plaintiff who files a bill to establish a sole right to fish in a stream will be restrained pending the equity suit from proceeding at sessions on an indictment against the defendant for breach of the peace in fishing in plaintiff's liberty. Supposing it was a suit for a right of land where entries had been made, and the bill was brought to quiet the possession and after that they [the plaintiffs] prefer an indictment for forcible entry, which is of a double nature, as it partakes of a breach of the peace, and is also a

civil right, this court would certainly stop the proceedings upon such indictment. Mayor, etc. of York *v. Pilkington*, 2 Atk. 302, 26 Eng. Reprint 584.

[b] Where the agent of a receiver acting under leave of court takes forcible possession of the premises, the defendant will be restrained from prosecuting an indictment against the agent for forcible entry and detainer. The court will prevent the defendant from proceeding against the officer of the court for doing what he would have been punished for not doing. *Turner v. Turner*, 15 Jur. (Eng.) 218.

[c] **The rule applies only where** (1) the same rights being enforced in equity are attempted to be enforced by criminal proceedings. The pursuer and pursued must be identical in both cases. *Spink v. Francis*, 20 Fed. 567. (2) Accordingly a plaintiff, who files a bill alleging various matters as to a partnership with the defendant and asking for a sale of the partnership property and an accounting, will not be enjoined from proceeding criminally against the defendant for unlawfully conspiring to defraud him of his share of the partnership business. *Saull v. Browne*, L. R. 10 Ch. App. Cas. (Eng.) 64.

95. **U. S.**—*Adams v. Tanner*, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. ed. 1336, Ann. Cas. 1917D, 973, L. R. A. 1917F, 1163; *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, 36 Sup. Ct. 370, 60 L. ed. 679, Ann. Cas. 1917B, 455, L. R. A. 1917A, 421; *Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. ed. 131, Ann. Cas. 1917B, 283, L. R. A. 1916D, 545; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. ed. 778; *Evansville Brew. Assn. v. Excise Commission*, 225 Fed. 204. **Cal.**—*Sullivan v. San Francisco Gas & E. Co.*, 148 Cal. 363, 83 Pac. 156, 3 L. R. A. (N. S.) 401, 7 Ann.



so, it has been held, even before the illegality has been established at law,<sup>96</sup> although some courts hold otherwise.<sup>97</sup> But if no property rights would be impaired by the prosecution, the mere unconstitutionality of the statute on which the prosecution is based is not ground for an injunction.<sup>98</sup>

4. **Wrong Application of Valid Statute.**—Similarly, although the statute is valid, an injunction will be granted where a similar injury is threatened by the officer transcending its bounds, and wrongfully applying it.<sup>99</sup>

5. **Multiplicity of Prosecutions.**—Another exception to the general rule exists when an injunction is necessary to prevent a multi-

Cas. 574. **Kan.**—*Brown v. Nichols*, 93 Kan. 737, 145 Pac. 561, L. R. A. 1915D, 327. **Minn.**—*Milton Dairy Co. v. Great Northern R. Co.*, 124 Minn. 239, 144 N. W. 764, 49 L. R. A. (N. S.) 951. **Ore.**—*Ideal Tea Co. v. Salem*, 77 Ore. 182, 150 Pac. 852, Ann. Cas. 1917D, 684; *Sherod v. Aitchison*, 71 Ore. 446, 142 Pac. 351, Ann. Cas. 1916C, 1151. **Tenn.**—*Alexander v. Elkins*, 132 Tenn. 663, 179 S. W. 310, L. R. A. 1916C, 261, note; *Kelly & Co. v. Conner*, 122 Tenn. 339, 396, 123 S. W. 622, 25 L. R. A. (N. S.) 201. **Tex.**—*State ex rel. McNamara v. Clark*, 79 Tex. Crim. 559, 187 S. W. 760; *Dibrell v. Coleman* (Tex. Civ. App.), 172 S. W. 550. **W. Va.** *Coal & C. R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613; *Fellows v. Charleston*, 62 W. Va. 665, 59 S. E. 623, 125 Am. St. Rep. 990, 13 L. R. A. (N. S.) 737.

[a] **There must be an element of irreparable injury** to some personal or property right, or inadequacy of legal remedy on some other ground in addition to the unconstitutionality of the law. *Coal & C. R. Co. v. Conley*, 67 W. Va. 129, 67 S. E. 613.

[b] **An anti-alien labor law may be enjoined.** *Truax v. Raich*, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. ed. 131, Ann. Cas. 1917B, 283.

[c] **The plaintiff must allege that the business in which he is engaged is clearly interdicted by the provisions of the enactment, or he may aver that, although the statute has no application to his business, yet he is threatened by a criminal action, in which latter case he must in the description of the business traverse each specification of the statute that is conditionally or ultimately prohibited.** *Sherod v. Aitchison*, 71 Ore. 446, 142 Pac. 351, Ann. Cas. 1916C, 1151.

96. *Torpedo Co. v. Clarendon*, 19 Fed. 231; *Carey v. Atlanta*, 143 Ga. 192, 84 S. E. 456, Ann. Cas. 1916E, 1151, L. R. A. 1915D, 684.

97. *Block v. Crockett*, 61 W. Va. 421, 56 S. E. 826; *Littleton v. Burgess*, 14 Wyo. 173, 82 Pac. 864, 2 L. R. A. (N. S.) 631.

[a] **When a statute has been declared illegal by a competent court, (1) equity will enjoin other prosecutions thereunder begun or threatened, which will result injuriously to one in the enjoyment of his civil rights of property.** *Block v. Crockett*, 61 W. Va. 421, 56 S. E. 826. (2) **The remedy by defense is not adequate against repeated prosecutions.** *Alexander v. Elkins*, 132 Tenn. 663, 179 S. W. 310, L. R. A. 1916C, 26, note.

98. **Ala.**—*Board of Comrs. v. Orr*, 181 Ala. 308, 61 So. 920, 45 L. R. A. (N. S.) 575. **Mich.**—*Kleinke v. Oates*, 187 Mich. 548, 153 N. W. 675; *Osborn v. Charlevoix* Circ. Judge, 114 Mich. 655, 72 N. W. 982. **Okla.**—*Yale Theater Co. v. Lawton*, 35 Okla. 444, 130 Pac. 135. **Ore.**—*Sherod v. Aitchison*, 71 Ore. 446, 142 Pac. 351, Ann. Cas. 1916C, 1151. **Tex.**—*State ex rel. McNamara v. Clark*, 79 Tex. Crim. 559, 187 S. W. 760; *Winn v. Dyess* (Tex. Civ. App.), 167 S. W. 294.

99. **U. S.**—*Philadelphia Co. v. Stimson*, 223 U. S. 605, 621, 32 Sup. Ct. 340, 56 L. ed. 570. **Ky.**—*Shinkle v. Covington*, 83 Ky. 420. **Wash.**—*Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523, Ann. Cas. 1917D, 676.

[a] **When it is manifest the sole purpose of the prosecution is to prevent the exercise of civil rights conferred by law, an injunction will lie.** *Cutsinger v. Atlanta*, 142 Ga. 555, 83

plcity of prosecutions.<sup>1</sup> There are two classes of cases embraced by this exception, first an injunction to prevent a multiplicity of prosecutions against one person, and second, to prevent a multiplicity against a number of persons.<sup>2</sup>

With respect to the first class, it is clear that an injunction will not be granted if the statute is valid.<sup>3</sup> And if the statute is of doubtful validity, the complainant cannot, by his wilful and repeated violation of its provisions, each furnishing separate grounds and depending upon separate facts, create this ground for equitable interposition without first settling the validity of the statute in the courts of law.<sup>4</sup> If he fears the prosecution of other suits, he can ordinarily refrain from the repetition of his acts in violation of its provisions until the proper forum has determined its invalidity.<sup>5</sup> Consequently, except when excused by the delay incident to the appeal,<sup>6</sup> a permanent injunction against repeated prosecutions against an individual for the violation of a statute will not be granted until after a determination in the law courts of its invalidity,<sup>7</sup> although a temporary injunction

S. E. 263, Ann. Cas. 1916C, 280, L. R. A. 1915B, 1097; Georgia R. & B. Co. v. Atlanta, 118 Ga. 486, 491, 45 S. E. 256; Atlanta v. Gate City Gas L. Co., 71 Ga. 106.

1. **U. S.**—Central Consumers' Co. v. Austin, 238 Fed. 616; Kansas City Gas Co. v. Kansas City, 198 Fed. 500. **Ala.** Board of Comrs. v. Orr, 181 Ala. 308, 319, 61 So. 920, 45 L. R. A. (N. S.) 575. **Ga.**—Carey v. Atlanta, 143 Ga. 192, 84 S. E. 456, Ann. Cas. 1916E, 1151; Cutsinger v. Atlanta, 142 Ga. 555, 83 S. E. 263, Ann. Cas. 1916C, 280, L. R. A. 1915B, 1097. **Ill.**—Poyer v. Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494. **Ky.**—Hieatt v. Settle, 176 Ky. 160, 195 S. W. 420; Zweigart v. Chesapeake & O. R. Co., 161 Ky. 463, 170 S. W. 1194. **N. Y.** Wallack v. Society, 67 N. Y. 23. **Pa.** Martin v. Baldy, 249 Pa. 253, 94 Atl. 1091. **Tenn.**—Alexander v. Elkins, 132 Tenn. 663, 179 S. W. 310, L. R. A. 1916C, 261, note. **Tex.**—Houston v. Richter (Tex. Civ. App.), 157 S. W. 189; Tyler v. Story, 44 Tex. Civ. App. 250, 97 S. W. 856.

But see Old Dominion Tel. Co. v. Powers, 140 Ala. 220, 37 So. 195, 1 Ann. Cas. 119, note.

See the title "Multiplicity of Suits."

2. See *infra*, this section.

3. Poyer v. Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494.

4. Poyer v. Des Plaines, 123 Ill.

111, 13 N. E. 819, 5 Am. St. Rep. 494.

5. **Ala.**—Brown v. Birmingham, 140 Ala. 590, 37 So. 173. **Ariz.**—Bisbee v. Arizona Ins. Agency, 14 Ariz. 313, 127 Pac. 722. **Ill.**—Poyer v. Des Plaines, 123 Ill. 111, 13 N. E. 819, 5 Am. St. Rep. 494.

[a] But where the complainant must take affirmative action to avoid prosecution, and must go to considerable expense to comply with the ordinance, although void, or must submit to the vexation of repeated prosecutions without warrant, though under color of law, equity will interfere and grant an injunction until the invalidity of the statute can be determined. Board of Comrs. v. Orr, 181 Ala. 308, 319, 61 So. 920, 45 L. R. A. (N. S.) 575. See also **U. S.** Hutchinson v. Beckham, 118 Fed. 399, 55 C. C. A. 333. **Mo.**—Sylvester Coal Co. v. St. Louis, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566. **N. Y.**—West v. New York, 10 Paige 539.

6. Hutchinson v. Beckham, 118 Fed. 399, 55 C. C. A. 333.

7. **Colo.**—Brunstein v. Fort Collins, 53 Colo. 254, 125 Pac. 119; Denver v. Beede, 25 Colo. 172, 54 Pac. 624. **Ill.** Wilkie v. Chicago, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182; Chicago v. Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408; Rago v. Melrose Park, 161 Ill. App. 18. **N. Y.**—Wallack v. Society, 67 N. Y. 23; West v. New York, 10 Paige 539. **Tenn.**—Alexander v. Elkins, 132

restraining all proceedings but one until the determination of that one may be granted.<sup>8</sup>

With respect to the second class of cases, when a multiplicity of prosecutions under an alleged invalid statute or ordinance requiring the payment of taxes or license fees by persons in particular professions, etc., is threatened, equity will take jurisdiction, determine the validity of the statute or ordinance, and grant an injunction if the bill is sustained.<sup>9</sup> Some courts hold, however, that such prosecutions, although criminal in form are civil in nature, and the right to an injunction rests upon different grounds.<sup>10</sup>

C. PARTIES.—The attorney general and prosecuting attorney are proper parties to the suit.<sup>11</sup>

**XIII. ABANDONMENT.**<sup>12</sup>—Where a plaintiff takes no steps to bring his suit to trial for a long period of years, according to some

Tenn. 663, 179 S. W. 310, L. R. A. 1916C, 261.

See also 20 STANDARD PROC. 79.

[a] **Repeated prosecutions against an individual under a statute to compel husbands to support their wives,** will be enjoined when the statute has been held unconstitutional. *Alexander v. Elkins*, 132 Tenn. 663, 179 S. W. 310, L. R. A. 1916C, 261.

8. **Board of Comrs. v. Orr**, 181 Ala. 308, 61 So. 920, 45 L. R. A. (N. S.) 575; *Third Ave. R. Co. v. New York*, 54 N. Y. 159, *distinguishing West v. New York*, 10 Paige (N. Y.) 539, on the ground that in it the injunction was asked to restrain *absolutely* the prosecution of any suits.

9. **U. S.—Hutchison v. Beckham**, 118 Fed. 399, 55 C. C. A. 333. **Ill.** *Wilkie v. Chicago*, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182; *Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408. **Ky.**—*Franklin v. Lacey*, 157 Ky. 261, 162 S. W. 1126. **Pa.**—*Martin v. Baldy*, 249 Pa. 253, 94 Atl. 1091. **Tex.** *Houston v. Richter* (Tex. Civ. App.), 157 S. W. 189.

And compare *Bisbee v. Arizona Ins. Agency*, 14 Ariz. 313, 127 Pac. 722.

[a] **Where an Ordinance Requires All Plumbers To Take Out Licenses.** *Wilkie v. Chicago*, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182.

[b] **Where an ordinance exacted a license fee from owners of wheeled vehicles.** *Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408.

[c] **Previous determination of the invalidity of the statute is unneces-**

sary. *Wilkie v. Chicago*, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182; *Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408; *Rago v. Melrose Park*, 161 Ill. App. 18.

[d] **A mere allegation of illegality is insufficient to confer jurisdiction.** A multiplicity of prosecutions must be shown. *Wilkie v. Chicago*, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182.

10. *Camden Interstate Ry. Co. v. Catlettsburg*, 129 Fed. 421; *Southern Express Co. v. Ensley*, 116 Fed. 756; *Jewel Tea Co. v. Carthage*, 257 Mo. 382, 165 S. W. 743; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566.

[a] **The prosecution is legally equivalent to a civil action of debt upon the statute, and its substantial character is not changed by calling the default a misdemeanor and providing for its prosecution by information.** It is merely part of the revenue system of the state. *Royal v. Virginia*, 116 U. S. 572, 584, 6 Sup. Ct. 510, 29 L. ed. 735; *Southern Express Co. v. Ensley*, 116 Fed. 756.

11. See 13 STANDARD PROC. 33.

12. **Discontinuance of an Action Amounts to an Abandonment.**—See 7 STANDARD PROC. 651.

**Abandonment of appeal**, see 2 STANDARD PROC. 393.

**Abandoning portion of claim to confer jurisdiction**, see 17 STANDARD PROC. 878.

**Voluntary nonsuit by plaintiff**, see 7 STANDARD PROC. 655.



authorities he is presumed to have abandoned it.<sup>13</sup> An action begun by the issuance of process is abandoned if not continued by the issuance of alias process from term to term without break or interval.<sup>14</sup> And by declining to offer testimony in support of his petition, the plaintiff is held to have abandoned his action.<sup>15</sup> The plaintiff may abandon one of the causes of action and proceed with the other,<sup>16</sup> or he may dismiss as to some of the defendants.<sup>17</sup>

**XIV. TERMINATION.**—According to some authorities actions are deemed to be pending until rendition of judgment,<sup>18</sup> and according to others until the judgment is satisfied.<sup>19</sup> Some statutes provide that an action is deemed to be pending until its final determination upon appeal or until the time for appeal has passed, unless the judgment is sooner satisfied.<sup>20</sup>

13. *Munley v. Sugar Notch Borough*, 215 Pa. 228, 64 Atl. 377; *Schmidt v. Heimberger*, 21 Pa. Co. Ct. 564. But see *Combs v. Wallace*, 3 Ky. L. Rep. 384, as long as the case is on the docket, it cannot be considered abandoned until an order of court to that effect is made. Compare *Taylor v. Taylor*, 76 W. Va. 469, 85 S. E. 652.

[a] **Remedy of Defendant.**—On application of the defendant, the court will grant a perpetual stay of proceedings or direct the case be non-prossed. *Schmidt v. Heimberger*, 21 Pa. Co. Ct. 564.

[b] **There is no definite rule as to what length of time is necessary to raise the presumption.** *Schmidt v. Heimberger*, 21 Pa. Co. Ct. 564. See *Huffman's Heirs v. Stiger*, 1 Crum. (Pa.) 185.

**Abandonment as a ground for dismissal or nonsuit**, see 7 STANDARD PROC. 675, et seq.

**Dismissal is without prejudice**, see 7 STANDARD PROC. 678.

**Waiver of right to dismissal**, see 7 STANDARD PROC. 679.

14. *Walker v. Vandiver*, 133 Tenn. 423, 181 S. W. 310. See 21 STANDARD PROC. 762, et seq.

15. *Sorrell v. Stone*, 60 Tex. Civ. App. 51, 127 S. W. 300.

16. *Hume v. Atkinson*, 8 Kan. App. 18, 54 Pac. 15.

[a] "Where two causes of action are indefinitely stated in a petition, and the petition is not attacked by motion separately to state and number the causes of action, or to make

more definite and certain, it is not error to permit the plaintiff, during the trial, to abandon one of the causes and proceed with the other." *Hume v. Atkinson*, 8 Kan. App. 18, 54 Pac. 15.

**Abandonment of counts in indictment**, see 12 STANDARD PROC. 687.

17. See 7 STANDARD PROC. 666.

18. *Tichenor v. Collins*, 45 N. J. L. 123; *Pittsburgh, C. C. & St. L. Ry. Co. v. Bemis*, 64 Ohio St. 26, 59 N. E. 745.

[a] **The Proceeding Is Called an Action Until the Rendition of the Judgment.**—*Pittsburgh, C. C. & St. L. Ry. Co. v. Bemis*, 64 Ohio St. 26, 59 N. E. 745.

[b] **All subsequent writs**, whether of execution or scire facias, are new proceedings although founded on the judgment. *Tichenor v. Collins*, 45 N. J. L. 123.

19. **U. S.**—*Wayman v. Southard*, 10 Wheat. 1, 23, 6 L. ed. 253. **Ala.**—*Martin v. Tally*, 72 Ala. 23, 31. **N. Y.** *Wegman v. Childs*, 41 N. Y. 159. **Utah.** *Sweetser v. Fox*, 43 Utah 40, 45, 134 Pac. 599, Ann. Cas. 1916C, 620, 47 L. R. A. (N. S.) 145. **Can.**—*Imperial Bank v. Smith*, 8 Man. 440, 442.

**A scire facias to revive a judgment is a continuation of the original suit.** See 16 STANDARD PROC. 512.

20. *Anderson v. Schloesser*, 153 Cal. 219, 94 Pac. 885; *Vermont Marble Co. v. Black*, 123 Cal. 21, 55 Pac. 599; *In re Egan*, 24 S. D. 301, 123 N. W. 478. And see also 1 STANDARD PROC. 1009.

# SUMMARY PROCEEDINGS

By the Editorial Staff.

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## CROSS-REFERENCES:

Forcible Entry and Detainer;	Recognizances and Bail;
Nuisance;	Sheriffs, Constables and Marshals;
Penalties, Forfeitures and Fines;	Taxation.

Summary trials in criminal cases, see the title "Trials."

For particular purposes, see the specific titles.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. DEFINITION AND NATURE.** — A summary proceeding is one in which the ancient established course of legal proceedings is disregarded, especially in the matter of trial by jury, and, in the case of the heavier crimes, presentment by a grand jury.<sup>1</sup> As a general rule, such proceedings are statutory and not according to common law.<sup>2</sup> They are sometimes regarded as special proceedings,<sup>3</sup> but they are not actions,<sup>4</sup> although analogous to actions in purpose and scope.<sup>5</sup>

**II. ILLUSTRATIONS OF.** — Numerous proceedings are embraced within the term "summary proceedings,"<sup>6</sup> but they are allowed chiefly against defaulting officers and their sureties,<sup>7</sup> or in favor of sureties and against their defaulting principals or cosureties,<sup>8</sup> or against defaulting attorneys charged with the collection of money for their clients.<sup>9</sup> Summary proceedings include such matters as contempt proceedings,<sup>10</sup> summary proceedings to enforce liability on bonds,<sup>11</sup>

1. *Okla.*—*Billings Hotel Co. v. Enid*, 53 Okla. 1, 154 Pac. 557, L. R. A. 1916D, 1016. *Tenn.*—*State ex rel. Mynatt v. King*, 137 Tenn. 17, 191 S. W. 352; *State ex rel. Timothy v. Howse*, 134 Tenn. 67, 82, 183 S. W. 510, Ann. Cas. 1917C, 1125. *Va.*—*Yoder v. Com.*, 107 Va. 823, 57 S. E. 581.

[a] A statutory provision that a trial shall be "summary" is equivalent to saying it shall be without a jury. *State ex rel. Mynatt v. King*, 137 Tenn. 17, 191 S. W. 352.

[b] The popular meaning of the word "summary," as being speedy and expeditious merely, is not applicable. *State ex rel. Timothy v. Howse*, 134 Tenn. 67, 83, 183 S. W. 510, Ann. Cas. 1917C, 1125.

2. *Ex parte Wilson*, 54 Ala. 296; *Soule v. Worsham*, 22 La. Ann. 78.

Contempt proceedings at common law, see the title "Contempt."

Distress at common law, see 18 STANDARD PROC. 521.

Proceedings against defaulting attorneys under common-law jurisdiction of the court, see 18 STANDARD PROC. 850.

3. *Seymour v. Hughes*, 105 N. Y. Supp. 249. But see *Hawley v. Gray Bros.*, etc. Co., 127 Cal. 560, 60 Pac. 437.

As to special proceedings, see the title "Suits and Actions."

4. *Seymour v. Hughes*, 105 N. Y. Supp. 249.

5. *Seymour v. Hughes*, 105 N. Y. Supp. 249.

6. As to customs duties, see 6 STANDARD PROC. 353.

Execution sale, to enforce, see 16 STANDARD PROC. 197, 205, 220, 222.

Judicial sale, to compel execution of deed, see 16 STANDARD PROC. 827; to compel purchaser to complete, see 16 STANDARD PROC. 828.

Life tenant against lessee holding over, see 18 STANDARD PROC. 623, note 11.

To recover damages in injunction suit, see 13 STANDARD PROC. 320.

Trying title to office in summary proceedings, see the title "Officers."

7. *Ex parte Wilson*, 54 Ala. 296.

[a] Against clerk of court and his sureties. *Cooper v. Williams*, 75 N. C. 94; *Broughton v. Haywood*, 61 N. C. 380; *Donelson v. State*, 3 Lea (Tenn.) 692; *Young v. Hare*, 11 Humph. (Tenn.) 303.

[b] Against Collectors of Revenue. *Derrick v. State*, 3 Lea (Tenn.) 396.

Against sheriffs, constables and marshals, see the title "Sheriffs, Constables and Marshals."

Against justices of the peace, see 18 STANDARD PROC. 389.

8. *Ex parte Wilson*, 54 Ala. 296, and 21 STANDARD PROC. 593.

9. *Ex parte Wilson*, 54 Ala. 296. See 18 STANDARD PROC. 848.

10. *Noble v. Aasen*, 10 N. D. 264, 86 N. W. 742. See generally the title "Contempt."

Violation of injunction, see 13 STANDARD PROC. 288.

11. Appeal bonds, see 2 STANDARD PROC. 83.

Forthcoming bonds, see 10 STANDARD PROC. 24.



liens,<sup>12</sup> and taxes,<sup>13</sup> proceedings to compel an accounting,<sup>14</sup> proceedings for ousting officers,<sup>15</sup> proceedings before magistrates for the enforcement of criminal laws,<sup>16</sup> proceedings for enforcement of city ordinances,<sup>17</sup> proceedings for abating nuisances,<sup>18</sup> summary proceedings by a receiver to recover possession of property,<sup>19</sup> distress proceedings by a landlord,<sup>20</sup> and special proceedings to determine boundaries.<sup>21</sup>

**III. CONSTRUCTION OF AND COMPLIANCE WITH STATUTE.**—The statutes providing for summary proceedings are strictly construed, and will not be extended by intendment or construction.<sup>22</sup> And proceedings thereunder must be in strict accordance with the statute.<sup>23</sup>

**IV. REMEDY IS CUMULATIVE.**—The summary remedies are generally regarded as cumulative,<sup>24</sup> and are waived by bringing an action at law and recovering judgment therein.<sup>25</sup>

**V. JURISDICTION.**—Jurisdiction over summary proceedings is

**Replevin bonds,** see 22 STANDARD PROC. 947.

**Undertakings and bonds generally,** see the title "**Undertakings.**"

[a] **Bonds Given in Judicial Proceedings.**—*Sperry & Hutchinson Co. v. Tacoma*, 205 Fed. 641.

[b] **Only bonds good as statutory bonds** may be so enforced. *Ala.*—*Branch Bank v. Darrington*, 14 Ala. 192. *Tex.* *Jones v. Hays*, 27 Tex. 1. *Va.*—*Lynchburg Trust & Sav. Bank v. Elliott*, 94 Va. 700, 27 S. E. 467.

12. See 18 STANDARD PROC. 1005.

**Agricultural lien,** see 18 STANDARD PROC. 646.

**Attorney's lien,** see 18 STANDARD PROC. 835.

13. See the title "**Taxation.**"

14. **By guardian,** see 10 STANDARD PROC. 822.

15. *Rankin v. Jauman*, 4 Idaho 53, 36 Pac. 502; *State ex rel. Timothy v. Howse*, 134 Tenn. 67, 83, 183 S. W. 510, Ann. Cas. 1917C, 1125. See the title "**Officers.**"

16. *Minard v. Dover, R. & P. O. Gas Co.*, 76 N. J. L. 132, 68 Atl. 910; *Feigen v. McGuire*, 64 N. J. L. 152, 44 Atl. 972. See the title "**Trial.**"

17. *Billings Hotel Co. v. Enid*, 53 Okla. 1, 154 Pac. 557, L. R. A. 1916D, 1016. See the titles "**Municipal Corporations;**" "**Trial.**"

**Summary proceedings to recover penalty for violation of health regulations,** see 10 STANDARD PROC. 985.

18. *Billings Hotel Co. v. Enid*, 53 Okla. 1, 154 Pac. 557, L. R. A. 1916D, 1016. See 10 STANDARD PROC. 981, and the title "**Nuisance.**"

19. See the title "**Receivers.**"

20. See 18 STANDARD PROC. 521.

21. See 18 STANDARD PROC. 652, 660.

22. *U. S.*—*Thatcher v. Powell*, 6 Wheat. 119, 5 L. ed. 221. *Ala.*—*Ex parte Wilson*, 54 Ala. 296. *Me.*—*Gile v. Atkins*, 93 Me. 223, 44 Atl. 896, 74 Am. St. Rep. 341.

**As to liens,** see 18 STANDARD PROC. 1005.

**Liberal construction,** see 18 STANDARD PROC. 1005.

23. *U. S.*—*Thatcher v. Powell*, 6 Wheat. 119, 5 L. ed. 221. *Ala.*—*Ex parte Wilson*, 54 Ala. 296; *Caldwell v. Guinn*, 54 Ala. 64. *Tenn.*—*Prowell v. Fowlkes*, 5 Baxt. 649; *Garner v. Carroll*, 7 Yerg. 365. *Tex.*—*Robinson v. Schmidt*, 48 Tex. 13.

24. *U. S.*—*Sperry & Hutchinson Co. v. Tacoma*, 205 Fed. 641. *Ala.*—*Dallas v. Timberlake*, 54 Ala. 403; *Jaffe v. Fidelity & Dep. Co.*, 7 Ala. App. 206. 60 So. 966. *Ind.*—*Hubbard v. Security Trust Co.*, 38 Ind. App. 156, 78 N. E. 79. *N. C.*—*Broughton v. Haywood*, 61 N. C. 380; *Grady v. Threadgill*, 35 N. C. 228. *Tenn.*—*Fossett v. Turnage*, 9 Humph. 686.

25. *Wood v. Hunt*, 23 Ga. 379; *Gopen v. Crawford*, 53 How. Pr. (N. Y.) 278; *Cottrell v. Finlayson*, 4 How. Pr. (N. Y.) 242, 2 Code Rep. 116.

dependent on the statute,<sup>26</sup> and everything essential to give jurisdiction should appear of record.<sup>27</sup>

**VI. PARTIES.**—Summary proceedings against officers in some states are brought against the officer alone, and if the suretyship is proved, judgment is rendered against the sureties without notice to them.<sup>28</sup> Where a statute provides for summary proceeding against an officer and his sureties, proceedings will not lie against the sureties alone.<sup>29</sup> Some statutes authorize proceedings against the sureties alone after death of the principal,<sup>30</sup> or against the survivors after death of a surety.<sup>31</sup> Statutes authorizing summary proceedings in favor of and against a person do not extend to his personal representatives,<sup>32</sup> unless the statute so provides.<sup>33</sup>

**VII. PLEADINGS, NOTICE, AND HEARING.**—As a general rule, the defendant in summary proceedings must be given notice and an opportunity to be heard.<sup>34</sup> The proceeding is generally instituted either by motion supported by affidavits,<sup>35</sup> or, under some circum-

26. See generally the statutes, and see the specific titles.

Jurisdiction of justices of the peace, see 17 STANDARD PROC. 972.

[a] Clerk of court may be proceeded against in the court of which he is clerk and under statute in the circuit court, even though he is not clerk of such court. *Donelson v. State*, 3 Lea (Tenn.) 692.

27. See 17 STANDARD PROC. 664, and *infra*, VIII.

Presumption in aid of record, see 15 STANDARD PROC. 426, 432.

28. *Maxwell v. Pounds*, 116 Ala. 551, 23 So. 730. See also the title "Sheriffs, Constables and Marshals."

29. *Derrick v. State*, 3 Lea (Tenn.) 396; *Houston v. Dougherty's Sureties*, 4 Humph. (Tenn.) 505.

[a] All the sureties (1) must be joined. *Hansen v. Martin*, 63 Cal. 282. (2) Or those not joined must be shown to be dead. *Hearn v. Ewin, Pendleton & Co.*, 3 Coldw. (Tenn.) 399.

30. *Maxwell v. Pounds*, 116 Ala. 551, 23 So. 730; *Derrick v. State*, 3 Lea (Tenn.) 396, under statute relating to sheriffs and collectors of revenue.

31. *Derrick v. State*, 3 Lea (Tenn.) 396.

32. *Ex parte Wilson*, 54 Ala. 296; *Prowell v. Fowlkes*, 5 Baxt. (Tenn.) 649; *State v. Deberry*, 9 Humph. (Tenn.) 605.

As to survival and revivor, see the titles "Revivor;" "Survival."

33. See generally the statutes.

34. *Ala.*—*Lovins v. Humphries*, 67 Ala. 437; *Caldwell v. Guinn*, 54 Ala. 64. *Idaho.*—*Dahlstrom v. Featherstone*, 18 Idaho 179, 110 Pac. 243. *N. Y.* *Chase v. Chase*, 65 How. Pr. 308. *Tenn.* *Tennessee Fertilizer Co. v. McFall*, 128 Tenn. 645, 655, 163 S. W. 806; *East Tennessee Brew. Co. v. Currier*, 126 Tenn. 535, 150 S. W. 541; *Garner v. Carroll*, 7 Yerg. 365.

[a] Even though statute is silent as to notice. *Arthur v. State*, 22 Ala. 61.

[b] Motion at the term operates as notice to clerk. *Caldwell v. Guinn*, 54 Ala. 64; *Garner v. Carroll*, 7 Yerg. (Tenn.) 365.

[c] Notice to the officer alone need be given, and judgment may be rendered against the sureties though they are not notified and do not appear. *Arthur v. State*, 22 Ala. 61; *Young v. Hare*, 11 Humph. (Tenn.) 303.

[d] But on execution against a tax-collector notice is not required. *Walden v. Lee*, 60 Ga. 296.

[e] Appearance without objection operates as waiver of defects in the mode of proceeding. *Ratliff v. Allgood*, 72 Ala. 119; *Watkins v. Barnes*, 1 Sneed (Tenn.) 201. See generally the title "Appearances."

35. *Ala.*—*McDonald v. State*, 143 Ala. 101, 39 So. 257; *Ex parte Wilson*, 54 Ala. 296. *Ia.*—*Phoenix Fire Extinguisher Co. v. T. M. Sinclair & Co.*, 169 Iowa 564, 151 N. W. 462. *N. Y.* *Ex parte Ferguson*, 6 Cow. 596. *N. C.*

stances, by petition<sup>36</sup> or complaint<sup>37</sup> for an order of court for the relief sought. Formal pleadings by the defendant are not usually required,<sup>38</sup> though some statutes provide that the defense to motions in summary proceedings may be made in the same manner as in actions at law.<sup>39</sup>

**Trial by Jury.** — The parties to summary proceedings are not entitled to a trial by jury unless such right is given by statute.<sup>40</sup>

A reference may sometimes be ordered.<sup>41</sup>

**VIII. JUDGMENT AND RECORD.** — The form of order or judgment prescribed by statute must be substantially followed,<sup>42</sup> and the record must affirmatively disclose those facts which give jurisdiction,<sup>43</sup> and that the remedy was pursued in compliance with the statute.<sup>44</sup>

**IX. REVIEW.** — Summary convictions may be reviewed on certiorari in accordance with general rules elsewhere discussed,<sup>45</sup> and a

Marsh v. Nimocks, 122 N. C. 478, 29 S. E. 840, 65 Am. St. Rep. 715; *Ex parte* Curtis' Heirs, 82 N. C. 435. **Tenn.** State *ex rel.* Mynatt v. King, 137 Tenn. 17, 191 S. W. 352; Donelson v. State, 3 Lea 692. **Wis.**—Atkinson v. Richardson, 18 Wis. 244.

[a] **What Is Commencement.** — In summary proceedings, the entry of the motion, not the notice, has been held the commencement of the suit. Bellanfont v. Coleman, 7 Heisk. (Tenn.) 559. But see Stanley v. Mobile Bank, 23 Ala. 652, holding the notice is the commencement of the suit. Compare generally the title "Suits and Actions."

[b] **Notice of Motion Serves the Purpose of Both Process and Pleading.** But the accuracy necessary in a declaration at common law is not required. Timberlake v. Brewer, 59 Ala. 108.

36. **Colo.**—*In re* Browne, 2 Colo. 553. **Ky.**—Moorar v. Covington City Nat. Bank, 80 Ky. 305. **N. J.**—McCarter v. Finch, 55 N. J. Eq. 245, 36 Atl. 937.

37. Bullock v. Angleman, 82 N. J. Eq. 23, 87 Atl. 627.

38. Collins v. White Oak Fuel Co., 69 W. Va. 292, 71 S. E. 277.

39. See generally the statutes and Collins v. White Oak Fuel Co., 69 W. Va. 292, 71 S. E. 277; State v. Keadle, 44 W. Va. 594, 29 S. E. 976.

[a] **Statute Is Permissive.**—Collins v. White Oak Fuel Co., 69 W. Va. 292, 71 S. E. 277.

40. See 16 STANDARD PROC. 908, 907, 904, 855; 10 STANDARD PROC. 985; State *ex rel.* Mynatt v. King, 137 Tenn. 17, 30, 191 S. W. 352; State *ex rel.* Timothy v. Howse, 134 Tenn. 67, 183 S. W. 510, Ann. Cas. 1917C, 1125.

41. See 18 STANDARD PROC. 853, and generally the title "References."

42. Board of Health v. Hayes, 79 N. J. L. 151, 74 Atl. 339. See Landro v. Great Northern R. Co., 122 Minn. 87, 141 N. W. 1103, and next following note.

[a] **There can be no judgment,** properly speaking, in a summary proceeding although the final order is frequently spoken of as one. Seymour v. Hughes, 105 N. Y. Supp. 249.

[b] **Liability of defendant must be shown in judgments by default.** Arthur v. State, 22 Ala. 61.

[c] **Notice must be shown.** Caldwell v. Guinn, 54 Ala. 64; Arthur v. State, 22 Ala. 61.

[d] **But details of the testimony** need not be set out. Snell v. Rawlings, 3 Humph. (Tenn.) 85.

**Decision as a bar,** see 15 STANDARD PROC. 559.

43. **U. S.**—Thatcher v. Powell, 6 Wheat. 119, 5 L. ed. 221. **Ala.**—Ratliff v. Allgood, 72 Ala. 119. **Ia.**—Morrow v. Weed, 4 Iowa 77, 66 Am. Dec. 122. **N. J.**—Orange v. McConnell, 71 N. J. L. 418, 59 Atl. 97.

See 17 STANDARD PROC. 664.

[a] **The judgment must recite all the facts necessary to give the court jurisdiction.** Arthur v. State, 22 Ala. 61; Wynne v. Taylor, 5 Heisk. (Tenn.) 691; Garner v. Carroll, 7 Yerg. (Tenn.) 365.

**As to presumptions,** see 15 STANDARD PROC. 426, 432.

44. Ratliff v. Allgood, 72 Ala. 119.

45. Webb v. Durham, 29 N. C. 130; East Tennessee Brew. Co. v. Currier, 126 Tenn. 535, 150 S. W. 541. See the title "Certiorari."



review may sometimes be had by appeal.<sup>46</sup>

**X. POSSESSORY WARRANT.**—Statutes sometimes provide for a proceeding by possessory warrant, to recover possession of personal property in controversy which has been taken or carried away by fraud, violence or other means from plaintiff's possession.<sup>47</sup> The warrant<sup>48</sup> is issued on complaint on oath<sup>49</sup> to a judge in any county where the property may be found.<sup>50</sup> The only issue in such proceeding is that of possession.<sup>51</sup> If possession is awarded to the plaintiff, a forthcoming bond must be given.<sup>52</sup> Every decision on a possessory warrant may be reviewed on certiorari.<sup>53</sup>

**XI. PROCEEDINGS AGAINST JOINT DEBTORS.**—Some statutes provide that when a judgment is recovered against one or more of several joint debtors, those who were not originally served with summons, and did not appear, may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served. The defendant may answer and the issues formed thereby may be tried as in other cases.<sup>54</sup> In some

46. On disbarment of attorneys, see 2 STANDARD PROC. 183.

In contempt cases, see 5 STANDARD PROC. 426, and 2 STANDARD PROC. 184.

[a] The same presumptions indulged on appeal in regular proceedings attach when the proceedings are summary. *Shouse v. Lawrence*, 51 Ala. 559.

47. Ga. Code, 1910, §5371; *Cobb v. Megrath*, 36 Ga. 625; *Mills v. Glover*, 22 Ga. 319; *Copeland v. Lucas*, 6 Ga. App. 6, 64 S. E. 113.

[a] This is a mere summary mode of transferring personal property to await the main trial of a case. *Jordan v. Owens*, 67 Ga. 616; *Butler v. Lazenby*, 8 Ga. App. 88, 68 S. E. 521.

[b] For Recovery of Personal Property Only.—*Gainus v. Martin*, 10 Ga. App. 210, 72 S. E. 1100.

48. See *infra*, this note.

[a] The warrant directs the seizure of the property specified therein and the arrest of the defendant. *Hill v. State*, 8 Ga. App. 77, 68 S. E. 614. See *Savannah G. & N. A. R. Co. v. Wilcox G. & Co.*, 48 Ga. 432.

[b] The officer executing the warrant is custodian of the property until final judgment in the proceeding. *Sumner v. Bell*, 118 Ga. 240, 44 S. E. 973.

49. *Mills v. Glover*, 22 Ga. 319.

[a] Previous possession of complainant must be shown. *Cobb v. Megrath*, 36 Ga. 625.

50. *Jordan v. Owens*, 67 Ga. 616.

51. *Mills v. Glover*, 22 Ga. 319.

[a] Title cannot be investigated. *Cicero v. Scaife*, 129 Ga. 333, 335, 58 S. E. 850; *Cobb v. Megrath*, 36 Ga. 625; *Mills v. Glover*, 22 Ga. 319.

52. *Cicero v. Scaife*, 129 Ga. 333, 58 S. E. 850; *Hillyer v. Brogden*, 67 Ga. 24.

[a] On failure of plaintiff to give security, possession of the property may be awarded to the defendant on his entering into like security. The statute applies only when judgment is rendered for the plaintiff. If the defendant was in peaceable possession of the property, and judgment for him is awarded, a bond is not required. *Bush v. Rawlins*, 80 Ga. 583, 5 S. E. 761.

53. *Jordan v. Owens*, 67 Ga. 616.

[a] Disposition of Proceeding.—On certiorari, the judge may remand the case or give final judgment. *Sheriff v. Thompson*, 116 Ga. 436, 42 S. E. 738; *Butler v. Lazenby*, 8 Ga. App. 88, 68 S. E. 521; *Monk v. Gay*, 3 Ga. App. 356, 59 S. E. 1117.

54. See generally the statutes and the following cases: Cal.—*Cooper v. Burch*, 140 Cal. 548, 74 Pac. 37; *Sneath v. Griffin*, 48 Cal. 438; *Tay, Brooks & Backus v. Hawley*, 39 Cal. 93. Kan.—*Robinson v. Kinney*, 2 Kan. 184. N. C.—*The Navassa Guano Co. v. Willard*, 73 N. C. 521. Wis.—*Dill v. White*, 52 Wis. 456, 9 N. W. 404.

[a] Statutory Method Is Exclusive. *Cooper v. Burch*, 140 Cal. 548, 74 Pac.

states an action on the judgment is brought in which a verified complaint and answer is filed.<sup>55</sup>

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| <p>37; <i>Tay, Brooks &amp; Backus v. Hawley</i>, 39 Cal. 93.</p> <p>[b] <b>Proceeding Is in Nature of Action on Judgment.</b>—<i>Cooper v. Burch</i>, 140 Cal. 548, 74 Pac. 37.</p> <p>[c] <b>Only on Joint Obligation Is Proceeding Proper.</b>—<i>Davis v. Sanderlin</i>, 119 N. C. 84, 25 S. E. 815; <i>Dill v. White</i>, 52 Wis. 456, 9 N. W. 404.</p> | <p>[d] <b>Debtor May File Answer.</b> <i>Cooper v. Burch</i>, 140 Cal. 548, 74 Pac. 37.</p> <p>55. <i>Hofferberth v. Nash</i>, 117 App. Div. 284, 102 N. Y. Supp. 317; <i>Bath Gas Light Co. v. Rowland</i>, 84 App. Div. 563, 82 N. Y. Supp. 841. See <i>Long v. Stafford</i>, 103 N. Y. 274, 8 N. E. 522; <i>Maples v. Mackey</i>, 89 N. Y. 146.</p> |
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**SUMMONS.**—See **Equity Jurisdiction and Procedure; Process; Service of Process and Papers; Suits and Actions.**

Vol. XXIV

# SUNDAY AND HOLIDAYS

By the Editorial Staff.

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For further references and cross-references, see the index to this work and the cross-references throughout this article.

## I. JUDICIAL ACTS AND PROCEEDINGS. — A. ON SUNDAYS.

1. **In General.** — The common law regards Sunday as dies non juridicus,<sup>1</sup> and prohibits the performance thereon of acts that are purely judicial,<sup>2</sup> as distinguished from those that are ministerial,<sup>3</sup> in their

1. **Kan.**—*Parsons v. Lindsay*, 41 Kan. 336, 21 Pac. 227, 13 Am. St. Rep. 290, 3 L. R. A. 658. **Mont.**—*Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798. **N. C.**—*State v. Howard*, 82 N. C. 623. **Ore.**—*Ex parte Tice*, 32 Ore. 179, 49 Pac. 1038. **Pa.**—*Whiteside v. Flora*, 27 Pa. Co. Ct. 25. **Tenn.**—*Styles v. Harrison*, 99 Tenn. 128, 41 S. W. 333, 63 Am. St. Rep. 824. **Tex.**—*Hanover F. Ins. Co. v. Shrader*, 89 Tex. 35, 32 S. W. 872, 33 S. W. 112, 59 Am. St. Rep. 25, 30 L. R. A. 498. **Vt.**—*Adams v. Cook*, 91 Vt. 281, 100 Atl. 42.

2. **Ark.**—*Tucker v. West*, 29 Ark. 386. **Cal.**—*Heisen v. Smith*, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39. **Ga.**—*Henderson v. Reynolds*, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327. **Ind.**—*Hadley v. Musselman*, 104 Ind. 459, 3 N. E. 122. **Kan.**—*Parsons v. Lindsay*, 41 Kan. 336, 21 Pac. 227, 13 Am. St. Rep. 290, 3 L. R. A. 658. **Mass.**—*Johnson v. Day*, 17 Pick. 106. **Mich.**—*Peck v. Cavell*, 16 Mich. 9. **Mont.**—*Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798. **Nev.**—*State v. Calif. Min. Co.*, 13 Nev. 203. **N. J.**—See *Glenn v. Eddy*, 51 N. J. L. 255, 17 Atl. 145, 14 Am. St. Rep. 684. **N. Y.**—*Butler v. Kelsey*, 15 Johns. 177. **Ore.**—*Ex parte Tice*,

32 Ore. 179, 49 Pac. 1038. **Pa.**—*In re Stern's Appeal*, 64 Pa. 447. **Vt.**—*Adams v. Cook*, 91 Vt. 281, 100 Atl. 42.

[a] **Origin of rule**, see *Merritt v. Earle*, 31 Barb. (N. Y.) 38.

3. **U. S.**—*In re Worthington*, 7 Biss. 455, 30 Fed. Cas. No. 18,051. **Ala.**—*Matthews v. Ansley*, 31 Ala. 20. **Ia.**—*State v. Ryan*, 113 Iowa 536, 85 N. W. 812. **Ind.**—*Hadley v. Musselman*, 104 Ind. 459, 3 N. E. 122. **Nev.**—*State v. Calif. Min. Co.*, 13 Nev. 203. **Vt.**—*Adams v. Cook*, 91 Vt. 281, 100 Atl. 42; *Lyon v. Strong*, 6 Vt. 219. **Eng.**—*Drury v. Defontaine*, 1 Taunt. 131, 127 Eng. Reprint 781; *Wilson v. Tucker*, 1 Salk. 78, 91 Eng. Reprint 74.

[a] **Filing complaint**, a ministerial act, may be done on Sunday. *Havens v. Stiles*, 8 Idaho 250, 67 Pac. 919, 101 Am. St. Rep. 195, 56 L. R. A. 736.

**Issuance and service of process**, see *infra*, I, A, 2.

[b] **The approval of an appeal bond** is not judicial business within the meaning of a statute providing that "no court can be open, nor can any judicial business be transacted, on Sunday, or on any legal holiday." *Deere, Wells & Co. v. Hodges*, 59 Neb. 288, 80 N. W. 897.

nature. The matter has received legislative attention in most states;<sup>4</sup> the statutes in general adopt and reaffirm the common law rule,<sup>5</sup> but recognize exceptions thereto in cases where necessity or urgency would require the act to be done.<sup>6</sup> A statute prohibiting "judicial business,"<sup>7</sup> or forbidding a court to be open or to transact business,<sup>8</sup> does not, it has been held, prevent even judicial, as distinguished from ministerial, acts, if they are not performed by a court as such.

**2. Issuance and Service of Process and Notices.**—a. *Civil Process.*—The issuance of process on Sunday is not illegal,<sup>9</sup> unless it is regarded as a judicial act,<sup>10</sup> or is forbidden by statute.<sup>11</sup> Though

4. See the statutes.

5. **Ala.**—Haynes *v.* Sledge, 2 Port. 530, 27 Am. Dec. 665. **Ill.**—Johnston *v.* People, 31 Ill. 469. **Ind.**—Chapman *v.* State, 5 Blackf. 111. **Kan.**—Parsons *v.* Lindsay, 41 Kan. 336, 21 Pac. 227, 13 Am. St. Rep. 290, 3 L. R. A. 658. **La.**—Foy *v.* Harper, 3 La. Ann. 275. **Mont.**—Hauswirth *v.* Sullivan, 6 Mont. 203, 9 Pac. 798. **Nev.**—State *v.* California Min. Co., 13 Nev. 203. **N. Y.**—Vanderwerker *v.* People, 5 Wend. 530; Rice *v.* Mead, 22 How. Pr. 445. **Ore.**—*Ex parte* Tice, 32 Ore. 179, 49 Pac. 1038. **Pa.**—*In re* Stern's Appeal, 64 Pa. 447. **Tex.**—Hanover F. Ins. Co. *v.* Shrader, 89 Tex. 35, 32 S. W. 872, 33 S. W. 112, 59 Am. St. Rep. 25, 30 L. R. A. 498. **Wash.**—State *v.* Straub, 16 Wash. 111, 47 Pac. 227.

6. See the statutes and Deere, Wells & Co. *v.* Hodges, 59 Neb. 288, 80 N. W. 897; A. G. Spalding & Bros. *v.* Bernhard, 76 Wis. 368, 44 N. W. 643, 20 Am. St. Rep. 75, 7 L. R. A. 423.

**Attachment on Sunday**, see 3 STANDARD PROC. 468.

**Injunction on Sunday**, see 13 STANDARD PROC. 178.

**Criminal process**, see *infra*, I, A, 2, b.

7. Deere, Wells & Co. *v.* Hodges, 59 Neb. 288, 80 N. W. 897, approval of appeal bond.

8. A. G. Spalding & Bros. *v.* Bernhard, 76 Wis. 368, 44 N. W. 643, 20 Am. St. Rep. 75, 7 L. R. A. 423, approval by court commissioner, of bond of assignee for creditors. "To extend the statute beyond its language, plainly expressed, and apply it to the action of a mere court commissioner or even of a judge at chambers, would be an attempt at judicial legislation."

9. **Idaho.**—Havens *v.* Stiles, 8 Idaho 250, 67 Pac. 919, 101 Am. St. Rep. 195, 56 L. R. A. 736. **Mass.**—Johnson *v.*

Day, 17 Pick. 106. **N. H.**—Clough *v.* Shepherd, 31 N. H. 490. **N. Y.**—Van Vechten *v.* Paddock, 12 Johns. 178, 7 Am. Dec. 303. **Ohio.**—Hastings *v.* Columbus, 42 Ohio St. 585.

[a] **Summons** issued on Sunday valid. Havens *v.* Stiles, 8 Idaho 250, 67 Pac. 919, 101 Am. St. Rep. 195, 56 L. R. A. 736.

[b] **Attachment** issued on Sunday valid. Matthews *v.* Ansley, 31 Ala. 20.

**Executions**, issuance on Sundays and holidays, see 15 STANDARD PROC. 755.

[c] **The award of judicial writs** is a judicial act and void if done on Sunday. But the issuing of original process . . . is merely ministerial. Com. Dig. 'Temps.' B. 3.

[d] **Process issued by a ministerial officer** is not "process awarded by a court" within the meaning of the common law prohibition against a court awarding process on Sunday. Clough *v.* Shepherd, 31 N. H. 490.

10. Valentine *v.* Roberts, 1 Alaska 536; Van Vechten *v.* Paddock, 12 Johns. (N. Y.) 178, 7 Am. Dec. 303. See Goodlett *v.* Hansell, 56 Ala. 346, and 17 STANDARD PROC. 1012, note 2.

**Issuance of process generally a ministerial act**, see 21 STANDARD PROC. 692.

[a] **The ground upon which it is considered a judicial act** is that the awarding of a process is to be presumed to be done by the court whilst it is actually sitting. "This seems to be carrying a presumption or fiction of law to a great length, and cannot well be reconciled with the established rule that legal fictions are not to be permitted to work injustice, and to set aside proceedings, which but for the fiction or presumption would be legal and valid." Johnson *v.* Day, 17 Pick. (Mass.) 106.

11. **Pa.**—See the statutes, and

service of process on Sunday was not illegal at the early common law,<sup>12</sup> it was in time forbidden by statute in England,<sup>13</sup> and comes within the implied or express prohibition of the Sunday laws in many,<sup>14</sup> but not all,<sup>15</sup> of the American states. Circumstances of necessity may justify the issuance and execution of writs and process on Sunday even in states where such acts would ordinarily be prohibited.<sup>16</sup>

*Whiteside v. Flora*, 27 Pa. Co. Ct. 25. **Tenn.**—*Helm v. Rodgers*, 5 Humph. 105. **Tex.**—*Crabtree v. Whiteselle*, 65 Tex. 111.

12. *Mackalley's Case*, 9 Coke 65b, 77 Eng. Reprint 828. See **Ala.**—*Matthews v. Ansley*, 31 Ala. 20. **Mass.**—*Johnson v. Day*, 17 Pick. 106. **Ohio.**—*Hastings v. Columbus*, 42 Ohio St. 585.

13. Statute 29 Car. II c. 7 (1 St. at L., Rev. ed. 779).

[a] This statute is recognized as part of the common law (1) in some jurisdictions in our country (*Valentine v. Roberts*, 1 Alaska 536), but (2) not in others. *Matthews v. Ansley*, 31 Ala. 20; *Hastings v. Columbus*, 42 Ohio St. 585.

14. **Ark.**—*Swinney v. Johnson*, 18 Ark. 534; *Haines v. McCormick*, 5 Ark. 663. **Ill.**—*Scammon v. Chicago*, 40 Ill. 146. **Kan.**—*Morris v. Shew*, 29 Kan. 661. **Ky.**—*Moore v. Hagan*, 2 Duv. 437. **La.**—*Foy v. Harper*, 3 La. Ann. 275. **Mich.**—*Anderson v. Biree*, 3 Mich. 280. **Neb.**—*Bryant v. State*, 16 Neb. 651, 21 N. W. 406. **N. H.**—*Shaw v. Dodge*, 5 N. H. 462. **N. J.**—*Jewett v. Bowman*, 27 N. J. Eq. 275. **N. Y.**—*Scott Shoe Mach. Co. v. Dancel*, 63 App. Div. 172, 71 N. Y. Supp. 263; *Vanderpool v. Wright*, 1 Cow. 209; *Field v. Park*, 20 Johns. 140. **N. C.**—*Devries & Co. v. Summit*, 86 N. C. 126. **Pa.**—*Com. v. De Puyter*, 16 Pa. Co. Ct. 589. **Tex.**—*Crabtree v. Whiteselle*, 65 Tex. 111. **Vt.**—*Fifield v. Wooster*, 21 Vt. 215; *Cavendish v. Weathersfield Turnpike Co.*, 2 Vt. 531.

[a] Though regarded as a ministerial act it is forbidden in some states. *Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798.

[b] Levy of distress warrant on Sunday, illegal. *Mayfield v. White*, 1 Browne (Pa.) 241.

[c] Execution of sequestration on Sunday, void. *Foy v. Harper*, 3 La. Ann. 275.

Levy of execution on Sunday has

been declared void. 15 STANDARD PROC. 920.

[d] Service of summons on a state superintendent of insurance appointed by law as agent of a foreign corporation for purpose of receiving service of process, is not invalidated by a statute prohibiting transaction of business in offices of the state on holidays, for the reason that as regards the receiving of a summons, etc., the superintendent is the agent of the corporation, not the servant of the state. *Flynn v. Union Surety & G. Co.*, 170 N. Y. 145, 63 N. E. 61.

[e] That publication in a Sunday newspaper does not constitute legal service see **Colo.**—*Schwed v. Hartwitz*, 23 Colo. 187, 47 Pac. 295, 58 Am. St. Rep. 221. **Ga.**—*Sawyer v. Cargile*, 72 Ga. 290. **Ill.**—*Scammon v. Chicago*, 40 Ill. 146. **Ind.**—*Shaw v. Williams*, 87 Ind. 158, 44 Am. Rep. 756. **Ky.**—*Ormsby v. Louisville*, 79 Ky. 197. **S. D.**—*McLaughlin v. Wheeler*, 2 S. D. 379, 50 N. W. 834. *Contra*, *Heisen v. Smith*, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39; *Savings & Loan Soc. v. Thompson*, 32 Cal. 347; *Hastings v. Columbus*, 42 Ohio St. 585.

[f] Service of process on Sunday irregular but it does not invalidate the judgment. *Comer v. Jackson*, 50 Ala. 384.

15. *Heisen v. Smith*, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39; *Hastings v. Columbus*, 42 Ohio St. 585.

[a] "Judicial business" prohibited by statute on Sundays and holidays may be "somewhat broader in meaning than the expression 'judicial acts' used by Coke. But it can hardly be extended to the service of process, or other ministerial acts, and certainly not to the publication of service." *Heisen v. Smith*, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39, 41.

16. *Langabier v. Fairbury P. & N. W. R. Co.*, 64 Ill. 243, 16 Am. Rep. 550; *Volz v. Tutt*, 12 Ky. L. Rep. 506.



b. *Criminal Process*.<sup>17</sup> — The issuance of criminal, like that of civil, process, is a ministerial act and may be performed on Sunday.<sup>18</sup> Considerations of necessity and public policy, moreover, justify the execution of such process on Sunday,<sup>19</sup> and it is authorized both at common law and under the statutes.<sup>20</sup>

c. *Notice and Other Papers*. — Not only is the execution of process on Sunday made illegal in some states, but the prohibition extends as well to the service of notice and other papers.<sup>21</sup> But unless there is some statutory inhibition against the giving of notice on Sunday it may be done with the same effect as on other days.<sup>22</sup>

3. *Return of Process or Notice*. — Process or notice should not be made returnable on Sunday,<sup>23</sup> nor is a return made on Sunday suffi-

*Injunction* see 13 STANDARD PROC. 178.

*Issuance of attachment on Sundays and holidays*, see 3 STANDARD PROC. 468.

17. *Bail*, see *infra*, I, A, 4.

18. *State v. Conwell*, 96 Me. 172, 51 Atl. 873, 90 Am. St. Rep. 333.

19. *State v. Conwell*, 96 Me. 172, 51 Atl. 873, 90 Am. St. Rep. 333.

20. *Ala.*—*Parish v. State*, 130 Ala. 92, 30 So. 474. *Conn.*—*Ward v. Green*, 11 Conn. 455. *Ga.*—*Weldon v. Colquitt*, 62 Ga. 449, 35 Am. Rep. 128. *Ky.* *Watts v. Com.*, 5 Bush. 309. *Me.*—*State v. Conwell*, 96 Me. 172, 51 Atl. 873, 90 Am. St. Rep. 333. *Mass.*—*Wright v. Dressel*, 140 Mass. 147, 3 N. E. 6.

But see *Wood v. Brooklyn*, 14 Barb. (N. Y.) 425.

[a] *Search Warrants*.—*State v. Conwell*, 96 Me. 172, 51 Atl. 873, 90 Am. St. Rep. 333; *Wright v. Dressel*, 140 Mass. 147, 3 N. E. 6; *Pearce v. Atwood*, 13 Mass. 324.

[b] *Only in cases of treason, felony and breach of the peace*. *Ohio.*—*Ex parte Carroll*, 9 Ohio Dec. (Reprint) 261. *Pa.*—*Com. v. DePuyter*, 16 Pa. Co. Ct. 589. *Vt.*—*Corbett v. Sullivan*, 54 Vt. 619.

21. *U. S.*—*Chesapeake & O. Canal Co. v. Bradley*, 4 Cranch C. C. 193, 5 Fed. Cas. No. 2,646. *N. Y.*—*Field v. Park*, 20 Johns. 140. *Pa.*—*Rheem v. Carlisle Deposit Bank*, 76 Pa. 132; *In re Stern's Appeal*, 64 Pa. 447. *Eng.* *Roberts v. Monkhouse*, 8 East 547, 103 Eng. Reprint 453.

[a] *Where notice of a motion is served on Sunday, the motion will be overruled, even though the parties have appeared according to the notice*. *Chesapeake & O. Canal Co. v. Brad-*

*ley*, 4 Cranch C. C. 193, 5 Fed. Cas. No. 2,646.

[b] *Demand for property made on Sunday is a nullity*. *Brackett v. Edgerton*, 14 Minn. 174, 100 Am. Dec. 211.

22. *State v. Ryan*, 113 Iowa 536, 85 N. W. 812.

[a] *Notice of the examination of a witness whose name was not endorsed on the indictment, is good though given on Sunday*. *State v. Ryan*, 113 Iowa 536, 85 N. W. 812.

[b] *Notice of hearing, dated on Sunday, held good*. *Taylor v. Thomas*, 2 N. J. Eq. 106.

[c] *Notice published in Sunday Newspaper held good*. *Nixon v. Burlington*, 141 Iowa 316, 115 N. W. 239; *Schenck v. Schenck*, 52 La. Ann. 2102, 28 So. 302.

23. See 21 STANDARD PROC. 728.

[a] *That process is merely irregular when made returnable on Sunday* see *Lawrence Harbor Colony v. American Surety Co.*, 70 N. J. L. 589, 57 Atl. 390 (summons); *McEvoy v. School Dist. No. 8*, 38 N. J. Eq. 420 (subpoena); *Boyd v. Vanderkemp*, 1 Barb. Ch. (N. Y.) 273 (execution); *Gould v. Spencer*, 5 Paige (N. Y.) 541.

[b] *The court will permit an amendment to correct the process where it is erroneously made returnable on Sunday*. *U. S.*—*Norton v. Dover*, 14 Fed. 106. *N. J.*—*Lawrence Harbor Colony v. American Surety Co.*, 70 N. J. L. 589, 57 Atl. 390; *McEvoy v. School Dist. No. 8*, 38 N. J. Eq. 420. *N. Y.* *Boyd v. Vanderkemp*, 1 Barb. Ch. 273; *Gould v. Spencer*, 5 Paige 541.

[c] *Defect Waived*.—Where a *ca-peas ad respondendum* was returnable on Sunday, the defect was waived by

cient to support the proceedings based on it.<sup>24</sup>

**4. Bail.**—The taking of bail security and admitting the prisoner to bail is permissible on Sunday<sup>25</sup> as a work of necessity.<sup>26</sup>

**5. Trial or Hearing.**—A trial may not ordinarily be had on Sunday<sup>27</sup> except in so far as allowed by statute.<sup>28</sup> But additional instructions may be given the jury on Sunday;<sup>29</sup> and a verdict may be received and entered on that day.<sup>30</sup> The court has, except in a few states, the power to discharge on Sunday a jury which on that day

putting in special bail, though without knowledge of the defect. *Wright v. Jeffrey*, 5 Cow. (N. Y.) 15.

[d] If the day appointed in the notice of final settlement of an administrator's accounts fall on Sunday, the court has no authority to act on the appointed day nor even on the day following. *McRee v. McRee*, 34 Ala. 165.

[e] An order returnable on Sunday is a nullity and the party is justified in disobeying it. *Arctic Fire Ins. Co. v. Hicks*, 7 Abb. Pr. (N. Y.) 204.

**24.** *Peck v. Cavell*, 16 Mich. 9.

[a] Return of execution on Sunday is fatal to the proceedings on the transcript based upon it. *Peck v. Cavell*, 16 Mich. 9.

**25. Ala.**—*Hammons v. State*, 59 Ala. 164, 31 Am. Rep. 13. **Ga.**—*Weldon v. Colquitt*, 62 Ga. 449, 35 Am. Rep. 128. **Ill.**—*Johnston v. People*, 31 Ill. 469. **Ind.**—*State v. Douglass*, 69 Ind. 544; *King v. Strain*, 6 Blackf. 447. **Ky.**—*Watts v. Com.*, 5 Bush. 309. **La.**—*State v. Wyatt*, 6 La. Ann. 701. **Tex.**—*Lindsay v. State*, 39 Tex. Crim. 468, 46 S. W. 1045.

**26. Ga.**—*Weldon v. Colquitt*, 62 Ga. 449, 35 Am. Rep. 128. **Ill.**—*Johnston v. People*, 31 Ill. 469. **Ky.**—*Watts v. Com.*, 5 Bush. 309.

**27. Ga.**—*Weldon v. Colquitt*, 62 Ga. 449, 35 Am. Rep. 128; *Cheeseborough v. Van Ness*, 12 Ga. 380. **Ind.**—*Chapman v. State*, 5 Blackf. 111. **Mo.**—*State v. Green*, 37 Mo. 466. **N. Y.**—*Pulling v. People*, 8 Barb. 384; *Vanderwerker v. People*, 5 Wend. 530. **N. C.**—*State v. Howard*, 82 N. C. 623.

[a] Jurisdiction of the offense, is not lost by the fact that the prisoner is tried on Sunday. *People v. Luhrs*, 79 Hun 415, 29 N. Y. Supp. 789, 9 N. Y. Crim. 266, 61 N. Y. St. 348.

[b] Should a judicial proceeding be inadvertently set for a non judicial day, the court may meet upon that day to continue the matter to a secular

day. *Cheeseborough v. Van Ness*, 12 Ga. 380.

**28.** *Watts v. Com.*, 5 Bush (Ky.) 309.

[a] A preliminary hearing on Sunday authorized. *Watts v. Com.*, 5 Bush (Ky.) 309.

**29.** 13 STANDARD PROC. 971.

**30. U. S.**—*Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. ed. 127. **Ala.**—*Sanford v. State*, 143 Ala. 78, 39 So. 370; *Simmons v. State*, 129 Ala. 41, 29 So. 929; *Chamblee v. State*, 78 Ala. 466. **Fla.**—*Hodge v. State*, 29 Fla. 500, 10 So. 556. **Ga.**—*Rawlins v. State*, 124 Ga. 31, 52 S. E. 1; *Weaver v. Carter*, 101 Ga. 206, 28 S. E. 869; *Bernstein v. Myers*, 99 Ga. 90, 24 S. E. 854. **Ill.**—*Baxter v. People*, 8 Ill. 368; *Kankakee & S. R. Co. v. Horan*, 23 Ill. App. 259. **Ind.**—*Jones v. Johnson*, 61 Ind. 257; *McCorkle v. State*, 14 Ind. 39. **Kan.**—*Stone v. Bird*, 16 Kan. 488. **Ky.**—*Meece v. Com.*, 78 Ky. 586; *Bales v. Com.*, 11 Ky. L. Rep. 297, 11 S. W. 470. **La.**—*State v. Ford*, 37 La. Ann. 443. **Me.**—*True v. Plumley*, 36 Me. 466. **Mo.**—*State v. Crisp*, 126 Mo. 605, 29 S. W. 699; *State v. Wilson*, 121 Mo. 434, 26 S. W. 357. **Nev.**—*State v. Rover*, 13 Nev. 17. **N. H.**—*Webber v. Merrill*, 34 N. H. 202. **N. J.**—*Van Riper v. Van Riper*, 4 N. J. L. 156, 7 Am. Dec. 576. **N. M.**—*Territory v. Nichols*, 3 N. M. 103, 2 Pac. 78. **N. C.**—*Taylor v. Ervin*, 119 N. C. 274, 25 S. E. 875. **Okl.**—*Milligan v. Territory*, 2 Okla. 164, 37 Pac. 1059. **Pa.**—*Com. v. Marra*, 8 Phila. 440; *Huidekoper v. Cotton*, 3 Watts 56. **S. C.**—*Hiller v. English*, 4 Strobb. 486. **Tex.**—*Moore v. State*, 49 Tex. Crim. 43, 90 S. W. 499; *Brown v. State*, 32 Tex. Crim. 119, 22 S. W. 596. **Vt.**—*Adams v. Cook*, 91 Vt. 281, 100 Atl. 42. **Wash.**—*State v. Straub*, 16 Wash. 111, 47 Pac. 227.

See 18 STANDARD PROC. 101.

has arrived at a verdict.<sup>31</sup> It may also in some states,<sup>32</sup> but not in others,<sup>33</sup> ascertain on Sunday the fact that the jury is unable to agree and forthwith order its discharge.

**6. Judgment.**—A judgment cannot be rendered,<sup>34</sup> nor entered<sup>35</sup> on Sunday, unless there is statutory authorization therefor.<sup>36</sup>

**7. Proceedings in Review.**—An undertaking or bond on appeal executed on Sunday is valid<sup>37</sup> since it is not the transaction of judicial business.<sup>38</sup> The clerk of court is not, in the absence of statutory requisition, obliged to take appeals on Sunday.<sup>39</sup> Presentation and signing of bills of exception on Sunday is unlawful where no necessity exists to justify it.<sup>40</sup>

**B. ON HOLIDAYS.**—Although the statutes of the various states make various provisions with regard to holidays,<sup>41</sup> a holiday is not "dies non" unless declared so by statute,<sup>42</sup> and judicial business may be transacted on such a day unless prohibited by statute.<sup>43</sup> Thus,

31. See 17 STANDARD PROC. 612.

32. *People v. Lightner*, 49 Cal. 226.

33. *Ex parte Tice*, 32 Ore. 179, 49 Pac. 1038.

[a] The reason for the rule is that such an act involves a judicial determination that the jury cannot agree, which is judicial business and invalid if performed on Sunday. *Ex parte Tice*, 32 Ore. 179, 49 Pac. 1038.

34. **U. S.**—*Ball v. United States*, 140 U. S. 118, 11 Sup. Ct. 761, 35 L. ed. 377. **Ga.**—*Henderson v. Reynolds*, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327. **Ill.**—*Johnston v. People*, 31 Ill. 469; *Baxter v. People*, 8 Ill. 368. **Ind.**—*Chapman v. State*, 5 Blackf. 111. **Ia.**—*Davis v. Fish*, 1 G. Gr. 406, 48 Am. Dec. 387. **Kan.**—*Parsons v. Lindsay*, 41 Kan. 336, 21 Pac. 227, 13 Am. St. Rep. 290, 3 L. R. A. 658. **Ky.**—*Arthur v. Mosby*, 2 Bibb 589. **N. Y.**—*Allen v. Godfrey*, 44 N. Y. 433. **Nev.**—*Ex parte White*, 15 Nev. 146, 37 Am. Rep. 466. **Ore.**—*Ex parte Tice*, 32 Ore. 179, 49 Pac. 1038. **Tenn.**—*Styles v. Harrison*, 99 Tenn. 128, 41 S. W. 333, 63 Am. St. Rep. 824. **Tex.**—*Shearman v. State*, 1 Tex. App. 215, 28 Am. Rep. 402. **Vt.**—*Blood v. Bates*, 31 Vt. 147.

See 14 STANDARD PROC. 978.

35. 14 STANDARD PROC. 833. Compare 18 STANDARD PROC. 101, notes 95 and 96.

**A Limitation.**—It is only the clerical act of spreading the judgment upon the record that may be done on this day. 14 STANDARD PROC. 1005. As to rendition, see *supra*, this section.

Judgment by confession may be entered. 14 STANDARD PROC. 816.

36. See the statutes.

[a] Where a verdict is received on Sunday judgment may be rendered thereon under a statute which directs that upon a return of a verdict judgment shall be rendered forthwith. *Neb.*—*Thompson v. Church*, 13 Neb. 287, 13 N. W. 626. **N. C.**—*Taylor v. Ervin*, 119 N. C. 274, 25 S. E. 875. **Wis.**—*Wearne v. Smith*, 32 Wis. 412. See 14 STANDARD PROC. 1005; 18 STANDARD PROC. 101, note 96.

37. *State v. California Min. Co.*, 13 Nev. 203.

38. *State v. California Min. Co.*, 13 Nev. 203.

39. *Russell v. Pickering*, 17 Ill. 31.

40. *Palmer v. State*, 136 Ind. 393, 36 N. E. 130.

41. See generally the statutes.

**Entry of confession of judgment**, see 14 STANDARD PROC. 816.

42. **Del.**—*Gehring v. Pfrommer*, 1 Marv. 336, 40 Atl. 1124, 2 Hardesty 76. **N. Y.**—*Carey v. Reilley*, 20 Misc. 610, 46 N. Y. Supp. 449. **Tex.**—*Crabtree v. Whiteselle*, 65 Tex. 111.

[a] **Holiday Not the Same as Sunday.**—*Glenn v. Eddy*, 51 N. J. L. 255, 17 Atl. 145, 14 Am. St. Rep. 684, quoted in *A. G. Spaulding & Bros. v. Bernhard*, 76 Wis. 368, 44 N. W. 643, 20 Am. St. Rep. 75, 7 L. R. A. 423.

43. **Kan.**—*Selders v. Boyle*, 5 Kan. App. 451, 49 Pac. 320. **S. C.**—*Mitchell v. Bates*, 57 S. C. 44, 35 S. E. 420. **Tex.**—*Pender v. State*, 12 Tex. App. 496.

[a] The prohibition extends no fur-



unless the statute forbids, a trial may be had on a holiday,<sup>44</sup> a jury instructed,<sup>45</sup> a verdict received,<sup>46</sup> or a judgment rendered.<sup>47</sup> A statute which forbids judicial acts on a holiday has been held not to include the issuance of process,<sup>48</sup> a summons made returnable,<sup>49</sup> an indictment returned,<sup>50</sup> or a deposition taken<sup>51</sup> on such a day.

Service may be made on holidays in some jurisdictions only under exceptional circumstances,<sup>52</sup> as where the officer having the process believes that service cannot be made if delayed until after the holiday,<sup>53</sup> and in such a case it must be made to appear, in the manner prescribed by statute, that the case was within the exception.<sup>54</sup>

**II. ACTIONS ON SUNDAY CONTRACTS.**—A. RETURN OF CONSIDERATION.—Statutes in a number of states provide that in an action upon a contract executed on Sunday, the defense that it was so executed may not be interposed until the defendant has returned such consideration as he may have received under the contract.<sup>55</sup>

B. PLEADING.—1. **Anticipating Defense.**—It is not necessary that the complaint anticipate the defense that the contract sued upon was executed on Sunday.<sup>56</sup>

2. **Plea or Answer.**—Where a contract made on Sunday is wholly void, the defendant may, in some jurisdictions, avail himself of this defense even though he does not set it up in his answer,<sup>57</sup> while in others the rule is that, in any aspect of the case, the defense that the

ther than is specified in the statute. *A. G. Spalding & Bros. v. Bernhard*, 76 Wis. 368, 44 N. W. 643, 20 Am. St. Rep. 75, 7 L. R. A. 423. See also *Deere, Wells & Co. v. Hodges*, 59 Neb. 288, 80 N. W. 897; *Glenn v. Eddy*, 51 N. J. L. 255, 17 Atl. 145, 14 Am. St. Rep. 684.

44. *Calhoun v. State*, 143 Ala. 11, 39 So. 378; *Reid v. State*, 53 Ala. 402, 25 Am. Rep. 627; *State v. Moore*, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696.

[a] A provision that no person shall be held to answer or appear on certain holidays means a submission to jurisdiction, and if that has already been done, a trial may lawfully be had on those days. *Michel v. Boxholm Co-op. Creamery*, 128 Iowa 706, 105 N. W. 323.

45. *McCoy v. Jordan*, 184 Mass. 575, 69 N. E. 358.

46. *State v. Atkinson*, 104 La. 570, 29 So. 279.

47. *Gehring v. Pfrommer*, 1 Marv. (Del.) 336, 40 Atl. 1124, 2 Hard. 76; *Hamer v. Sears*, 81 Ga. 288, 6 S. E. 810.

When rendition forbidden, see 14 STANDARD PROC. 979, note 61.

48. *Whipple v. Hill*, 36 Neb. 720, 55 N. W. 227, 38 Am. St. Rep. 742, 20 L. R. A. 313.

49. *Gehring v. Pfrommer*, 1 Marv. (Del.) 336, 40 Atl. 1124, 2 Hard. 76.

50. *State v. Soper*, 148 Mo. 217, 49 S. W. 1007.

51. *In re Green*, 86 Mo. App. 216.

52. See generally the statutes of the various states.

53. *Paul v. Bruce & Co.*, 9 Bush. (Ky.) 317.

54. *Paul v. Bruce & Co.*, 9 Bush. (Ky.) 317.

55. See generally the statutes and the following: Conn.—*Wetherell v. Hollister*, 73 Conn. 622, 48 Atl. 826. Ky.—*Hale v. Harris*, 28 Ky. L. Rep. 1172, 91 S. W. 660, 5 L. R. A. (N. S.) 295. Me.—*Bridges v. Bridges*, 93 Me. 557, 45 Atl. 827.

56. *DeForth v. Wisconsin & M. R. Co.*, 52 Wis. 320, 9 N. W. 17, 38 Am. Rep. 737.

57. *Jacobson v. Bentzler*, 127 Wis. 566, 107 N. W. 7, 115 Am. St. Rep. 1052, 4 L. R. A. (N. S.) 1151; *Pearson v. Kelly*, 122 Wis. 660, 100 N. W. 1064.

contract sued upon was executed on Sunday is, like infancy,<sup>58</sup> a special defense which must be specially pleaded.<sup>59</sup> Where a return of the consideration received is a necessary prerequisite to a defense of the illegality of the contract,<sup>60</sup> the plea must show that the consideration has been returned.<sup>61</sup>

**III. PENALTIES.**—**A. IN GENERAL.**—The penalty imposed in a number of states upon persons violating the Sunday laws<sup>62</sup> is recoverable in an action<sup>63</sup> or other proceeding provided by law for the purpose.<sup>64</sup> Where the statute provides a criminal as well as a civil remedy against one who violates the Sunday law, it is not necessary to pursue the former to conviction before resorting to the latter.<sup>65</sup>

**B. JOINDER.**<sup>66</sup>—Under a statute prohibiting under penalty the employment of persons on Sunday and making it a separate offense for each person so employed, the plaintiff may maintain one suit for several penalties incurred by defendant through the employment of several persons on Sunday,<sup>67</sup> and in such case he cannot be compelled to elect which of the several causes he would prosecute.<sup>68</sup>

**C. PETITION OR COMPLAINT.**—Facts rather than conclusions must be alleged,<sup>69</sup> which will bring the case within the provisions of the statute.<sup>70</sup> Should these facts reveal that the act performed was a work of necessity within the meaning of an exception to the statutory inhibition, the petition is demurrable.<sup>71</sup>

#### IV. PROSECUTIONS.—A. THE INDICTMENT, INFORMATION OR

58. *Rule v. Carey*, 178 Iowa 184, 159 N. W. 699.

59. *Rule v. Carey*, 178 Iowa 184, 159 N. W. 699.

60. See *supra*, II, A.

61. *Bridges v. Bridges*, 93 Me. 557, 45 Atl. 827.

62. **Ky.**—*Com. v. Chesapeake & O. R. Co.*, 128 Ky. 542, 108 S. W. 851; *Louisville & N. R. Co. v. Com.*, 92 Ky. 114, 17 S. W. 274. **N. Y.**—*New York v. Williams*, 48 Misc. 77, 96 N. Y. Supp. 237. **Va.**—*Puckett v. Com.*, 107 Va. 844, 57 S. E. 591.

63. *New York v. Williams*, 48 Misc. 77, 96 N. Y. Supp. 237.

[a] **Penal Action.**—*Com. v. Chesapeake & O. R. Co.*, 128 Ky. 542, 108 S. W. 851; *Louisville & N. R. Co. v. Com.*, 92 Ky. 114, 17 S. W. 274.

64. *Wells v. Com.*, 107 Va. 834, 57 S. E. 588.

[a] **Civil Warrant.**—The forfeiture imposed upon one who violates Sec. 3799 of the code (Virginia) is recoverable only by civil warrant and not by a criminal warrant. *Wells v. Com.*, 107 Va. 834, 57 S. E. 588.

65. *New York v. Williams*, 48 Misc. 77, 96 N. Y. Supp. 237.

66. See generally the title "Joinder of Actions."

67. *Com. v. Chesapeake & O. Ry. Co.*, 128 Ky. 542, 108 S. W. 851.

68. *Com. v. Chesapeake & O. R. Co.*, 128 Ky. 542, 108 S. W. 851.

69. *Louisville & N. R. Co. v. Com.*, 92 Ky. 114, 17 S. W. 274.

[a] **To allege that the act was done of the Sabbath**, is to state a fact and not a conclusion. *Louisville & N. R. Co. v. Com.*, 92 Ky. 114, 17 S. W. 274.

[b] **The allegation "was not a work of necessity or charity"** is an allegation of fact. *Louisville & N. R. Co. v. Com.*, 92 Ky. 114, 17 S. W. 274.

70. *Crippen v. Byron*, 4 Gray (Mass.) 314.

[a] **The day of the month upon which the fact happened need not be alleged.** *Louisville & N. R. Co. v. Com.*, 92 Ky. 114, 17 S. W. 274.

71. *Com. v. Chesapeake & O. R. Co.*, 128 Ky. 542, 108 S. W. 851; *Louisville & N. R. Co. v. Com.*, 92 Ky. 114, 17 S. W. 274.

**COMPLAINT.**<sup>72</sup> — In charging the offense of violating the Sunday laws each element which the statute makes a part of the offense must appear,<sup>73</sup> but more than this is not required,<sup>74</sup> it being usually sufficient to follow the language of the statute creating the offense.<sup>75</sup> It is imperative that it affirmatively appear that the act complained of was performed on a Sunday,<sup>76</sup> but the date of the particular Sunday need not be given,<sup>77</sup> other than that it must appear that it is within the statute of limitations.<sup>78</sup> Venue of the offense must appear.<sup>79</sup> The necessity for negating exceptions depends upon the general rules elsewhere treated,<sup>80</sup> and upon the local statutes and the various interpretations given them, being considered necessary in some states,<sup>81</sup> and unnecessary in others.<sup>82</sup> Clerical and grammatical errors will not invalidate an otherwise sufficient charge.<sup>83</sup> A criminal intent is seldom an element of the offense and need not be averred.<sup>84</sup>

**B. TRIAL.** — Whether or not the accused performed an act within the inhibition of the statute,<sup>85</sup> or whether such act was within one of the exceptions thereto,<sup>86</sup> is for the jury to determine.

72. See generally the title "**Indictment and Information.**"

73. **Mo.**—*State v. Carpenter*, 62 Mo. 594. **N. Y.**—*People ex rel. Poole v. Hesterberg*, 43 Misc. 510, 89 N. Y. Supp. 498. **Pa.**—*Miller v. Com.*, 24 Pa. Co. Ct. 513; *Noftsker v. Com.*, 8 Pa. Dist. 572.

See generally, 12 STANDARD PROC. 204.

[a] **An Illustration.**—A statute made playing base ball a crime when it interrupted the repose and religious liberty of the community. Under such a statute an information which only charges the playing of baseball, without alleging interruption of repose, etc., is insufficient. *People ex rel. Poole v. Hesterberg*, 43 Misc. 510, 89 N. Y. Supp. 498.

74. *Shover v. State*, 10 Ark. 259.

[a] **Ownership** need not be charged when proceeding under a statute prohibiting keeping open on Sunday. *Shover v. State*, 10 Ark. 259.

75. *State v. Crabtree*, 27 Mo. 232. See 12 STANDARD PROC. 442, 447.

76. **Ark.**—*Robinson v. State*, 38 Ark. 548. **Ga.**—*Jackson v. State*, 88 Ga. 787, 15 S. E. 905. **Ind.**—*State v. Land*, 42 Ind. 311. **Pa.**—*Com. v. Gelbert*, 170 Pa. 426, 32 Atl. 1091; *Miller v. Com.*, 24 Pa. Co. Ct. 513. **W. Va.**—*State v. Baltimore & O. R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803.

[a] **Alleging the date of the act** without specifying that the day was Sunday is sufficient. Court will take

judicial notice of the day. *State v. Bergfeldt*, 41 Wash. 234, 83 Pac. 177.

77. *Robinson v. State*, 38 Ark. 549; *Topeka v. Crawford*, 78 Kan. 583, 96 Pac. 862, 17 L. R. A. (N. S.) 1156.

78. *Jackson v. State*, 88 Ga. 787, 15 S. E. 905.

79. *Com. v. Phelps*, 170 Pa. 430, 32 Atl. 1092. See generally 12 STANDARD PROC. 426.

80. See 12 STANDARD PROC. 458.

81. *Halliburton v. State*, 71 Ark. 474, 75 S. W. 929; *Russell v. State*, 50 Ind. 174.

[a] **That it was not a work of necessity** should be alleged. *Miller v. Com.*, 24 Pa. Co. Ct. 513.

82. **Ga.**—*Seale v. State*, 121 Ga. 741, 49 S. E. 740. **Kan.**—*State v. Nesbit*, 8 Kan. App. 104, 54 Pac. 326. **Mass.**—*Com. v. Shannihan*, 145 Mass. 99, 13 N. E. 347; *Com. v. Dextra*, 143 Mass. 28, 8 N. E. 756. **W. Va.**—*State v. Baltimore & O. R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803.

83. *People v. Maguire*, 26 Cal. 635. See generally, 12 STANDARD PROC. 303.

84. *Brittin v. State*, 10 Ark. 299. See 12 STANDARD PROC. 402.

85. *Snider v. State*, 59 Ala. 64; *Heigert v. State*, 37 Ind. App. 398, 75 N. E. 850.

**Province of jury, generally**, see the title, "**Province of Judge and Jury.**"

86. **Ind.**—*Ungericht v. State*, 119 Ind. 379, 21 N. E. 1082, 12 Am. St. Rep. 419. **Pa.**—*Com. v. Gillespie*, 146 Pa. 546, 23 Atl. 393. **W. Va.**—*State v.*



C. INSTRUCTIONS. — Pursuant to the general rules elsewhere treated,<sup>87</sup> the instructions given to the jury should restrict that body's deliberations to the issues involved<sup>88</sup> without in any manner depriving the defendant of the benefit of the presumption of his innocence.<sup>89</sup>

V. IN THE COMPUTATION OF TIME. — The rules governing the inclusion or exclusion of Sundays and holidays in the computation of time are treated elsewhere in this work.<sup>90</sup>

McBee, 52 W. Va. 257, 43 S. E. 121,  
60 L. R. A. 638.

87. See the title "Instructions."

88. *Whitecomb v. State*, 30 Tex. App.  
269, 17 S. W. 258.

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89. *Johnson v. People*, 42 Ill. App.  
594.

90. See the title "Time."

Vol. XXIV

# SUPERSEDEAS AND STAY OF PROCEEDINGS

By the Editorial Staff.

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For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. DEFINITION AND NATURE.**—A. SUPERSEDEAS.—The term supersedeas is a comprehensive one,<sup>1</sup> and includes the prevention as well as the setting aside or annulling of an act.<sup>2</sup> Usually, however, the remedy is of an injunctive or prohibitive, rather than a corrective character.<sup>3</sup> A supersedeas may be either express or implied; the former with or without writ.<sup>4</sup> A writ of supersedeas is a common-law writ,<sup>5</sup> to suspend the execution of a judgment.<sup>6</sup> In modern times the term is often used synonymously with a stay of proceedings,<sup>7</sup> and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment.<sup>8</sup> In some states the

1. *Ex parte Woods*, 3 Ark. 532, 538.

[a] “**The Term Supersedeas Is a Comprehensive One.**—Sometimes it is express in its commands, at others only so by implication. In the first, when the person to whom it is directed, is commanded from the doing of an act therein mentioned; or if the act has already been done, to annul it as far as possible. In the second, it only suspends without annulling acts done before its issuing, and which before were lawful. . . . Almost every writ, whether it be of error, habeas corpus, prohibition, and the like, are, in their nature and effects to some extent writs of supersedeas.” *Ex parte Woods*, 3 Ark. 532, 538.

[b] “**A supersedeas, properly so called,** is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution has issued, it is a prohibition emanating from the court of appeal against the execution of the writ.” *Hovey v. McDonald*, 109 U. S. 150, 159, 3 Sup. Ct. 136, 27 L. ed. 888.

2. 9 Bacon Abr. 274; *Ex parte Woods*, 3 Ark. 532.

3. *Craig v. Stansburg* (Cal. App.), 174 Pac. 404.

4. 9 Bacon's Abr. 274.

[a] **Express supersedeas without writ** is where a person who has, pursuant to an authority vested in him, made an order for the doing of an act, does, by a second order, forbid the doing of the act. 9 Bacon's Abr. 274, 275.

5. *Fryer v. Austill*, 2 Stew. (Ala.) 119.

6. *Mabry v. Ross*, 1 Heisk. (Tenn.) 769.

[a] **Originally** a writ of supersedeas was a writ directed to an officer commanding him to desist from enforcing

the execution of another writ which he was about to execute or which might come into his hands. *Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 33 Pac. 123; *Tyler v. Presley*, 72 Cal. 290, 13 Pac. 856; *State v. Small*, 49 Ore. 595, 90 Pac. 1110.

[b] **It is a mere formal notice** deriving its efficacy from the order under which it issued. *Welch v. Jones*, 11 Ala. 660.

[c] **As applied to review on appeal,** the writ of supersedeas is an auxiliary process designed to supersede the enforcement of a judgment brought up by writ of error for review. *Williams v. Bruffy*, 102 U. S. 248, 26 L. ed. 135; *Dulin v. Pacific W. & C. Co.*, 98 Cal. 304, 33 Pac. 123.

[d] **In Kentucky,** the code defines a supersedeas to be a written order signed by the clerk commanding the appellee and all others to stay proceedings on the judgment or order. *Gardner v. Continental Ins. Co.*, 31 Ky. L. Rep. 69, 101 S. W. 911.

[e] **The proper function of the writ** is to stay proceedings merely. *McMinnville & M. R. Co. v. Huggins*, 7 Coldw. (Tenn.) 217.

[f] **There must be something in the course of execution,** to suspend which the writ is awarded. *Mabry v. Ross*, 1 Heisk. (Tenn.) 769.

7. *Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 33 Pac. 123; *State v. Small*, 49 Ore. 595, 90 Pac. 1110. *Compare* *Montgomery v. King*, 125 Ga. 388, 54 S. E. 135, it is not synonymous with stay of proceedings.

[a] **It is a statutory remedy** in modern practice. *Sage v. Central R. R. Co.*, 93 U. S. 412, 23 L. ed. 933.

8. *Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 33 Pac. 123; *State v. Small*, 49 Ore. 595, 90 Pac. 1110.



writ is unknown, though equivalent proceedings are provided for.<sup>9</sup> In others the supersedeas is a substitute for writ of error<sup>10</sup> or audita querela.<sup>11</sup> Although frequently ancillary to certiorari or writ of error,<sup>12</sup> supersedeas may be originally remedial, in some states.<sup>13</sup>

By implication, every writ is a supersedeas by which, although no writ of supersedeas has issued thereupon, the doing of an act is prevented.<sup>14</sup>

B. A STAY OF PROCEEDINGS has been defined to be a temporary suspension of the regular order of proceedings in a cause by direction or order of court.<sup>15</sup> It is distinct from an injunction by order,<sup>16</sup> and from an order enlarging the time to answer or plead;<sup>17</sup> but is much like an order granting a continuance.<sup>18</sup>

**II. STAY OF PROCEEDINGS.**—A. POWER OF COURT.—Courts have inherent power to stay proceedings in causes pending before them.<sup>19</sup>

B. WAIVER OF RIGHT TO STAY.—The right of a party to a stay may be waived by conduct inconsistent with a recognition of the right.<sup>20</sup>

C. GROUNDS.—1. Generally.—Proceedings may be stayed in a

9. See *State v. Small*, 49 Ore. 595, 90 Pac. 1110.

10. *Williams v. Bruffy*, 102 U. S. 248, 26 L. ed. 135 (under Virginia practice); *Wingfield v. Crenshaw*, 3 Hen. & M. (13 Va.) 245.

[a] The writ is only allowed when (1) the court is of the opinion that the decision complained of ought to be reviewed. The court's action on the application is a determination whether or not the record presents a sufficient question for the consideration of the court. *Williams v. Bruffy*, 102 U. S. 248, 26 L. ed. 135. (2) It is the proper remedy only where error is apparent on the face of the record. *Wingfield v. Crenshaw*, 3 Hen. & M. (13 Va.) 245.

11. See *infra*, IV.

12. *Edmondson v. King*, 1 Overt. (Tenn.) 425. See *infra*, VII.

13. *Edmondson v. King*, 1 Overt. (Tenn.) 425. See *infra*, V, A, 10.

14. 9 Bacon Abr. 275. And see *Ex parte Woods*, 3 Ark. 532, 538. See *infra*, VI, IX and X.

15. *Rossiter v. Aetna L. Ins. Co.*, 96 Wis. 466, 71 N. W. 898. See *Black Law Dict.*

[a] It operates in relation to something within the usual course of judicial proceedings and which the court by its authority over the parties and their attorneys can regulate and control without resort to a writ of in-

junction. *Rossiter v. Aetna L. Ins. Co.*, 96 Wis. 466, 468, 71 N. W. 898.

[b] It has reference solely to the proceedings of the applicant's adversary and binds him so that he cannot stir. *Sisson v. Lawrence*, 25 How. Pr. (N. Y.) 435, 16 Abb. Pr. 259.

16. See 12 STANDARD PROC. 1008.

17. *Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co.*, 60 Fed. 929 (which does not stay or prevent any provisional remedy plaintiff may apply for); *Sisson v. Lawrence*, 25 How. Pr. (N. Y.) 435, 16 Abb. Pr. 259; *Wilcox v. Curtis*, 1 N. Y. Code Rep. 96.

18. *Johnstown v. Reiley*, 24 Wis. 494. See the title "Continuances."

19. *Minn.—Briggs v. Shea*, 48 Minn. 218, 50 N. W. 1037. N. Y.—*Belasco Co. v. Klaw*, 98 App. Div. 74, 90 N. Y. Supp. 593. Eng.—*Cocker v. Tempest*, 7 M. & W. 502, 9 D. P. C. 306, 10 L. J. Ex. 195.

[a] It is a power incident to inferior as well as superior courts. *Cocker v. Tempest*, 7 M. & W. (Eng.) 502, 9 D. P. C. 306, 10 L. J. Ex. 195.

Power to stay proceedings in another court, see *infra*, II, D.

20. Attorney General v. Continental Life Ins. Co., 38 Hun 521; *Robinson v. Klein*, 31 Abb. N. C. 481, 30 N. Y. Supp. 262, 62 N. Y. St. 73; *Moore v. Moore*, 44 App. Div. 253, 60 N. Y. Supp. 653; *Hill v. Muller*, 53 Misc. 262, 103 N. Y. Supp. 96.

great variety of cases.<sup>21</sup> Thus proceedings may be stayed until necessary parties are brought in,<sup>22</sup> until a cross-bill may be heard,<sup>23</sup> and when the cause of action is frivolous,<sup>24</sup> or when an attorney brings an unauthorized suit.<sup>25</sup> Actions which are not brought in good faith<sup>26</sup> or which are vexatious,<sup>27</sup> may be stayed. And payment of the debt sued on and costs sometimes authorizes a stay of proceedings.<sup>28</sup>

21. See *infra*, this note and section. Because of lack of jurisdiction, see 17 STANDARD PROC. 657, note 23.

To compel payment of costs in former suits which were dismissed or discontinued, see 5 STANDARD PROC. 967.

To compel giving of security for costs, see the title "Security for Costs," and 5 STANDARD PROC. 470.

[a] Until delivery of papers in possession of superseded attorney. *In re Ackerman's Estate*, 166 N. Y. Supp. 1080.

[b] Where plaintiff was dead at time of filing of bill. *Balbi v. Duvet*, 3 Edw. Ch. (N. Y.) 418.

[c] If another action for the same cause has been determined and the debt satisfied pending an action before the court, a permanent stay will be ordered. *General Dehydrator Co. v. Bussing Co.*, 176 App. Div. 503, 163 N. Y. Supp. 263.

[d] Where plaintiff fraudulently destroys or withholds evidence of defendant's rights, his proceedings may be stayed until he produces it. *Premo v. Smith*, 10 Abb. Pr. N. S. (N. Y.) 90, 2 Sweeny 467, 40 How. Pr. 480.

Where action is brought without leave of court, see 13 STANDARD PROC. 582, and 4 STANDARD PROC. 421.

22. *Collin Co. School Trustees v. Stiff* (Tex. Civ. App.), 190 S. W. 216; *Latham v. Tombs*, 32 Tex. Civ. App. 270, 73 S. W. 1060. And see the title "Parties."

23. See 11 STANDARD PROC. 20, and 6 STANDARD PROC. 291.

24. See 10 STANDARD PROC. 274.

25. In the Matter of Merritt, 5 Paige (N. Y.) 125.

[a] A stay of proceedings because the attorney is unauthorized to bring the action will not be granted unless there is an actual fraud on the court, as where the attorney without the knowledge or consent of the plaintiff is using his name in a wrongful manner. *Delhi v. Graham*, 3 Hun (N. Y.) 407.

26. *Ramsey v. Erie R. Co.*, 8 Abb. Pr. N. S. (N. Y.) 174, 57 Barb. 398,

39 How. Pr. 62; *Cocker v. Tempest*, 7 M. & W. (Eng.) 502, 9 D. P. C. 306, 10 L. J. Ex. 195; *Moscato v. Lawson*, 4 Ad. & El. 331, 31 E. C. L. 157, 111 Eng. Reprint 811.

[a] Except where brought in violation of some understanding between the parties, suits are not perpetually stayed as against good faith. *Ramsey v. Erie R. Co.*, 8 Abb. Pr. N. S. (N. Y.) 174, 57 Barb. 398, 39 How. Pr. 62.

[b] A suit brought after withdrawal of a juror by consent in a previous action is not in good faith and will be stayed. *Moscato v. Lawson*, 4 Ad. & El. 331, 31 E. C. L. 157, 111 Eng. Reprint 811.

27. N. J.—*Wallace, Muller & Co. v. Leber*, 67 N. J. L. 26, 50 Atl. 586. N. Y.—In the Matter of Merritt, 5 Paige 125. Eng.—*Hyman v. Helm*, 24 Ch. Div. 531, 49 L. T. N. S. 376, 32 Wkly. Rep. 258; *McHenry v. Lewis*, 22 Ch. Div. 397, 52 L. J. Ch. 325, 47 L. T. N. S. 549, 31 Wkly. Rep. 305.

See 5 STANDARD PROC. 967.

[a] Where successive suits are brought on a judgment merely to accumulate costs. *Keeler v. King*, 1 Barb. (N. Y.) 390.

28. See *infra*, this note.

[a] In actions on bonds and the like, proceedings may be stayed on payment of the penalty and costs. *Oshiel v. De Graw*, 6 Cow. (N. Y.) 63.

[b] In an action against a sheriff for money levied under an execution without demand, proceedings will be stayed on payment of the sum levied. *Jefferies v. Sheppard*, 3 B. & Ald. 696, 5 E. C. L. 400, 106 Eng. Reprint 815.

[c] But an action for unliquidated damages will not be stayed on payment of the debt and costs. *Fisher v. Pyne*, 1 M. & G. 265, 39 E. C. L. 752, 133 Eng. Reprint 334.

[d] But a conditional order staying proceedings in the event of payment of the debt on a subsequent day, is improper. *Norton v. Fraser*, 2 M. & G. 916, 40 E. C. L. 921, 133 Eng. Reprint 1015.

**2. Pending Other Relief.** — a. *Generally.* — The court may stay proceedings pending an application for other relief.<sup>29</sup>

b. *Pending Motion for New Trial.* — According to some authorities, execution cannot issue until a motion for a new trial is determined.<sup>30</sup> But under some statutes, a motion for new trial does not operate as a stay of proceedings or execution,<sup>31</sup> although the judge may stay proceedings pending the motion.<sup>32</sup> Staying the entry of judgment pend-

29. See *infra*, this note.

Pending appeal, see *infra*, V.

Until a discovery is had, see 11 STANDARD PROC. 538.

Stay pending determination of garnishment proceedings, see 10 STANDARD PROC. 425.

Stay pending taking of depositions, see 7 STANDARD PROC. 234.

Pending certiorari or application therefor, see *infra*, VII.

[a] Until accounting can be had in another action. *Johnston v. Reiley*, 24 Wis. 494.

[b] To enable party to procure reformation of an instrument in equity. *Martin v. Smith*, 102 Me. 27, 65 Atl. 257; *Prescott v. Hawkins*, 12 N. H. 19.

Staying creditor's bill to enable party to set aside a judgment on fraudulent conveyance, see 10 STANDARD PROC. 183.

Stay pending application for pardon, see 2 STANDARD PROC. 921.

Stay of proceedings on certification of interlocutory proceedings to supreme court, see 4 STANDARD PROC. 749, 761.

[c] But pending an application in equity for an injunction against proceeding in the law action, a stay of proceedings in the law action will not be granted. *O'Brien v. O'Brien*, 195 Ill. App. 346.

[d] Motion for rehearing in the appellate court does not of itself stay proceedings. *Busch v. Wilcox*, 106 Mich. 514, 64 N. W. 485. See *Case v. Case*, 26 Mich. 484, 494, denying application because of insufficiency of showing.

[e] On filing of a bill of review, the original cause is brought into that one and proceedings under the decree may be stayed on terms. *Manufacturers' Paper Co. v. Lindblom*, 68 Ill. App. 539, an injunction is not necessary. Compare 15 STANDARD PROC. 358, note 31.

Pending bankruptcy proceedings, see *infra*, II, K.

30. **U. S.**—*Danielson v. Northwestern Fuel Co.*, 55 Fed. 49. See *Dawson v. Daniel*, 2 Flip. (U. S.) 305, 7 Fed. Cas. No. 3,669 (the irregularity is cured by denial of motion); *Arnold v. Jones*, Bee 104, 1 Fed. Cas. No. 559. **Med.**—*Truett v. Legg*, 32 Md. 147. **N. J.**—*Erie R. Co. v. Ackerson*, 33 N. J. L. 33. **N. M.**—*Pearce v. Strickler*, 9 N. M. 46, 49 Pac. 727. **N. Y.**—*Poughkeepsie Bank v. Haight*, 3 How. Pr. 167. **Pa.**—*Windsor v. Tillottson*, 135 Pa. 208, 19 Atl. 817. Compare *Spang v. Com.*, 12 Pa. 358.

[a] Such Is the Common Law Rule. **Ill.**—*People v. Gary*, 105 Ill. 264; *Hearson v. Graudine*, 87 Ill. 115. **Ky.** *Reynolds v. Horine*, 13 B. Mon. 234; *Wright v. Haddock*, 7 Dana 253; *Turner's Admr. v. Booker*, 2 Dana 334. **Mo.**—*Ex parte Craig*, 130 Mo. 590, 32 S. W. 1121.

[b] "Until the motion for a new trial is disposed of, the whole matter remains in the breast of the court, and hence there is no final judgment." *Walter v. Scofield*, 167 Mo. 537, 546, 67 S. W. 276. See also *McGurry v. Wall*, 122 Mo. 614, 27 S. W. 327; *Romine v. Haag* (Mo.), 178 S. W. 147.

31. **Cal.**—*Jones v. Spears*, 56 Cal. 163; *People ex rel. Carpentier v. Loucks*, 28 Cal. 68. **Ill.**—*Parr v. Van Horne*, 40 Ill. 122; *International Pack. Co. v. Cichowicz*, 114 Ill. App. 121. **Ind.** *Logan v. Sult*, 152 Ind. 434, 53 N. E. 456. **Kan.**—*Church v. Goodin*, 22 Kan. 527. **Mich.**—*People v. Clerk of Circ. Ct.*, 14 Mich. 169. **Minn.**—*Eaton v. Caldwell*, 3 Minn. 134. **Mo.**—*Ex parte Craig*, 130 Mo. 590, 32 S. W. 1121. **Neb.**—*Walker v. Fitzgerald*, 69 Neb. 52, 95 N. W. 32; *Van Dorn v. Mengedocht*, 41 Neb. 525, 537, 59 N. W. 800. **Wis.**—*Colle v. Kewaunee, Green Bay & W. R. Co.*, 149 Wis. 96, 135 N. W. 536.

But see *Kukea v. Keahi*, 10 Hawaii 505.

32. See generally the statutes and the following: **Cal.**—*Pierce v. Los An-*



ing motion for new trial is elsewhere treated.<sup>33</sup>

The federal statute provides to the effect that when a district court enters judgment in a civil action, execution may, on motion of either party, in the discretion of the court, and on such security as the court may judge proper, be stayed to give time to file a petition for new trial.<sup>34</sup>

**3. Pendency of Another Action or Proceeding.**—The pendency of another action or proceeding is sometimes a ground for staying proceedings until the determination of such other action or proceeding.<sup>35</sup> Proceedings may be stayed because of the pendency of another action or proceeding even though the latter may not be pleadable

geles, 15 Cal. App. 702, 115 Pac. 746. **Colo.**—*Outcalt v. Johnston*, 9 Colo. App. 519, 49 Pac. 1058. **Conn.**—See *Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226. **Ga.**—*Liverpool, etc. Co. v. People's Bank*, 143 Ga. 355, 85 S. E. 114; *Parker-Hensel Engineering Co. v. Schuler*, 133 Ga. 696, 66 S. E. 800. **Ind.**—*Logan v. Sult*, 152 Ind. 434, 53 N. E. 456. **Kan.**—*Church v. Goodin*, 22 Kan. 527. **Ky.**—*Boyle v. Stivers*, 109 Ky. 253, 58 S. W. 691. **Mo.**—*Ex parte Craig*, 130 Mo. 590, 32 S. W. 1121. **Mont.**—*State ex rel. Robinson v. Clements*, 37 Mont. 96, 94 Pac. 837, 127 Am. St. Rep. 701. **Okla.**—*Barnett v. Bohannon*, 27 Okla. 368, 112 Pac. 987.

Court commissioner may order stay in such case. See 16 STANDARD PROC. 705, note 89.

[a] **Order of stay in rule nisi** on motion for new trial is without effect after overruling of motion. *Parker-Hensel Eng. Co. v. Schuler*, 133 Ga. 696, 66 S. E. 800.

33. See 14 STANDARD PROC. 1006.

34. Rev. St., §987; U. S. Comp. St. 1918, §§1268, 1633; *Cambuston v. United States*, 95 U. S. 285, 24 L. ed. 448. See also *Lillienthal v. Wallach*, 36 Fed. 255.

[a] This statute relates only to the method (1) of staying execution and does not limit the time in which to file motions for new trial. *Felton v. Spiro*, 78 Fed. 576, 24 C. C. A. 321. (2) It does not relate either to appeals or writs of error. *Sanborn v. Bay*, 194 Fed. 37, 114 C. C. A. 57.

Stay pending appeal or error, see *infra*, V, A, 2, c.

35. **Alaska.**—*Yager v. Ring*, 1 Alaska 305. **Ind.**—*Walker v. Heller*, 73 Ind. 46. **Minn.**—*Duxbury v. Shanahan*, 84 Minn. 353, 87 N. W. 944. **Mo.**—*Sharkey v. Kiernan*, 97 Mo. 102, 10 S. W.

886. **Neb.**—*State v. O'Connor*, 166 N. W. 556. **N. J.**—See *Van Houten v. Stevenson*, 69 N. J. Eq. 626, 64 Atl. 1094; *Den v. Fen*, 17 N. J. L. 354. **N. Y.**—*Doerfler v. Pottberg*, 218 N. Y. 27, 112 N. E. 445; *Cushman v. Leland*, 93 N. Y. 652; *McCarthy v. Peake*, 9 Abb. Pr. 164. **Ore.**—*Crane v. Larsen*, 15 Ore. 345, 15 Pac. 326. **Tenn.**—*Sanford-Day Iron Wks. v. Interprise Foundry & Mach. Co.*, 138 Tenn. 437, 198 S. W. 258. **Tex.**—*Avocato v. Dell' Ara* (Tex. Civ. App.), 84 S. W. 444. **Wis.**—*Wilson v. Jarvis*, 19 Wis. 597.

[a] **Pendency of other suit on appeal** (1) authorizes stay (**Ind.**—*Peters v. Banta*, 120 Ind. 416, 22 N. E. 95, 23 N. E. 84. **Kan.**—*Standard Implement Co. v. Stevens*, 51 Kan. 530, 33 Pac. 366. **Mich.**—*Schmid v. Benzie* Circuit Judge, 138 Mich. 452, 101 N. W. 620. **N. Y.**—*Swift v. Finnigan*, 53 App. Div. 76, 65 N. Y. Supp. 723. **Tenn.**—*Sanford-Day Iron Wks. v. Interprise Foundry & Mach. Co.*, 138 Tenn. 437, 198 S. W. 258. See 1 STANDARD PROC. 1010, note 63), unless (2) brought purely for delay. *Pool v. Charnock*, 3 T. R. 79, 100 Eng. Reprint 465.

[b] **Though not a ground for a continuance**, a stay pending an appeal in another action may be granted. *Peters v. Banta*, 120 Ind. 416, 22 N. E. 95, 23 N. E. 84. See generally 5 STANDARD PROC. 467.

[c] **Although pleadable in abatement** the pendency of another action may be urged as a ground for stay of proceedings, but the former is the better practice. *State ex rel. Puget Sound Nat. Bank v. Superior Court*, 14 Wash. 686, 45 Pac. 670.

[d] **Although the plea in abatement** be defective, the court should stay proceedings in the subsequent suit or

in abatement,<sup>36</sup> as where one proceeding is in a state and the other in a federal court,<sup>37</sup> or where the causes of action are not the same but custody or control of the same property is essential to the exercise of jurisdiction and there has been a seizure in the first action.<sup>38</sup> But generally a motion for stay on this ground is governed by the same principles as a plea in abatement.<sup>39</sup> In order that the motion may prevail, there must be an identity of parties,<sup>40</sup> subject matter,<sup>41</sup> of issues,<sup>42</sup> and of the relief demanded.<sup>43</sup> But an identity in all

consolidate the actions. *Crane v. Larsen*, 15 Ore. 345, 15 Pac. 326.

[e] **Instead of a stay of proceedings, a consolidation** may be had. *Yager v. Ring*, 1 Alaska 305; *Crane v. Larsen*, 15 Ore. 345, 15 Pac. 326. And see generally the title "**Consolidation of Actions**," and particularly 5 STANDARD PROC. 251, note 5.

36. *Hurd v. Moiles*, 28 Fed. 897. See also *infra*, this section, and 1 STANDARD PROC. 1010, note 63.

[a] **Until the determination of a cause which could be used as res judicata**, a stay of proceedings may be granted. *Standard Imp. Co. v. Stevens*, 51 Kan. 530, 33 Pac. 366; *Willard v. Ostrander*, 51 Kan. 481, 32 Pac. 1092, 37 Am. St. Rep. 294. See *Duxbury v. Shanahan*, 84 Minn. 353, 87 N. W. 944, where a garnishment involves the construction of a will which is being probated, the garnishment proceedings should be stayed until the will has been construed in the proper tribunal.

37. See *infra*, this section, and 17 STANDARD PROC. 815, note 88; 1 STANDARD PROC. 1005.

38. See *infra*, this section, and 17 STANDARD PROC. 808, note 39. Compare also 17 STANDARD PROC. 822, note 24; 1 STANDARD PROC. 1006.

39. *Doerfler v. Pottberg*, 218 N. Y. 27, 28, 112 N. E. 445; *Dawley v. Brown*, 79 N. Y. 390; *Smith v. College of St. Francis Xavier*, 20 N. Y. Supp. 533, 46 N. Y. St. 893, 29 Jones & S. 363. See generally the title "**Another Action Pending**."

[a] **Action Must Be Pending**.—*Doerfler v. Pottberg*, 218 N. Y. 27, 112 N. E. 445. See 1 STANDARD PROC. 1008.

40. **U. S.**—*Kirkpatrick v. Eastern Milling & E. Co.*, 135 Fed. 144. **Ill.** *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631. **N. Y.**—*Dolbeer v. Stout*, 139 N. Y. 486, 489, 34 N. E. 1102; *Ogden v. Pioneer Ironworks*, 91 App. Div. 394, 86 N. Y. Supp. 955; *Smith v. College of St. Francis Xavier*, 20

N. Y. Supp. 533, 46 N. Y. St. 893, 29 Jones & S. 363.

See 1 STANDARD PROC. 1013, et seq.

[a] **The plaintiff in one action** must be a party or privy to the other. *Dolbeer v. Stout*, 139 N. Y. 486, 34 N. E. 1102; *Sammons v. Parkhurst*, 46 Misc. 128, 93 N. Y. Supp. 1063, 16 N. Y. Ann. Cas. 251. Compare *Loewenstein v. Diamond Soda Water Mfg. Co.*, 94 App. Div. 383, 88 N. Y. Supp. 313, where the court held a stockholder's suit should have been stayed by stipulation or order pending a suit by a director.

[b] **If the plaintiff is the assignor of the plaintiff in the other**, it is sufficient. *Parmalee v. Wheeler*, 32 Wis. 429. See also *Scott v. Herald*, 8 Blackf. (Ind.) 129.

[c] **Mere presence of other parties** does not prevent granting of stay. *De La Vergne Mach. Co. v. New York & B. Brew. Co.*, 125 App. Div. 649, 110 N. Y. Supp. 24. See 1 STANDARD PROC. 1015.

But as to consolidation rule, see 5 STANDARD PROC. 251.

41. *Van Houten v. Stevenson*, 69 N. J. Eq. 626, 64 Atl. 1094. See 1 STANDARD PROC. 1019, 1022.

42. *People v. Judge*, 27 Mich. 406, 15 Am. Rep. 195; *Raymore Realty Co. v. Pfothenhauer-Nesbit Co.*, 139 App. Div. 126, 123 N. Y. Supp. 875; *Ogden v. Pioneer Iron Works*, 91 App. Div. 394, 86 N. Y. Supp. 955. See 1 STANDARD PROC. 1019, et seq.

[a] **Suits in rem and in personam** do not involve identical issues. *People v. Judge*, 27 Mich. 406, 15 Am. Rep. 195. See 1 STANDARD PROC. 1025.

43. *Smith v. College of St. Francis Xavier*, 20 N. Y. Supp. 533, 46 N. Y. St. 893, 29 Jones & S. 363. See 1 STANDARD PROC. 1026.

[a] **If the entire relief sought in one action cannot be obtained in the other**, a stay cannot be granted. *Nuss-*

respects is not absolutely essential.<sup>44</sup> It is the substance which governs,<sup>45</sup> and if the decision in one will determine the right set up in the other, and will dispose of the controversy in both actions a stay will be granted.<sup>46</sup> Thus a foreclosure suit may be stayed pending an action to cancel the mortgage,<sup>47</sup> or an action at law for damages for breach of covenant,<sup>48</sup> or an action for an accounting of the amount due.<sup>49</sup>

**Which Action Is Stayed.** — Generally it is the second action only which is stayed,<sup>50</sup> but circumstances may justify a departure from this rule.<sup>51</sup>

**Good Faith.** — As the stay rests in the discretion of the court,<sup>52</sup> it may be denied if the first action is not prosecuted in good faith,<sup>53</sup>

*berger v. Wasserman*, 40 Misc. 120, 81 N. Y. Supp. 295.

44. *De la Vergne Mach. Co. v. New York & B. Brew. Co.*, 125 App. Div. 649, 110 N. Y. Supp. 24.

45. *De la Vergne Mach. Co. v. New York & B. Brew. Co.*, 125 App. Div. 649, 110 N. Y. Supp. 24.

46. **Ind.**—*Scott v. Herald*, 8 Blackf. 129. **Ia.**—*Thomas v. Timonds*, 179 Iowa 509, 159 N. W. 881. **N. Y.** *Rosenberg v. Slotchin*, 181 App. Div. 137, 168 N. Y. Supp. 101; *De la Vergne Mach. Co. v. New York & B. Brew. Co.*, 125 App. Div. 649, 110 N. Y. Supp. 24; *Post v. Banks*, 67 App. Div. 187, 73 N. Y. Supp. 596; *Nussberger v. Wasserman*, 40 Misc. 120, 81 N. Y. Supp. 295. **W. Va.**—*Keenan v. Scott*, 78 W. Va. 729, 90 S. E. 331.

[a] Because a legal question is common to two suits does not authorize a stay of a suit. *Dunfee v. Childs*, 59 W. Va. 225, 234, 53 S. E. 209.

[b] The decision in the other suit must have legal effect in the suit in which the stay is asked and close its litigation to authorize a stay. *Dunfee v. Childs*, 59 W. Va. 225, 234, 53 S. E. 209.

[c] When a trial of the second action will be necessary whatever the result of the first, a stay of proceedings will not be granted. *Bicalky Fan Co. v. Mosier*, 177 App. Div. 372, 164 N. Y. Supp. 177; *Clark v. Vilas Nat. Bank*, 22 App. Div. 605, 48 N. Y. Supp. 192; *Lowenstein v. Schiffer*, 29 Misc. 477, 61 N. Y. Supp. 1011.

[d] When only a portion of the questions involved in the last action will be settled in the first, a stay will not be granted. *Rosenberg v. Slotchin*, 181 App. Div. 137, 168 N. Y. Supp. 101; *Clark v. Vilas Nat. Bank*, 22 App.

Div. 605, 48 N. Y. Supp. 192. See also *Fowler v. Westerhoff Bros.* (N. J. Eq.), 104 Atl. 198.

[e] Partition suit will be stayed pending suit involving adverse claims of title to the res. *Sharkey v. Kiernan*, 97 Mo. 102, 10 S. W. 886.

[f] Pending ejectment, a suit for damages for trespass brought by the defendant will be stayed. *Yager v. Ring*, 1 Alaska 305.

[g] Suit against an indorser of a note will be stayed pending appeal from a judgment for defendant in an action against the maker on the same note. *Scott v. Herald*, 8 Blackf. (Ind.) 129.

[h] Pending a suit to contest a will devising property, a suit to avoid a conveyance of the property by the deceased because of mental incapacity will be stayed. *Thomas v. Timonds*, 179 Iowa 509, 159 N. W. 881.

[i] An action on a judgment will be stayed pending an action by the judgment defendant to set it aside. *Avocato v. Dell' Ara* (Tex. Civ. App.), 84 S. W. 444; *Parmalee v. Wheeler*, 32 Wis. 429.

47. *Horman v. Hartmetz*, 131 Ind. 558, 31 N. E. 81.

48. *Bergman v. Fortescue*, 74 N. J. Eq. 266, 69 Atl. 474.

49. *Hurd v. Moiles*, 28 Fed. 897.

50. *Wilson v. Jarvis*, 19 Wis. 597.

51. *Schenck v. Yard* (N. J. Eq.), 86 Atl. 81; *Oppenheimer v. Carabaya Rubber & Nav. Co.*, 145 App. Div. 830, 130 N. Y. Supp. 587, staying the first action where the issues presented by the counterclaim were tendered in another action before filing thereof.

52. See *infra*, II, H.

53. **Ind.**—*Horman v. Hartmetz*, 131 Ind. 558, 31 N. E. 81. **N. Y.**—*Doerfler*



and with a reasonable prospect of success.<sup>54</sup>

A cross action by the defendant may be stayed pending a prior action against him which will dispose of both actions.<sup>55</sup>

**Actions at Law and in Equity.** — The hearing of an action at law may be postponed until after the hearing of a cause in chancery involving the same matter.<sup>56</sup> A court of equity has power to suspend a suit when it cannot safely be proceeded with until some point is settled in an action at law.<sup>57</sup>

**Actions in Different States or Countries.** — Although the pendency of another action in another state is not ground of abatement,<sup>58</sup> a stay of proceedings in the subsequent action pending the outcome of the first may be had<sup>59</sup> in the discretion of the court.<sup>60</sup> Likewise the pend-

*v. Pottberg*, 218 N. Y. 27, 112 N. E. 445; *Jaffray v. Hunter*, 8 App. Div. 315, 40 N. Y. Supp. 932, 75 N. Y. St. 329. **Eng.**—*Pool v. Charnock*, 3 T. R. 79, 100 Eng. Reprint 465.

[a] **Merely colorable suit** is insufficient. *People ex rel. La Grange v. State Treasurer*, 24 Mich. 468.

54. *Horman v. Hartmetz*, 131 Ind. 558, 31 N. E. 81.

55. *Parmalee v. Wheeler*, 32 Wis. 429; *Wilson v. Jarvis*, 19 Wis. 597.

**Otherwise where abatement is sought**, see 1 STANDARD PROC. 1018.

[a] **But an action on a claim which may be set up as a counterclaim** in the former action will not be stayed as the defendant cannot be compelled to plead his counterclaim. *Rosenberg v. Slotchin*, 181 App. Div. 137, 168 N. Y. Supp. 101; *Walkup v. Mesick*, 110 App. Div. 326, 97 N. Y. Supp. 142.

56. **Fla.**—*Connor v. Elliott*, 59 Fla. 227, 52 So. 729. **Ia.**—*Purinton v. Frank*, 2 Iowa 565. **Mich.**—*Vaughan v. Wayne* Circ. Judge, 153 Mich. 478, 116 N. W. 1086. **N. Y.**—*Auburn City Bank v. Leonard*, 20 How. Pr. 193.

[a] **Rule Stated.**—“When a chancery case and a case at law involving the same legal questions between the same parties are pending in the same court and the legal questions will be determined in the chancery suit, good practice suggests the continuance of the law case until the chancery case is disposed of.” *Connor v. Elliott*, 59 Fla. 227, 52 So. 729.

[b] **Even when the chancery cause is pending before another court**, a stay may be granted as to proceedings in the law court. *Vaughan v. Wayne* Circ. Judge, 153 Mich. 478, 116 N. W. 1086.

**Not ground of abatement**, see 1 STANDARD PROC. 1000.

57. *Schmid v. Benzie* Circ. Judge, 138 Mich. 452, 101 N. W. 620; *Sanford-Day Iron Wks. v. Interprise Foundry & Mach. Co.*, 138 Tenn. 437, 198 S. W. 258; *Horton v. Thompson*, 3 Tenn. Ch. 575.

[a] **But if the legal action has no bearing on the equity suit**, a stay will not be granted. And if the effect of the law suit is to make litigation in equity useless, the complainant must elect which suit should be determined. *Horton v. Thompson*, 3 Tenn. Ch. 575.

58. See 1 STANDARD PROC. 1004. Compare 17 STANDARD PROC. 830.

**Not ground for continuance**, see 5 STANDARD PROC. 467, note 64.

59. **U. S.**—*Kirkpatrick v. Eastern Milling & E. Co.*, 135 Fed. 144. **N. J.** *Fairchild v. Fairchild*, 53 N. J. Eq. 678, 681, 34 Atl. 10, 51 Am. St. Rep. 650. **N. Y.**—*Allentown Foundry & Mach. Wks. v. Loretz*, 16 App. Div. 72, 44 N. Y. Supp. 689, 4 N. Y. Ann. Cas. 294. **Wash.**—*Kelley v. Bausman*, 98 Wash. 686, 168 Pac. 181. **Wis.** *Parmalee v. Wheeler*, 32 Wis. 429.

Compare 17 STANDARD PROC. 830.

[a] **Except where the effect of the stay is to jeopardize the party in obtaining satisfaction of his claim.** *Allentown Foundry & Mach. Wks. v. Loretz*, 16 App. Div. 72, 44 N. Y. Supp. 689, 4 N. Y. Ann. Cas. 294.

60. *Fairchild v. Fairchild*, 53 N. J. Eq. 678, 681, 34 Atl. 10, 51 Am. St. Rep. 650.

[a] **Where the opportunity of obtaining satisfaction in the foreign suit is not as good as that afforded by the domestic suit**, a stay should not be or-

ency of an action in another country is sometimes made the basis of a stay of proceedings.<sup>61</sup>

**Actions in State and Federal Courts.**—Proceedings in state<sup>62</sup> and federal<sup>63</sup> courts are sometimes stayed pending prior actions in the federal and state courts, in the discretion of the court.<sup>64</sup>

A suit in one federal district may be stayed pending an action in another.<sup>65</sup>

**Civil and Criminal Action.**—Under the modern practice, the pendency of a criminal action is not ground for staying a civil action arising out of the same transaction<sup>66</sup> unless statute so provides.<sup>67</sup>

**D. IN WHAT ACTION OR COURT ORDER MADE.**—An order staying proceedings in an action must be made in the action sought to be stayed. It cannot be made in another action,<sup>68</sup> although the courts, by acting upon the parties to actions before them, sometimes control other actions.<sup>69</sup>

**E. AT WHOSE INSTANCE RELIEF MAY BE HAD.**—Proceedings may

dered. *Wallace, Muller & Co. v. Leber*, 67 N. J. L. 26, 50 Atl. 586.

61. *Oppenheimer v. Carabaya Rubber & N. Co.*, 145 App. Div. 830, 130 N. Y. Supp. 587. See *Youngblood v. Banca Commerciale Italiana*, 177 App. Div. 491, 164 N. Y. Supp. 285. Compare 1 STANDARD PROC. 1004.

[a] A special case must be made out. *Hyman v. Helm*, 24 Ch. Div. (Eng.) 531, 49 L. T. N. S. 376, 32 Wkly. Rep. 258.

[b] But if the system of jurisprudence in the foreign country is not closely analogous to ours, the stay will not be granted. *Oppenheimer v. Carabaya Rubber & N. Co.*, 145 App. Div. 830, 130 N. Y. Supp. 587. See *McHenry v. Lewis*, 22 Ch. Div. (Eng.) 397, 52 L. J. Ch. 325, 47 L. T. N. S. 549, 31 Wkly. Rep. 305.

62. *Ashland v. Wisconsin Cent. R. Co.*, 121 Wis. 646, 98 N. W. 532, 99 N. W. 431. But see *Wood v. Lake*, 13 Wis. 84.

[a] Where no conflict of authority between the respective courts is involved, a stay will not be granted. *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631.

63. See 17 STANDARD PROC. 815 (note 88), 822, note 25; 1 STANDARD PROC. 1006, note 48.

Not a ground of abatement, see 1 STANDARD PROC. 1005.

[a] The crucial point in each case is whether an unseemly or improper interference with the jurisdiction of the court entertaining the first suit is

involved. *Lamar v. Spalding*, 154 Fed. 27, 83 C. C. A. 111.

[b] But where no conflict over the custody or dominion of property arises, a stay will not be granted. *McClellan v. Carland*, 187 Fed. 915, 921, 110 C. C. A. 49.

64. *Ironton v. Harrison Const. Co.*, 212 Fed. 353, 129 C. C. A. 29.

65. *Hurd v. Moiles*, 28 Fed. 897.

66. *Cowdery v. State*, 71 Kan. 450, 80 Pac. 953.

67. *Ex parte Brooks*, 48 Ala. 423.

68. *Grammer v. Greenbaum*, 146 App. Div. 3, 130 N. Y. Supp. 569; *Raymore Realty Co. v. Pfotenhauer-Nesbit Co.*, 139 App. Div. 126, 123 N. Y. Supp. 875; *Pitman v. Smith*, 135 App. Div. 904, 120 N. Y. Supp. 193 (per Burr, J.); *Belasco Co. v. Klaw*, 98 App. Div. 74, 90 N. Y. Supp. 593; *Cocker v. Tempest*, 7 M. & W. (Eng.) 502, 9 D. P. C. 306, 10 L. J. Ex. 195. But compare *Manufacturers' Paper Co. v. Lindblom*, 68 Ill. App. 539, as to practice on bill of review.

Which action stayed, see *supra*, II, C, 3.

69. *Cushman v. Leland*, 93 N. Y. 652; *Nussberger v. Wasserman*, 40 Misc. 120, 81 N. Y. Supp. 295.

[a] As to injunctive relief in equity. *Cocker v. Tempest*, 7 M. & W. (Eng.) 502, 9 D. P. C. 306, 10 L. J. Ex. 195. See also 15 STANDARD PROC. 256, and 16 STANDARD PROC. 450. Enjoining other actions, see the title "Suits and Actions."

be stayed at the instance of a party,<sup>70</sup> at the instance of third parties,<sup>71</sup> and by the court of its own motion in a proper case.<sup>72</sup>

F. WHEN APPLICATION MADE.—A stay pending another action should not be granted until after issue joined.<sup>73</sup> But an application made after trial and verdict comes too late.<sup>74</sup>

G. THE APPLICATION, NOTICE AND SECURITY.—The stay of proceedings may be had on motion on affidavits,<sup>75</sup> or on petition.<sup>76</sup> Notice of motion is sometimes required.<sup>77</sup> And statutes sometimes provide that a stay longer than a prescribed period cannot be made except upon notice to the adverse party.<sup>78</sup> The court may require security,<sup>79</sup>

70. See *infra*, this note and section.

[a] But a plaintiff maintaining two suits cannot stay one because of pendency of the other. *Horton v. Thompson*, 3 Tenn. Ch. 575.

Stay pending appeal, see *infra*, V, A, 5.

71. *Livingston v. D'Orgenoy*, 108 Fed. 469, though such exercise of power is rare.

72. *Latham v. Tombs*, 32 Tex. Civ. App. 270, 73 S. W. 1060, where necessary party is omitted.

73. *Rosenberg v. Slotchin*, 181 App. Div. 137, 168 N. Y. Supp. 101; *International Post Card Co. v. Lithograph & Mfg. Co.*, 144 App. Div. 72, 128 N. Y. Supp. 780 (for until then the necessity for a stay cannot be determined); *Ogden v. Pioneer Ironworks*, 91 App. Div. 394, 86 N. Y. Supp. 955. See *Wilson v. Jarvis*, 19 Wis. 597. Compare *Walker v. Heller*, 73 Ind. 46, in which the court says that on application for stay before answering or going to trial a stay would have been granted.

74. *Walker v. Heller*, 73 Ind. 46.

75. *Prentiss v. Danaher*, 20 Wis. 311, 318. See *Fiffeld v. Brown*, 2 Cow. (N. Y.) 503.

76. *Horman v. Hartmetz*, 131 Ind. 558, 31 N. E. 81.

[a] A petition for stay because of pendency of another action must state facts showing a defense to the action, that such defense is properly pleaded in the other case, and that the other action is prosecuted in good faith. *Horman v. Hartmetz*, 131 Ind. 558, 31 N. E. 81.

77. U. S.—*Den v. Bacon*, 4 Wash. C. C. 578, 7 Fed. Cas. No. 3,783. Mich. Case v. Case, 26 Mich. 484. N. J. *Den v. Fen*, 17 N. J. L. 354. S. C.

*Meinhard v. Youngblood*, 37 S. C. 223, 15 S. E. 947, after answer.

See generally the title "Motions."

78. U. S.—*Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co.*, 60 Fed. 929. Minn.—*State v. Searle*, 81 Minn. 467, 84 N. W. 324. N. Y.—*Sisson v. Lawrence*, 25 How. Pr. 435, 16 Abb. Pr. 259; *Banks v. Selden*, 13 How. Pr. 374; *Chubbuck v. Morrison*, 6 How. Pr. 367. S. C.—*Strom v. American Freehold L. M. Co.*, 42 S. C. 97, 20 S. E. 16.

[a] Does not refer to injunctions against persons. Statute refers only to proceedings of the court or some process issued by its authority. *Strom v. American Freehold L. M. Co.*, 42 S. C. 97, 20 S. E. 16.

[b] Ex parte orders limited to the time prescribed by statute may be made. *Sales v. Woodin*, 8 How. Pr. (N. Y.) 349.

[c] Successive stays for the period limited, made ex parte, are not allowable. *Sales v. Woodin*, 8 How. Pr. (N. Y.) 349; *Marvin v. Lewis*, 12 Abb. Pr. (N. Y.) 482; *Anonymous*, 5 Sandf. (N. Y.) 656.

[d] An order in violation of statute is nugatory after the prescribed time but is not irregular ab initio. *Strom v. American Freehold L. M. Co.*, 42 S. C. 97, 20 S. E. 16.

[e] An order in violation of the statute is validated where, on a subsequent motion to set it aside, the court directs it to stand. *Clumpha v. Whiting*, 10 Abb. Pr. (N. Y.) 448.

79. Minn.—*Dennis v. Nelson*, 55 Minn. 144, 56 N. W. 589. Nev.—*Frevert v. Swift*, 19 Nev. 400, 13 Pac. 6. Ohio.—*Baker v. Morath*, 40 Ohio St. 157; *Negley v. Jeffers*, 28 Ohio St. 90. Wis.—*Parmalee v. Wheeler*, 32 Wis. 429.



but need not do so,<sup>80</sup> unless statute so provides.<sup>81</sup>

H. DETERMINATION, ORDER AND SERVICE. — The granting of an application for a stay of proceedings rests in the discretion of the court.<sup>82</sup> When granted to enable party to apply for other relief, the stay should not be made for a given period of time.<sup>83</sup> Notice of the order must be served on ministerial officers to bind them.<sup>84</sup> When granted to enable a party to make a motion, the order, when served, must be accompanied by a notice of motion.<sup>85</sup>

I. REVIEW AND VACATION. — An order granting a stay may be vacated or modified in the discretion of the court on proper application.<sup>86</sup> Orders granting<sup>87</sup> and denying<sup>88</sup> stays of proceedings are not appealable orders.

J. EFFECT AND DURATION OF STAY. — A stay of proceedings ends all progress in the action and no step can be lawfully taken during its continuance.<sup>89</sup> But it does not prevent independent or ancillary actions,<sup>90</sup> or enlarge the time to plead.<sup>91</sup> The stay does not affect the

80. *Mont.*—State *ex rel.* Robinson v. Clements, 37 *Mont.* 96, 94 *Pac.* 837, 127 *Am. St. Rep.* 701. **S. C.**—Meinhard v. Youngblood, 37 *S. C.* 223, 15 *S. E.* 947. **Wis.**—Parmalee v. Wheeler, 32 *Wis.* 429.

[a] The court should require security, except in cases where the ultimate satisfaction of the judgment is otherwise assured. State *ex rel.* Robinson v. Clements, 37 *Mont.* 96, 94 *Pac.* 837, 127 *Am. St. Rep.* 701.

[b] Security will not be required where the personal judgment is a lien on defendant's unencumbered real estate sufficient to satisfy it or where the judgment is for the recovery of real property, or foreclosure of mortgages. State *ex rel.* Robinson v. Clements, 37 *Mont.* 96, 94 *Pac.* 837, 127 *Am. St. Rep.* 701.

81. *Lemon v. Morehead*, 8 *Blackf. (Ind.)* 561. See *Hatch v. Washtenaw* *Circ. Judge*, 200 *Mich.* 1, 166 *N. W.* 218, where stay is longer than twenty days.

82. *Ala.*—*Western Union Tel. Co. v. Howington*, 73 *So.* 550. **Minn.** *Graves v. Backus*, 69 *Minn.* 532, 72 *N. W.* 811. **Mont.**—State *ex rel.* Robinson v. Clements, 37 *Mont.* 96, 94 *Pac.* 837, 127 *Am. St. Rep.* 701. **N. Y.** *Doerfler v. Pottberg*, 218 *N. Y.* 27, 112 *N. E.* 445. **Wis.**—*Johnston v. Reiley*, 24 *Wis.* 494. **Eng.**—*Pool v. Charnock*, 3 *T. R.* 79, 100 *Eng. Reprint* 465; *Cocker v. Tempest*, 7 *M. & W.* 502, 9 *D. P. C.* 306, 10 *L. J. Ex.* 195.

[a] Sound Discretion.—*Keenan v. Scott*, 78 *W. Va.* 729, 90 *S. E.* 331.

[b] Power To Be Exercised With Caution.—State *ex rel.* Robinson v. Clements, 37 *Mont.* 96, 94 *Pac.* 837, 127 *Am. St. Rep.* 701; *McHenry v. Lewis*, 22 *Ch. D. (Eng.)* 397, 406, 52 *L. J. Ch.* 325, 47 *L. T. N. S.* 549, 31 *Wkly. Rep.* 305.

83. *Chubbuck v. Morrison*, 6 *How. Pr. (N. Y.)* 367, the stay should be until the application can be made.

84. *Monell v. Lawrence*, 12 *Johns. (N. Y.)* 521, 529; *Freehold Permanent Bldg. Soc. v. Choate*, 3 *Ch. Chamb. (Can.)* 440.

85. See *infra*, III, C, 8.

86. **N. Y.**—*Voss v. Fielden*, 2 *Sandf.* 690, 3 *Code Rep.* 202. **S. C.**—*Meinhard v. Youngblood*, 37 *S. C.* 223, 15 *S. E.* 947. **Wis.**—*Parmalee v. Wheeler*, 32 *Wis.* 429.

87. *Johnston v. Reiley*, 24 *Wis.* 494.

[a] Order Does Not Involve "Merits of Action."—*Johnston v. Reiley*, 24 *Wis.* 494.

88. *Graves v. Backus*, 69 *Minn.* 532, 72 *N. W.* 811; *Rossiter v. Aetna L. Ins. Co.*, 96 *Wis.* 466, 71 *N. W.* 898.

89. *Sisson v. Lawrence*, 25 *How. Pr. (N. Y.)* 435; *Wallace v. Wallace*, 13 *Wis.* 224, 227.

[a] But the revival of an action on death of a party is not a proceeding in violation of the stay. *Matter of Bainbridge*, 67 *Barb. (N. Y.)* 293.

90. *First Nat. Bank v. McIlvaine*, 32 *S. D.* 177, 142 *N. W.* 468, action to subject to judgment, lands standing in name of wife.

91. *Schermerhorn v. Van Valkenburgh*, 7 *Cow. (N. Y.)* 519, 11 *Johns.*

jurisdiction of the court.<sup>92</sup> Consequently proceedings in disregard of it are irregular merely,<sup>93</sup> but not void.<sup>94</sup>

**Termination.**—A stay pending another action terminates on its final determination,<sup>95</sup> and a stay until further order of court expires by its own limitation on a denial of a permanent stay.<sup>96</sup>

**K. PENDING BANKRUPTCY PROCEEDINGS.**—An adjudication in bankruptcy does not deprive the trial court of jurisdiction<sup>97</sup> or supersede its proceedings.<sup>98</sup> An order granting a stay is essential to stay proceedings.<sup>99</sup>

The federal bankruptcy statute provides that a suit which is founded upon a claim from which a discharge would be a release, and which is pending at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; and if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.<sup>1</sup>

529; *Sniffen v. Peck*, 6 Civ. Proc. 188, *McGowan v. Leavenworth*, 3 N. Y. Code Rep. 151; *White v. Smith*, 16 Abb. Pr. (N. Y.) 109.

92. *Briggs v. Shea*, 48 Minn. 218, 50 N. W. 1037; *Wessels v. Boettcher*, 142 N. Y. 212, 36 N. E. 883; *Patchen v. President, etc. Canal Co.*, 62 App. Div. 543, 71 N. Y. Supp. 122.

93. *Briggs v. Shea*, 48 Minn. 218, 50 N. W. 1037.

[a] **May Be Set Aside.**—*Danner v. Capehart*, 41 Minn. 294, 42 N. W. 1062.

94. *Davidson v. Brown*, 93 Wis. 85, 67 N. W. 42; *Egan v. Sengfeil*, 46 Wis. 703, 1 N. W. 467.

A judgment entered in violation of a stay is irregular but not void. See 14 STANDARD PROC. 1007.

95. *Finney v. Egan*, 43 Ore. 1, 72 Pac. 136.

[a] A stay pending an order to show cause terminates if a peremptory order is not obtained. *Fassett v. Dorr*, 11 Wend. (N. Y.) 177.

96. *Graves v. Backus*, 69 Minn. 532, 72 N. W. 811.

97. *Williams v. Lane*, 158 Cal. 39, 109 Pac. 873.

[a] **Filing in state court of a copy of the order adjudging a party a bankrupt** does not deprive state court of jurisdiction. *Reynolds v. Pennsylvania Oil Co.*, 150 Cal. 629, 89 Pac. 610.

98. *In re De Lany & Co.*, 124 Fed. 280; *Taylor v. Buser*, 167 N. Y. Supp. 887.

99. See *infra*, this section.

**Stay of execution** where discharge in bankruptcy was too late to be used as a defense in the action, see *infra*, III, C, 6.

1. Bankr. Act, §11, subd. a. See 3 STANDARD PROC. 938, and *In re Flinders*, 121 Fed. 936; *Anders Bros. v. Latimer* (Ala.), 73 So. 925.

[a] **Applies to voluntary and involuntary bankrupts alike.** *In re Geister*, 97 Fed. 322; *Rosenthal v. Nove*, 175 Mass. 559, 56 N. E. 884, 73 Am. St. Rep. 512.

[b] **Whether pending in a state or federal court**, the suit may be stayed. *In re Geister*, 97 Fed. 322.

[c] **In respect to actions brought within four months' period.** *Ohio Motor Car Co. v. Eiseman Mag. Co.*, 230 Fed. 370, 144 C. C. A. 512; *New River Coal Land Co. v. Ruffner Bros.*, 165 Fed. 881, 888, 91 C. C. A. 559, 21 Am. B. R. 474.

[d] **Judgment on nondischargeable debts** should not be stayed. *In re Koronsky*, 170 Fed. 719, 96 C. C. A. 39; *In re Dowie*, 202 Fed. 816.

[e] **Supplementary proceedings** are within the statute. *In re De Lany & Co.*, 124 Fed. 280.

[f] **If not stayed**, the proceedings in the suit continue and the bankrupt may be compelled to observe all orders therein lawfully made. *In re De Lany & Co.*, 124 Fed. 280.

[g] **But if a discharge in bankruptcy within six years** has been had, a stay will not be granted. *In re Johnson*, 233 Fed. 841.

To obtain a stay the applicant<sup>2</sup> should file in the court in which the action against the bankrupt is pending,<sup>3</sup> or in the bankruptcy court,<sup>4</sup> a proper application or pleading setting forth the pendency of bankruptcy proceedings,<sup>5</sup> upon which it becomes the duty of that court to stay proceedings.<sup>6</sup> But the additional stay after adjudication rests in the discretion of the court.<sup>7</sup>

The bankruptcy court has power to enjoin the parties from further proceedings in the action, when the discharge would be a release,<sup>8</sup> and

2. See 3 STANDARD PROC. 939, and *In re Gerdes*, 102 Fed. 318, denying a petition by a trustee on grounds not affecting his right to apply.

[a] **The creditor** may apply. *Mackel v. Rochester*, 135 Fed. 904, 14 Am. B. R. 429; *In re Siebert*, 133 Fed. 781, 13 Am. B. R. 348. See *In re Goldberg*, 117 Fed. 692.

[b] **The Bankrupt.**—*In re Geister*, 97 Fed. 322.

[c] **Co-debtor** with bankrupt against whom no bankruptcy proceedings are pending cannot apply. *Johnson v. Waxelbaum Co.*, 1 Ga. App. 511, 58 S. E. 56.

3. **U. S.**—*Ohio Motor Car Co. v. Eiseman Mag. Co.*, 236 Fed. 370, 144 C. C. A. 512; *In re Geister*, 97 Fed. 322. **Neb.**—*McIntyre v. Malone*, 3 Neb. (Unof.) 159, 91 N. W. 246. **N. Y.** *Maas v. Kuhn*, 130 App. Div. 68, 114 N. Y. Supp. 444.

[a] **In first instance, application should be made to state court** as a matter of comity. *Ohio Motor Car Co. v. Eiseman Mag. Co.*, 230 Fed. 370, 144 C. C. A. 512; *In re Geister*, 97 Fed. 322. But see *In re Hornstein*, 122 Fed. 266.

**Application decided by the judge**, see 3 STANDARD PROC. 938.

4. See *infra*, this section.

[a] **On refusal by state court, application to bankruptcy court** may be made. *New River Coal Land Co. v. Ruffner*, 165 Fed. 881, 91 C. C. A. 559, 21 Am. B. R. 474.

[b] **Must be filed with the clerk of the court.** *In re Gerdes*, 102 Fed. 318.

5. **U. S.**—*In re Goldberg*, 117 Fed. 692; *In re Geister*, 97 Fed. 322. **Cal.** *Reynolds v. Pennsylvania Oil Co.*, 150 Cal. 629, 89 Pac. 610. **Ill.**—*Holden v. Sherwood*, 84 Cal. 92. **Mo.**—*State ex rel. Strother v. Broadbush*, 234 Mo. 358, 137 S. W. 268.

[a] **Before a justice of the peace**, a motion accompanied with the transcript of the record showing bank-

ruptcy and based thereon is the proper practice. *Holden v. Sherwood*, 84 Ill. 92.

[b] **Petition by attorney** (1) is sufficient although a petition in form by the moving party is better practice. *In re Goldberg*, 117 Fed. 692. (2) But a mere statement of counsel is insufficient. *McGowan v. Bowman*, 79 Vt. 295, 64 Atl. 1121.

[c] **The plea must show that the debt sued on is one from which a discharge would be a release**, and that an application for a discharge has been made or that the time therefor has not elapsed. *Johnson v. Waxelbaum Co.*, 1 Ga. App. 511, 58 S. E. 56.

6. *In re Geister*, 97 Fed. 322; *American Wood Wkg. Mach. Co. v. Fur-bush*, 193 Mass. 455, 79 N. E. 770.

7. *In re Guanacevi Tunnel Co.*, 201 Fed. 316, 119 C. C. A. 554; *Rogers v. Abbot*, 206 Mass. 270, 92 N. E. 472, 138 Am. St. Rep. 394; *Feiganspan v. McDonnell*, 201 Mass. 341, 87 N. E. 624; *Rosenthal v. Nove*, 175 Mass. 559, 56 N. E. 884, 78 Am. St. Rep. 512. See 3 STANDARD PROC. 938.

[a] **If not for benefit of bankrupt's estate**, the stay will not be granted. *In re Federal Biscuit Co.*, 203 Fed. 37, 121 C. C. A. 373.

8. *Mitchell Storebuilding Co. v. Carroll*, 193 Fed. 616, 113 C. C. A. 484; *Moore v. Green*, 145 Fed. 472, 76 C. C. A. 242, 16 Am. Bankr. 648; *In re De Lany & Co.*, 124 Fed. 280.

[a] **Power Sparingly Exercised.**—*In re United Wireless Tel. Co.*, 196 Fed. 153; *Henry v. Harris*, 191 Fed. 868.

[b] **Application to a state court for stay does not affect power of bankruptcy court to grant stay.** *New River Coal Land Co. v. Ruffner Bros.*, 165 Fed. 881, 91 C. C. A. 559, 21 Am. B. R. 474.

[c] **Injunction should not run against the state court and its judge**, except perhaps in case of imperative



it may also grant a stay against a proceeding which has the effect of defeating the operation of the bankrupt law by interfering with the administration of the bankrupt's estate.<sup>9</sup>

A referee cannot grant such stay, however.<sup>10</sup>

**Effect of the Stay.**—The stay of proceedings does not operate as a dismissal of the action in the state or federal court.<sup>11</sup> The exercise of jurisdiction is only suspended temporarily.<sup>12</sup>

The stay may be vacated in a proper case.<sup>13</sup>

**III. STAY OF EXECUTION.**<sup>14</sup>—**A. STATUTORY STAY WITHOUT ACTION OF COURT.**—**1. Generally.**<sup>15</sup>—Statutes frequently provide that execution shall not issue until the lapse of a prescribed period after rendition of judgment.<sup>16</sup>

**2. Stay on Security, or Where Defendant Is a Freeholder.**—Some statutes provide that execution may be stayed for a limited time on filing of security,<sup>17</sup> or where the defendant is a freeholder possessing

necessity. *In re Dana*, 167 Fed. 529, 93 C. C. A. 238.

**9. Morehouse v. Giant Powder Co.**, 206 Fed. 24, 124 C. C. A. 158.

[a] **Power is given by §2, cl. 15** of the bankruptcy act. *Morehouse v. Giant Powder Co.*, 206 Fed. 24, 124 C. C. A. 158.

[b] **Injunction against persons within the court's jurisdiction**, whether parties to the bankruptcy proceeding or not, to prevent a transfer or disposition of the bankrupt's property, may be granted under this power. *Morehouse v. Giant Powder Co.*, 206 Fed. 24, 124 C. C. A. 158; *In re Isaac Harris Co.*, 173 Fed. 735; *In re Hornstein*, 122 Fed. 266; 271.

[c] **An ex parte injunction** restraining a creditor from suing outside the jurisdiction of the district court is unwarranted. *Acme Harvester Co. v. Beekman Lumb. Co.*, 222 U. S. 300, 311, 32 Sup. Ct. 96, 56 L. ed. 208.

[d] **Reference.**—Application shall be heard and decided by a judge, but a reference to ascertain the facts may be ordered. *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. ed. 1183, 4 Am. Bankr. 178, under §2, cl. 15 of Bankr. Act.

**10. White v. Schloerb**, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. ed. 1183, 4 Am. Bankr. 178; *In re Berkowitz*, 143 Fed. 598.

[a] **But judge may refer** the application to a referee to ascertain the facts. Gen. Order XII, 172 U. S. 657, 43 L. ed. 1196, 89 Fed. vii, 32 C. C. A. xvi.

**11. New River Coal Land Co. v.**

*Ruffner Bros.*, 165 Fed. 881, 91 C. C. A. 559, 21 Am. B. R. 474; *American Woolen Co. v. Maaget*, 86 Conn. 234, 85 Atl. 583, Ann. Cas. 1913E, 889.

**12. New River Coal Land Co. v. Ruffner Bros., 165 Fed. 881, 91 C. C. A. 559, 21 Am. B. R. 474; *Williams v. Lane*, 158 Cal. 39, 109 Pac. 873.**

[a] **Proceedings After Termination of Stay.**—On dissolution of the injunction or dismissal of the petition in bankruptcy, the action proceeds as if uninterrupted. If the discharge is granted, it may be pleaded in the state court as against the recovery. *New River Coal Land Co. v. Ruffner Bros.*, 165 Fed. 881, 91 C. C. A. 559, 21 Am. B. R. 474. See *Anders Bros. v. Latimer (Ala.)*, 73 So. 925.

**13. In re Isaac Harris Co.**, 173 Fed. 735. See also 3 STANDARD PROC. 939.

[a] **After debtor's discharge**, the stay will be vacated as a matter of course on application of the creditor. *In re Rosenthal*, 108 Fed. 368.

[b] **Bankruptcy court may vacate stay to permit prosecution** of bankrupt for contempt committed prior to the filing of the petition. *In re Sims*, 176 Fed. 645.

**14. Stay pending appeal**, see *infra*, V.

**15. Stay pending appeal**, see *infra*, V.

**16. See 15 STANDARD PROC. 751.**

**17. Ind.**—*Boggs v. Boggs*, 45 Ind. App. 397, 90 N. E. 1040. **Neb.**—*State v. Fleming*, 21 Neb. 321, 32 N. W. 73. **Pa.**—*Erie City Bank v. Compton*, 27 Pa. 195. **Wash.**—*American Sur. Co. v. Fishback*, 95 Wash. 124, 163 Pac. 488.

an estate equal to the amount of the judgment recovered or of the execution to which plaintiff is entitled, clear of encumbrances.<sup>18</sup> As in the case of other statutory bonds and undertakings, the statute usually provides a summary method of enforcement of the bond given,<sup>19</sup> as by issuance of execution as in case of a confessed judgment.<sup>20</sup>

**B. STAY BY CONSENT OF PARTIES.**—An execution may be stayed by the consent of parties.<sup>21</sup>

**C. STAY ON ORDER OF COURT OR JUDGE.**<sup>22</sup>—**1. Power of Court.** It is an inherent power<sup>23</sup> of all courts to stay or supersede their own executions for adequate cause, when necessary to accomplish the ends

Wyo.—Laughlin *v.* King, 22 Wyo. 8, 133 Pac. 1073.

In justice court, see 18 STANDARD PROC. 144.

[a] **A delivery of a suspending bond** to the officer by a claimant of the property levied on suspends proceedings under statute. August *v.* Gilmer, 53 W. Va. 65, 44 S. E. 143. See the title "Forthcoming Bonds."

[b] **The Stay Operates From Time Bond Is Given.**—American Sur. Co. *v.* Fishback, 95 Wash. 124, 163 Pac. 488; August *v.* Gilmer, 53 W. Va. 65, 44 S. E. 143.

18. Hearn *v.* Ralph, 2 Harr. (Del.) 6; Erie City Bank *v.* Compton, 27 Pa. 195; Com. *v.* Meredith, 5 Binn. (Pa.) 432; Horts *v.* Brinser, 7 Pa. Dist. 327.

[a] **Only actions for breach of contract instituted by writ** are within this statute. Horst *v.* Brinser, 7 Pa. Dist. 327.

[b] **But judgments in favor of the commonwealth** are not within the statute. Com. *v.* Myers, 22 Pa. Dist. 1062.

[c] **It must appear of record** that defendant is a freeholder. Hearn *v.* Ralph, 2 Harr. (Del.) 6.

[d] **Although the filing of a plea of freehold** is the usual practice, (1) it is not necessary. Riegel *v.* Wilson, 60 Pa. 388. Compare Hearn *v.* Ralph, 2 Harr. (Del.) 6, the privilege of freehold must be claimed. (2) An insufficient plea of freehold may be stricken out. Harrison *v.* Hyneman, 1 Phila. (Pa.) 204.

19. See the titles "Summary Proceedings;" "Undertakings;" and *infra*, V, A, 2, b, (III), (J).

20. Ark.—Stevenson *v.* McKissick, 12 Ark. 394. Ind.—Watt *v.* Alvord, 25 Ind. 533; Nunemacher *v.* Ingle, 20 Ind. 135; Lewis *v.* Phillips, 17 Ind. 108, 79 Am. Dec. 457. Mich.—Sweeney *v.*

Lustfield, 116 Mich. 696, 75 N. W. 136. Neb.—State *v.* Fleming, 21 Neb. 321, 32 N. W. 73.

[a] **On suggestion of death of principal**, execution may issue against surety only. Stevenson *v.* McKissick, 12 Ark. 394.

[b] **Enforcement in Another State.** But a bond having the effect of a confessed judgment in one state cannot be sued on in another state as a judgment, but merely as a bond. Foote *v.* Newell, 29 Mo. 400. Compare 15 STANDARD PROC. 660.

21. Ind.—Ristine *v.* Early, 21 Ind. 103. Ky.—Pollard *v.* Pollard, 2 Mon. 16. La.—Pemberton *v.* Erwin, 5 La. 22. N. Y.—Sullivan *v.* Van Valkenburg, 128 N. Y. Supp. 624. Pa.—Mettfett *v.* Mohn, 171 Pa. 395, 33 Atl. 367. Tenn.—Porter's Lessee *v.* Coe, Peck 30.

[a] **But execution for officer's costs** may legally issue, despite an agreement for stay of execution. Clegg *v.* De Bruhl, 45 Tex. 141.

22. **Stay pending appeal**, see *infra*, V.

23. Ala.—Edinburgh American Land Mtg. Co. *v.* Canterbury, 172 Ala. 323, 55 So. 498; Gravett *v.* Malone, 54 Ala. 19; Payne *v.* Thompson, 48 Ala. 535. Fla.—Robinson *v.* Yon, 8 Fla. 350. Ill. Robinson *v.* Chesseldine, 5 Ill. 332. Pa. *In re* Sturges' Appeal, 86 Pa. 413. R. I.—Steere *v.* Stafford, 12 R. I. 131; Sawin *v.* Mt. Vernon Bank, 2 R. I. 382.

[a] **Every court has power.** Eaton *v.* Cleveland, St. L. & K. C. Ry. Co., 41 Fed. 421.

[b] **All Courts of Common Law.** Eaton *v.* Cleveland, St. L. & K. C. Ry. Co., 41 Fed. 421.

[c] **Probate Court.**—Payne *v.* Thompson, 48 Ala. 535.

of justice. It is immaterial whether it be a trial<sup>24</sup> or appellate court, or a court of general<sup>25</sup> or of inferior jurisdiction,<sup>27</sup> or whether it be a state<sup>28</sup> or federal<sup>29</sup> court.

The exercise of this power rests in the discretion of the court.<sup>30</sup> But it should be cautiously exercised;<sup>31</sup> and rather than try some issues in this summary method, the court will leave the parties to their remedy by action.<sup>32</sup>

**2. What Executions May Be Stayed.**—Executions against the person,<sup>33</sup> as well as executions against property,<sup>34</sup> may be stayed.

**3. Who May Procure a Stay.**<sup>35</sup>—Only parties may procure a stay of execution.<sup>36</sup> A stay may be entered at the instance of one or all the defendants.<sup>37</sup>

**Stay by judge at chambers,** see 16 STANDARD PROC. 615, notes 47 and 48, and page 429, note 80.

**24. Ark.**—Walker v. Files, 94 Ark. 453, 127 S. W. 739. **Fla.**—Barnett v. Hickson, 52 Fla. 457, 41 So. 606. **N. Y.** Granger v. Craig, 85 N. Y. 619. **Wis.** Levy v. Goldberg, 40 Wis. 308.

**Stay by trial court after appeal,** see *infra*, V, A, 3, a.

**25. American Ins. Co. v. McGehee Liquor Co.,** 113 Ark. 486, 169 S. W. 251, 253.

[a] It is not the exercise of original jurisdiction but merely the exercise of the court's inherent power over its process. *American Ins. Co. v. McGehee Liquor Co.*, 113 Ark. 486, 169 S. W. 251.

**Stay pending appeal,** see *infra*, V, A, 3, b.

**Stay after remand,** see *infra*, VI.

**Supersedeas by supreme court of interlocutory orders in court below, under Tennessee practice,** see *infra*, VIII.

**26.** See cases cited *infra*, this section.

**27. In justice's courts,** see 18 STANDARD PROC. 144.

[a] **City Court.**—Margolies v. Ernst, 34 Misc. 405, 69 N. Y. Supp. 646.

**28.** See cases cited *infra*, this section.

**29. United States v. McLemore,** 4 How. (U. S.) 286, 11 L. ed. 977; *Eaton v. Cleveland*, St. L. & K. C. Ry. Co., 41 Fed. 421, federal circuit court.

**30. U. S.**—Menees v. Matthews, 197 Fed. 633; *Petrified Bone Min. Co. v. Rogers*, 159 Fed. 1019. **Mont.**—*State ex rel. Robinson v. Clements*, 37 Mont. 96, 94 Pac. 837, 127 Am. St. Rep. 701. **N. Y.**—*Granger v. Craig*, 85 N. Y. 619; *Schmidt v. Levy*, 61 Barb. 496; *People*

*v. Manhattan R. Co.*, 9 Abb. N. C. 448. **Pa.**—*Gamble v. Woods*, 53 Pa. 158; *Erie City Bank v. Compton*, 27 Pa. 195. **R. I.**—*White v. Almy*, 82 Atl. 994; *Sawin v. Mt. Vernon Bank*, 2 R. I. 382.

**31. Eaton v. Cleveland, St. L. & K. C. Ry. Co., 41 Fed. 421; *State ex rel. Robinson v. Clements*, 37 Mont. 96, 94 Pac. 837, 127 Am. St. Rep. 701.**

**32. Myers v. Kelsey, 19 Johns. (N. Y.) 197; *Lansing v. Orcott*, 16 Johns. (N. Y.) 4.**

[a] **Remedy by stay of execution is not a substitute for an equity suit for an injunction.** *Pennsylvania Co. v. Harshaw*, 6 Wkly. N. C. (Pa.) 272.

**33. Baker v. Taylor, 1 Cow. (N. Y.) 165. See *infra*, III, C, 6.**

**34.** See cases cited *supra*, and *infra*, this section.

[a] **Execution may be stayed upon a judgment on a recognizance to obtain a stay of execution.** *Wolfe v. Nesbit*, 4 Watts & S. (Pa.) 312.

**35. Who may procure stay of proceedings,** see *supra*, II, E.

**36. Bonnell v. Neely, 43 Ill. 288.**

[a] **Third persons cannot assert adverse claims by this remedy.** *Bonnell v. Neely*, 43 Ill. 288.

**37. Robinson v. Narber, 65 Pa. 85, whether on the ground of security or freehold.**

[a] **Question whether the defendant is a freeholder is not reviewable on writ of error.** *Robinson v. Narber*, 65 Pa. 85.

[b] **A judgment debtor company has same right to the stay as a private individual.** *Allinson v. Philadelphia & R. R. Co.*, 5 Pa. Co. Ct. 344, 19 Phila. 334; *American Surety Co. v. Fishback*, 95 Wash. 124, 163 Pac. 488.



**4. From What Court and in What Action Stay Issues.**<sup>39</sup>—Generally it is only in the court from which,<sup>39</sup> and in the action in which the execution issued,<sup>40</sup> that a stay of execution can be granted. But after removal of the cause, the reviewing court may order a stay,<sup>41</sup> though not after it has remanded the cause.<sup>42</sup>

**5. Length of Stay.**—The stay of execution may be either temporary<sup>43</sup> or perpetual,<sup>44</sup> depending upon the grounds upon which it is based.

**6. Grounds.**—The grounds for issuing a supersedeas or stay of execution must rest generally, it has been held, on facts occurring subsequent to the decree.<sup>45</sup> A stay may be granted where an execution has issued improperly,<sup>46</sup> and, it has been held, where a levy is made on realty before personalty is exhausted.<sup>47</sup> But mere inconvenience to the debtor,<sup>48</sup> or irregularity in the judgment,<sup>49</sup> does not authorize a stay.

**Pending Other Proceedings.**—Execution may be stayed pending other

**38. What court has power to grant a stay,** see *supra*, III, C, 1; pending appeal, see *infra*, V, A, 6, d.

**39. Com. v. Smith,** 4 Phila. (Pa.) 419. See *supra*, II, D.

[a] **When judgment is transferred to another county** for execution, that court has power to stay the execution. *Com. v. Smith*, 4 Phila. (Pa.) 419.

[b] **Court to which a testatum fi. fa. is directed** cannot stay it. *Com. v. Smith*, 4 Phila. (Pa.) 419; *State v. Brophy*, 38 Wis. 413.

[c] **As to judgments of appellate court,** a circuit judge cannot grant supersedeas. *Dibrell v. Eastland*, 3 Yerg. (Tenn.) 507.

**40. Gilroy v. Everson-Hickok Co.**, 120 App. Div. 207, 105 N. Y. Supp. 188. But see *Pitman v. Smith*, 135 App. Div. 904, 120 N. Y. Supp. 193, holding the court in one action may stay execution on another action in the same court.

**41. See** *infra*, V, A, 3, b.

**Stay by trial court after appeal,** see *supra*, V, A, 3, a.

**42. See** *infra*, VI.

**43. Eaton v. Cleveland**, St. L. & K. C. Ry. Co., 41 Fed. 421; *Barnett v. Hickson*, 52 Fla. 457, 41 So. 606.

**44. Fla.**—*Barnett v. Hickson*, 52 Fla. 457, 41 So. 606. **Mich.**—*Parks v. Goodwin*, 1 Mich. 35. **Miss.**—*Kramer v. Holster*, 55 Miss. 243.

See *infra*, III, C, 6.

[a] But see *Smith v. Eline*, 5 Pa. Dist. 92, holding a permanent injunction should be obtained in equity and not by petition and rule.

**45. Shoemaker v. Shirtliffe**, 1 Dall. (U. S.) 127, 1 L. ed. 66; *Gravett v. Malone*, 54 Ala. 19; *Marshall v. Caudler*, 21 Ala. 490.

[a] But see *Starr v. Schuyler*, 3 Johns. (N. Y.) 139, where feigned issue as to issue of usury was awarded after judgment.

[b] **That purchaser will take no title** does not authorize stay. *Pennsylvania Co. v. Harshaw*, 6 W. N. C. (Pa.) 272.

**46. Greenup v. Brown**, 1 Ill. 252; *Piernas v. Milliet*, 10 La. Ann. 286. See *Shearer v. Boyd*, 10 Ala. 279.

[a] **When an execution is unauthorized by the judgment**, a supersedeas is a proper remedy; or when the court is in session, a motion to quash will be entertained. *Crenshaw v. Hardy*, 3 Ala. 653. See *Shearer v. Boyd*, 10 Ala. 279. And see *infra*, IV.

[b] **Execution for an Amount Greater Than the Judgment.**—*Alabama Great So. R. Co. v. Queen City Elec. Light Co.*, 121 Ala. 300, 25 So. 324.

**47. Farrell v. McKee**, 36 Ill. 225; *Welch v. James*, 22 How. Pr. (N. Y.) 474, setting aside the sale and granting a perpetual stay with respect to the land in question until sale of all other property.

**48. Eaton v. Cleveland**, St. L. & K. C. Ry. Co., 41 Fed. 421.

**49. Warren v. Chicago, B. & Q. Ry. Co.**, 122 Mo. App. 254, 99 S. W. 16, where judgment failed to repond to verdict.

proceedings.<sup>50</sup> Thus execution may be stayed pending a motion to vacate or modify a judgment,<sup>51</sup> pending a motion to quash the execution,<sup>52</sup> or pending garnishment proceedings against the defendant for the judgment debt.<sup>53</sup>

A perpetual stay of execution may be granted where the judgment is void,<sup>54</sup> or has been satisfied,<sup>55</sup> when the debtor's discharge in bankruptcy was too late to be available as a defense,<sup>56</sup> when the action was instituted without authority and the attorney is insolvent,<sup>57</sup> as well as in other cases when the judgment ought not to be enforced.<sup>58</sup>

An execution against the person will be stayed when its issuance is delayed beyond the period within which it should issue.<sup>59</sup>

50. *Lasselle v. Moore*, 1 Blackf. (Ind.) 226.

[a] Pending a cross-action to enable the cross-complainant to obtain an offset. *Knox v. Hexter*, 10 Jones & S. (N. Y.) 496.

[b] To Enable Parties To Seek Relief in Equity.—*American R. Co. v. Ponce & G. R. Co.*, 246 Fed. 925, 159 C. C. A. 197; *Lansing v. Orcott*, 16 Johns. (N. Y.) 4.

[c] Pending another action between the parties, where judgment debtor is insolvent. *Steere v. Stafford*, 12 R. I. 131. But compare 1 STANDARD PROC. 1032.

[d] Until costs can be retaxed, after reversal. *Ex parte Burril*, 24 Cal. 350.

[e] Pending feigned issue (1) to try issue of payments on judgment (*Wardell v. Eden*, 2 Johns. Cas. [N. Y.] 258), or (2) of usury. *Starr v. Schuyler*, 3 Johns. (N. Y.) 139.

Pending appeal, see *infra*, V.

Pending motion for new trial, see *supra*, II, C, 2, b.

Stay of proceedings generally pending other proceedings, see *supra*, II, C, 2.

51. *Pearce v. Miller*, 201 Ill. 188, 66 N. E. 221; *Morrill v. Seip*, 26 Kan. 148.

52. See 16 STANDARD PROC. 429.

But the motion itself does not suspend execution. See 16 STANDARD PROC. 429.

53. U. S.—*Early v. Rogers*, 16 How. 599, 14 L. ed. 1074; *Menees v. Matthews*, 197 Fed. 633. Ala.—*Crawford v. Slade*, 9 Ala. 887, 44 Am. Dec. 463. Minn.—*Blair v. Hilgedick*, 45 Minn. 23, 47 N. W. 310. Miss.—*Yazoo & Miss. Valley R. Co. v. Fulton*, 71 Miss. 385, 14 So. 271. Pa.—*Daly v. Derringer*, 9 Leg. Int. 46, 1 Phila. 324.

*Compare Phelps v. Morgan*, 18 Phila. 655, holding the issuance of an attachment execution is not ground for stay. The sheriff should pay proceeds into court for distribution.

But see La.—*Brown v. Lowe*, 5 La. Ann. 34. Tex.—*Foy v. East Dallas Bank* (Tex. Civ. App.), 28 S. W. 137. W. Va.—*Shrewsbury v. Tufts*, 41 W. Va. 212, 23 S. E. 692, as to nonresident.

Garnishment of judgment, see 10 STANDARD PROC. 426.

54. *Sanchez v. Carriaga*, 31 Cal. 170; *Kramer v. Holster*, 55 Miss. 243.

[a] But not where judgment is erroneous merely. *Chas. v. Christianson*, 41 Cal. 253.

[b] At any time, stay may be granted. *Logan v. Hillegass*, 16 Cal. 200.

55. Ala.—*Gravett v. Malone*, 54 Ala. 19. Ill.—*Bonnell v. Neely*, 43 Ill. 288. Mich.—*Parks v. Goodwin*, 1 Mich. 35. N. Y.—*Wilson v. Smith*, 2 Code Rep. 18.

56. U. S.—*Boynton v. Ball*, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. ed. 985. Cal.—*Imlay v. Carpentier*, 14 Cal. 173. Mich.—*Parks v. Goodwin*, 1 Mich. 35.

See *Harpman v. Andelman*, 190 Ill. App. 29.

Stay of proceedings pending bankruptcy proceedings, see *supra*, II, K.

57. *Campbell v. Bristol*, 19 Wend. (N. Y.) 101.

58. *Davis v. Tiffany*, 1 Hill (N. Y.) 642.

[a] Where plaintiff brings successive suits on a judgment to coerce payment by accumulating costs, the court will stay execution in all suits except the first. *Keeler v. King*, 1 Barb. (N. Y.) 390.

59. *Metcalf v. Moore*, 128 Mich.

**7. Proceedings To Procure Stay.**<sup>60</sup>—Any statutory regulations relating to stays of execution should be complied with.<sup>61</sup>

Generally the stay may be obtained on motion,<sup>62</sup> or petition,<sup>63</sup> supported by facts sufficient to move the discretion of the court.<sup>64</sup> Notice to the adverse party should be given,<sup>65</sup> so that he may resist the application.<sup>66</sup> The court may require the party obtaining the order to enter into an undertaking,<sup>67</sup> and should require it except in cases where the ultimate satisfaction of the judgment is otherwise assured.<sup>68</sup> In some states a stipulation as to the preservation of the lien is required.<sup>69</sup>

On its own motion, the court may order a stay in some cases.<sup>70</sup>

**8. Order of Stay.**—On the hearing of the application, the court or judge must make an order granting or denying the stay.<sup>71</sup> The

138, 87 N. W. 129; *Douglas v. Manistee* Circ. Judge, 42 Mich. 495, 4 N. W. 225; *Smith v. Knapp*, 30 N. Y. 581, 590; *Minturn v. Phelps*, 3 Johns. (N. Y.) 446.

**Time for issuance**, see 16 STANDARD PROC. 278.

**60. Stay pending appeal**, see *infra*, V, A, 1 and 2.

**61.** See generally the statutes and *Mo.*—*Parker v. Hannibal & St. Joseph R. Co.*, 44 Mo. 415. *N. J.*—*Chadwick v. Reeder*, 19 N. J. L. 156. *Pa.*—*Erie City Bank v. Compton*, 27 Pa. 195.

**62. Cal.**—*Sanchez v. Carriaga*, 31 Cal. 170. *Ill.*—*Robinson v. Chesseldine*, 5 Ill. 332. *Mo.*—*Johnson* to use of *Hemminghaus v. Greve*, 60 Mo. App. 170, 1 Mo. App. Rep. 80, on motion to court. *R. I.*—*White v. Almy*, 82 Atl. 994.

**63. Ala.**—*Oswitchee Co. v. Hope & Co.*, 5 Ala. 629; *Gates v. McDaniel*, 3 Port. 356. *La.*—*Wiley v. Woodman*, 19 La. Ann. 210 (on petition, affidavit and bond); *Piernas v. Milliet*, 10 La. Ann. 286, when the ground for stay does not appear of record, an affidavit is required. *Mo.*—*Johnson* to use of *Hemminghaus v. Greve*, 60 Mo. App. 170, 1 Mo. App. Rep. 80, by petition to judge in vacation.

**64. State ex rel.** *Robinson v. Clements*, 37 Mont. 100, 95 Pac. 845, 127 Am. St. Rep. 701.

**65. Cal.**—*Livermore v. Hodgkins*, 54 Cal. 637. *Ind.*—*Curran v. Abbott*, 141 Ind. 492, 40 N. E. 1091, 50 Am. St. Rep. 337. *Pa.*—*Irons v. McQuewan*, 27 Pa. 196, 67 Am. Dec. 456. *S. C.*—*New York Life Ins. Co. v. Mobley*, 89 S. C. 189, 71 S. E. 817.

[a] An order to show cause should

be issued. *Lewis v. Linton*, 207 Pa. 320, 56 Atl. 874. *Contra*, *Wiley v. Woodman*, 19 La. Ann. 210.

**66. Lewis v. Linton, 207 Pa. 320, 56 Atl. 874, he may file an answer.**

**67. U. S.**—*Fisher v. Meyer*, 20 Blatchf. 273, 10 Fed. 268. *Kan.*—*Morrill v. Seip*, 26 Kan. 148. *N. Y.*—*Gilroy v. Everson-Hickok Co.*, 120 App. Div. 207, 105 N. Y. Supp. 188. *Tenn.* *Clark v. Henderson*, 1 Tenn. Ch. 506.

**In justice's courts**, see 18 STANDARD PROC. 144.

[a] **Stay without undertaking** (1) may be granted (*Carter v. Hodge*, 150 N. Y. 532, 44 N. E. 1101; *Granger v. Craig*, 85 N. Y. 619; *Margolis v. Ernst*, 34 Misc. 405, 69 N. Y. Supp. 646), unless (2) statute provides otherwise. *Erie City Bank v. Compton*, 27 Pa. 195, where defendant is not a freeholder.

[b] **Bond May Be Amended.**—*State ex rel. Cleary v. Russell*, 17 Neb. 201, 22 N. W. 455.

**68. State ex rel.** *Robinson v. Clements*, 37 Mont. 96, 94 Pac. 837, 127 Am. St. Rep. 701.

**69. Irons v. McQuewan, 27 Pa. 196, 67 Am. Dec. 456.**

**70. Piernas v. Milliet, 10 La. Ann. 286.**

[a] **When Process Appears on Its Face To Have Been Wrongfully Issued.**—*Piernas v. Milliet*, 10 La. Ann. 286.

**71. State ex rel.** *Robinson v. Clements*, 37 Mont. 96, 94 Pac. 837, 127 Am. St. Rep. 701. See *State v. Reynolds*, 14 Mont. 383, 36 Pac. 449; *Gwinn v. Harrell*, 12 Lea (Tenn.) 738; *Cannon v. Trail*, 1 Head (Tenn.) 282.

[a] On granting a stay, the court



order should be served,<sup>72</sup> and if made with a view to a motion, must be accompanied with a notice of motion.<sup>73</sup>

**9. Vacation, Modification and Review.**—An order staying execution may be vacated,<sup>74</sup> and may sometimes be reviewed on appeal,<sup>75</sup> or by mandamus.<sup>76</sup>

**10. Effect of Stay.**—The effect of a stay of execution is substantially the same as the effect of a stay or supersedeas pending proceedings for review.<sup>77</sup> The force and effect of the judgment is not impaired.<sup>78</sup> Writs of execution and proceedings issued and had thereon in violation of the stay are regarded as voidable merely,<sup>79</sup> and may be set aside on proper application.<sup>80</sup> As to executions already issued the stay suspends the running of the time during which it may be executed.<sup>81</sup> The lien of the execution is not affected,<sup>82</sup> but in some states levies already made are released.<sup>83</sup> If a levy has not been made before the granting of the stay, other creditors may seize the defendant's goods.<sup>84</sup> The right to a review of the action by appellate proceedings is not waived by the taking of a stay of execution,<sup>85</sup> unless

should direct a levy to be made and preserve liens. *In re Sturges' Appeal*, 86 Pa. 413.

[b] **Record entry may be corrected** to conform to the facts. *Kendall v. O'Neal*, 16 Mont. 303, 40 Pac. 599.

72. *Campbell v. Smith*, 9 Wis. 305.

[a] **Showing of supersedeas to sheriff** is sufficient delivery. *Hopkinson v. Sears*, 14 Vt. 494, 39 Am. Dec. 236.

73. *Sales v. Woodin*, 8 How. Pr. (N. Y.) 349; *Rosevelt v. Fulton*, 5 Cow. (N. Y.) 438.

[a] **Otherwise It Does Not Operate as a Stay.**—*Rosevelt v. Fulton*, 5 Cow. (N. Y.) 438.

74. *Rosevelt v. Fulton*, 5 Cow. (N. Y.) 438; *Steffin v. Steffin*, 4 N. Y. Civ. Proc. 179; *Dibrell v. Eastland*, 3 Yerg. (Tenn.) 507. Compare 18 STANDARD PROC. 144.

[a] **But the mere institution of insolvency proceedings** by a surety, is not sufficient to induce the court to issue execution. *Warner v. Baneroft*, 2 Miles (Pa.) 95.

[b] **Nor Is the Death of the Surety.** *Wriggins v. Stevens*, 2 Miles (Pa.) 427.

[c] **On Motion.**—*Rosevelt v. Fulton*, 5 Cow. (N. Y.) 438.

[d] **Mandamus lies to compel vacation of order.** *State ex rel. Robinson v. Clements*, 37 Mont. 100, 95 Pac. 845, 127 Am. St. Rep. 701. But compare the title "Mandamus."

75. See 2 STANDARD PROC. 182.

76. *People v. Manhattan R. Co.*, 9 Abb. N. C. (N. Y.) 448.

77. See *infra*, V, A, 9.

78. *Willard v. Ostrander*, 51 Kan. 481, 32 Pac. 1092, 37 Am. St. Rep. 294.

79. **U. S.**—*Beebe v. United States*, 161 U. S. 104, 113, 16 Sup. Ct. 532, 40 L. ed. 636. **N. C.**—*Cody v. Quinn*, 28 N. C. 191, 44 Am. Dec. 75. **Pa.** *Stewart v. Stocker*, 13 Serg. & R. 199, 15 Am. Dec. 589. *Contra*, *Milliken v. Brown*, 10 Serg. & R. 188.

80. *Sullivan v. Van Valkenburg*, 128 N. Y. Supp. 624; *Campbell v. Smith*, 9 Wis. 305.

81. *Ansonia Brass & Copper Co. v. Conner*, 103 N. Y. 502, 9 N. E. 238, 11 Civ. Proc. 371.

82. **U. S.**—*Love v. Love*, 15 Fed. Cas. No. 8,549. **Del.**—*Hickman v. Hickman*, 3 Harr. 484. **R. I.**—See *Steere v. Stafford*, 12 R. I. 131.

[a] **Levy** is not destroyed. *State v. Records*, 5 Harr. (Del.) 146.

[b] **Priority of lien** not lost. *Hickman v. Hickman*, 3 Harr. (Del.) 484; *Marshall v. Moore*, 36 Ill. 321.

83. *Parker v. Dean*, 45 Miss. 408; *Hamilton v. Henry*, 27 N. C. 218.

In justice's court, see 18 STANDARD PROC. 97.

84. *In re Sturges' Appeal*, 86 Pa. 413.

85. *White v. Blum*, 4 Neb. 555 (compare next note following); *Russell v. Giles*, 31 Ohio St. 293, distinguished

the statute so provides.<sup>86</sup>

D. IN CRIMINAL CASES. — 1. **In General.** — There is a clear distinction between the suspension of the imposition of a sentence and the suspension or remission of the enforcement or execution of a sentence already imposed.<sup>87</sup>

2. **At Early Common Law.** — At early common law the courts had discretionary power, especially in capital cases, to grant reprieves in exceptional cases to prevent abuses of their process and to prevent irreparable injustice from being done to defendants.<sup>88</sup>

3. **Under Modern Practice.** — a. *In the Absence of Statute.* — The authorities are irreconcilable in their reasoning and conclusions as to the power of a trial court to indefinitely suspend a sentence imposed upon a defendant in a criminal case.<sup>89</sup> According to some authorities, a trial court has inherent power in the absence of statute providing otherwise,<sup>90</sup> to stay the execution of a sentence in a criminal case, in whole or in part,<sup>91</sup> and for a definite,<sup>92</sup> or for an indefinite period<sup>93</sup> of time, whether the defendant consents to it or not.<sup>94</sup> When the suspension is upon conditions expressed in the judgment, the prisoner has a right to rely upon such conditions, and so long as he complies therewith the suspension will stand.<sup>95</sup> But when the suspension is without express conditions, it is within the power of the court on its own<sup>96</sup>

in *Shafer v. Hockheimer & Son*, 36 Ohio St. 215.

86. *Miller v. Hyers*, 11 Neb. 474, 9 N. W. 645.

87. *State v. Sturgis*, 110 Me. 96, 85 Atl. 474, 43 L. R. A. (N. S.) 443; *In re Webb*, 89 Wis. 354, 62 N. W. 177, 46 Am. St. Rep. 846, 27 L. R. A. 356, *distinguishing* *People ex rel. Forsyth v. Court of Sessions*, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856.

**Suspension of the imposition of sentence**, see the title "Sentence and Judgment."

[a] **The withholding of the commitment is equivalent to the suspension of the execution of the sentence.** *Ex parte Slattery*, 163 Cal. 176, 124 Pac. 856.

[b] **A suspension of execution necessarily involves a suspension of the penal consequences of the judgment.** *Belden v. Hugo*, 88 Conn. 500, 91 Atl. 369.

88. *Fuller v. State*, 100 Miss. 811, 57 So. 806, Ann. Cas. 1914A, 98, 39 L. R. A. (N. S.) 242.

[a] **Rule May Have Been Confined to Capital Cases.** — As all of the early cases which have come under observation upholding the power of the court were cases in which the death penalty was imposed, it may be that the

rule is confined to such cases, but it is unnecessary to decide the point. *Fuller v. State*, 100 Miss. 811, 57 So. 806, Ann. Cas. 1914A, 98, 39 L. R. A. (N. S.) 242.

89. See *infra*, this section.

90. See the statutes and *infra*, III, D, 3, b, (IV).

91. **N. H.** — *State v. Drew*, 75 N. H. 604, 76 Atl. 191; *State v. Drew*, 75 N. H. 402, 74 Atl. 875; *Sylvester v. State*, 65 N. H. 193, 20 Atl. 954. **N. Y.** *Miller's Case*, 9 Cow. 730. **N. C.** — See *State v. Crook*, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260. **Ohio.** — *Weber v. State*, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472.

See *In re Collins*, 8 Cal. App. 367, 97 Pac. 188.

92. *State v. Drew*, 75 N. H. 402, 74 Atl. 875; *Ex parte Howard*, 17 N. H. 545.

93. *State v. Drew*, 75 N. H. 402, 74 Atl. 875; *Sylvester v. State*, 65 N. H. 193, 20 Atl. 954; *Weber v. State*, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472.

94. *Weber v. State*, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472.

95. *Weber v. State*, 58 Ohio 616, 51 N. E. 116, 41 L. R. A. 472.

96. *Weber v. State*, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472.

motion at any time during the same term,<sup>97</sup> to set aside the suspension, and to order the sentence to be executed.<sup>98</sup>

But according to the weight of authority a trial court has no power to suspend the execution of a judgment after sentence pronounced,<sup>99</sup> except pending an appeal or other proceeding to obtain a new trial or review of the judgment,<sup>1</sup> or where cumulative sentences are imposed,<sup>2</sup> or in some cases of necessity or emergency.<sup>3</sup> It cannot suspend execution of the sentence indefinitely,<sup>4</sup> or suspend the execution of the sentence during the good behavior of the defendant,<sup>5</sup> or provide

97. *Weber v. State*, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472.

[a] **Whether it has such power afterwards**, query. *Weber v. State*, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472.

98. *Weber v. State*, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472.

99. *Tanner v. Wiggins*, 54 Fla. 203, 45 So. 459; *State v. Murphy*, 23 Nev. 390, 48 Pac. 628. See also cases cited *infra*, this section.

[a] **The court cannot stay execution** of a sentence of imprisonment for any length of time. *State v. Murphy*, 23 Nev. 390, 48 Pac. 628.

1. **Fla.**—*Tanner v. Wiggins*, 54 Fla. 203, 45 So. 459. **Ga.**—*Daniel v. Persons*, 137 Ga. 826, 74 S. E. 260; *Roberts v. Wansley*, 137 Ga. 439, 73 S. E. 654. **Me.**—*State v. Sturgis*, 110 Me. 96, 85 Atl. 474, 43 L. R. A. (N. S.) 443. **Minn.**—*State v. Waterman*, 112 Minn. 157, 127 N. W. 473; *State ex rel. Cary v. Langum*, 112 Minn. 121, 127 N. W. 465. **Wis.**—*In re Webb*, 89 Wis. 354, 62 N. W. 177, 46 Am. St. Rep. 846, 27 L. R. A. 356; *State v. Grottkau*, 73 Wis. 589, 41 N. W. 80, 1063, 9 Am. St. Rep. 816.

*Contra*, *In re Markuson*, 5 N. D. 180, 64 N. W. 939. And see *State v. Murphy*, 23 Nev. 390, 48 Pac. 628.

**Supersedeas or stay pending appeal or error**, see *infra*, V, B.

[a] **The court has inherent power** to grant a stay of execution to enable the defendant to perfect an appeal. *State ex rel. Cary v. Langum*, 112 Minn. 121, 127 N. W. 465.

2. **Tanner v. Wiggins, 54 Fla. 203, 45 So. 459; *State v. Sturgis*, 110 Me. 96, 85 Atl. 474, 43 L. R. A. (N. S.) 443.**

3. **Fla.**—*Tanner v. Wiggins*, 54 Fla. 203, 45 So. 459. **Me.**—*State v. Sturgis*, 110 Me. 96, 85 Atl. 474, 43 L. R. A.

(N. S.) 443. **S. C.**—*State v. Abbott*, 87 S. C. 466, 70 S. E. 6, Ann. Cas. 1912B, 1189, 33 L. R. A. (N. S.) 112. **Tenn.**—*Fults v. State*, 2 Sneed 232.

[a] **To Enable Defendant To Apply for a Reprieve or Pardon.**—*Fults v. State*, 2 Sneed (Tenn.) 232.

4. **Fla.**—*Ragland v. State*, 55 Fla. 157, 46 So. 724; *Tanner v. Wiggins*, 54 Fla. 203, 45 So. 459. **Ga.**—*Daniel v. Persons*, 137 Ga. 826, 74 S. E. 260; *Roberts v. Wansley*, 137 Ga. 439, 73 S. E. 654; *Neal v. State*, 104 Ga. 509, 30 S. E. 858, 69 Am. St. Rep. 175, 42 L. R. A. 190. **Idaho.**—*In re Peterson*, 19 Idaho 433, 113 Pac. 729, 33 L. R. A. (N. S.) 1067. **Ill.**—*People v. Barrett*, 202 Ill. 287, 67 N. E. 23, 95 Am. St. Rep. 230, 63 L. R. A. 82. **Ia.**—*Miller v. Evans*, 115 Iowa 101, 88 N. W. 198, 91 Am. St. Rep. 143, 56 L. R. A. 101; *State v. Voss*, 80 Iowa 467, 45 N. W. 898, 8 L. R. A. 767. **Kan.**—*In re Strickler*, 51 Kan. 700, 33 Pac. 620. **Me.**—*State v. Sturgis*, 110 Me. 96, 85 Atl. 474, 43 L. R. A. (N. S.) 443; *Tuttle v. Lang*, 100 Me. 123, 60 Atl. 892. **Mo.**—*Ex parte Bugg*, 163 Mo. App. 44, 145 S. W. 831. **Nev.**—*State v. Murphy*, 23 Nev. 390, 48 Pac. 628. **N. D.**—*In re Markuson*, 5 N. D. 180, 64 N. W. 939. **Okla.**—*Ex parte Clendenning*, 22 Okla. 108, 97 Pac. 650, 132 Am. St. Rep. 628, 19 L. R. A. (N. S.) 1041. **S. C.**—*State v. Abbott*, 87 S. C. 466, 70 S. E. 6, Ann. Cas. 1912B, 1189, 33 L. R. A. (N. S.) 112, 120. **Tenn.**—*Spencer v. State*, 125 Tenn. 64, 140 S. W. 597, 38 L. R. A. (N. S.) 680. **Wis.**—*In re Webb*, 89 Wis. 354, 62 N. W. 177, 46 Am. St. Rep. 846, 27 L. R. A. 356.

5. *Fuller v. State*, 100 Miss. 811, 57 So. 806, Ann. Cas. 1914A, 98, 39 L. R. A. (N. S.) 242 (note); *State v. Abbott*, 87 S. C. 466, 70 S. E. 6, Ann. Cas. 1912B, 1189, 33 L. R. A. (N. S.) 112.



in its judgment that the imprisonment of the defendant shall begin at some future indefinite time, depending upon the happening of a contingency.<sup>6</sup> The changes in the criminal law have rendered unnecessary the early judicial power of reprieve,<sup>7</sup> and the exercise of such power would infringe the powers of the executive.<sup>8</sup> It has been held, however, that a judgment with a proviso that no execution issue is distinguishable from a suspension of execution of sentence.<sup>9</sup>

**Effect of Invalid Order of Stay.** — According to some authorities, an invalid order of stay does not avoid the original judgment,<sup>10</sup> and in the absence of a request to be taken into custody, will be presumed to have been consented to by the defendant,<sup>11</sup> and, therefore, if there is no statute to the contrary,<sup>12</sup> the defendant, if at liberty, may be rearrested as an escape and ordered into custody upon the executed judgment.<sup>13</sup> Other authorities hold that after an unauthorized order indefinitely suspending execution the court cannot issue a warrant for the defendant's arrest, after the expiration of the time for imprisonment.<sup>14</sup>

b. *Under Statute.* — (I.) **Generally.** — The statutes in some states confer and regulate the power to suspend execution in criminal

6. *Ex parte* Clendenning, 22 Okla. 108, 97 Pac. 650, 132 Am. St. Rep. 628, 19 L. R. A. (N. S.) 1041.

[a] That a court may fix a day certain in the future on which the sentence shall begin, see the title "Sentence and Judgment."

7. See *Fuller v. State*, 100 Miss. 811, 57 So. 806, Ann. Cas. 1914A, 98, 39 L. R. A. (N. S.) 242.

[a] Whatever justification the hardships resulting from the peculiar rules of the common law may have furnished for such a practice have disappeared with the enactment of statutes affording full opportunity for the correction of errors. *Miller v. Evans*, 115 Iowa 101, 88 N. W. 198, 91 Am. St. Rep. 143, 56 L. R. A. 101.

8. *Miller v. Evans*, 115 Iowa 101, 88 N. W. 198, 91 Am. St. Rep. 143, 56 L. R. A. 101; *State v. Sturgis*, 110 Me. 96, 85 Atl. 474, 43 L. R. A. (N. S.) 443.

9. *Ex parte* Clendenning, 22 Okla. 108, 97 Pac. 650, 132 Am. St. Rep. 628, 19 L. R. A. (N. S.) 1041, distinguishing *State v. Hatley*, 110 N. C. 522, 14 S. E. 751.

[a] The proviso that no execution issue is no part of the sentence or judgment but is a mere memorandum directing the clerk to postpone the period at which the sentence should go into execution. Such a course is

not infrequent but is not recommended. *State v. Hatley*, 110 N. C. 522, 14 S. E. 751.

10. *In re* Collins, 8 Cal. App. 367, 97 Pac. 188.

11. *Fuller v. State*, 100 Miss. 811, 57 So. 806, Ann. Cas. 1914A, 98, 39 L. R. A. (N. S.) 242.

[a] **Consensus Follit Errorem.**—*Fuller v. State*, 100 Miss. 811, 57 So. 806, Ann. Cas. 1914A, 98, 39 L. R. A. (N. S.) 242.

12. See the statutes.

13. **Cal.**—*Ex parte* Moore, 12 Cal. App. 161, 107 Pac. 129; *In re* Collins, 8 Cal. App. 367, 97 Pac. 188. **Miss.** *Fuller v. State*, 100 Miss. 811, 57 So. 806, Ann. Cas. 1914A, 98, 39 L. R. A. (N. S.) 242. **Mo.**—*Ex parte* Bugg, 163 Mo. App. 44, 145 S. W. 831. **N. H.** *State v. Drew*, 75 N. H. 402, 74 Atl. 875. **Tenn.**—*Spencer v. State*, 125 Tenn. 64, 140 S. W. 597, 38 L. R. A. (N. S.) 680.

14. **Ala.**—*Scottsboro v. Johnston*, 121 Ala. 397, 25 So. 809. **Kan.**—*In re* Strickler, 51 Kan. 700, 33 Pac. 620. **Me.**—*State v. Sturgis*, 110 Me. 96, 85 Atl. 474, 43 L. R. A. (N. S.) 443; *Tuttle v. Lang*, 100 Me. 123, 60 Atl. 892. **N. J.**—*State v. Clifford*, 84 N. J. L. 595, 87 Atl. 97. **N. D.**—*In re* Markuson, 5 N. D. 180, 64 N. W. 939. **Wis.**—*In re* Webb, 89 Wis. 354, 62 N. W. 177, 46 Am. St. Rep. 846, 27 L. R. A. 356.

cases.<sup>15</sup> Some of these statutes are construed to give the court absolute power of suspension,<sup>16</sup> and irregularities in the court's action do not invalidate the order of suspension, when the court acts under the statute and within its limits.<sup>17</sup>

(II.) Probation.—Some statutes authorize the court to suspend the execution of sentence,<sup>18</sup> for such period of time as the statute prescribes or allows,<sup>19</sup> upon such terms and conditions as it shall determine, and to place the defendant on probation and under the charge and supervision of a probation officer during such suspension.<sup>20</sup> The order of suspension is an operative judgment of the court,<sup>21</sup> and so remains until revoked or modified by an order regularly made,<sup>22</sup> and consequently the issuance of a commitment without an order of revocation or modification is improper,<sup>23</sup> and the defendant will be released on habeas corpus.<sup>24</sup> The suspension of the execution is inconsistent with its execution; and upon revocation of the suspension,

15. See the statutes and *Mass.* *Com. v. Drohan*, 210 *Mass.* 445, 97 *N. E.* 89. *Mich.*—*People v. Fritch*, 161 *Mich.* 111, 125 *N. W.* 785. *Minn.* *State v. Fjolander*, 125 *Minh.* 529, 147 *N. W.* 273.

[a] **To Enable Defendant To Apply for a Pardon.**—But the power will only be exercised in a proper case and will not be exercised generally. *Crane v. State*, 94 *Tenn.* 86, 98, 28 *S. W.* 317; *Allen v. State*, *Mart. & Y. (Tenn.)* 294.

[b] **To Enable Party To Apply for a Writ of Error.**—*State ex rel. Stafford v. Hawk*, 47 *W. Va.* 434, 34 *S. E.* 918. And see *infra*, V, B.

[c] **Court Has Discretionary Power.** *Cal.*—*People v. Dunlop*, 27 *Cal. App.* 460, 150 *Pac.* 389. *La.*—*State v. Serio*, 138 *La.* 678, 70 *So.* 609. *Mass.*—*Com. v. Drohan*, 210 *Mass.* 445, 97 *N. E.* 89. *Tenn.*—*Crane v. State*, 94 *Tenn.* 86, 98, 28 *S. W.* 317.

[d] **Presence of prisoner unnecessary.** *State v. Young*, 50 *W. Va.* 96, 40 *S. E.* 334, 88 *Am. St. Rep.* 846.

**Supersedeas or stay pending appeal or error**, see *infra*, V, B.

16. *In re Giannini*, 18 *Cal. App.* 166, 122 *Pac.* 831.

17. *Ex parte Slaterry*, 163 *Cal.* 176, 124 *Pac.* 856; *In re Giannini*, 18 *Cal. App.* 166, 122 *Pac.* 831.

18. See the statutes, and *Cal.*—*In re Giannini*, 18 *Cal. App.* 166, 122 *Pac.* 831. See *In re Collins*, 8 *Cal. App.* 367, 97 *Pac.* 188. *Conn.*—*Belden v. Hugo*, 88 *Conn.* 500, 91 *Atl.* 369. *R. I.*—*Ex parte Scamporrino*, 30 *R. I.* 587, 76 *Atl.* 761.

[a] **The matter is left to the discretion of the trial court.** *People v. Dunlop*, 27 *Cal. App.* 460, 470, 150 *Pac.* 389.

19. See *infra*, this note.

[a] **Length of Probation.**—When the statute provides that the court may suspend execution and place the defendant on probation "for such period of time not exceeding the maximum possible term of such sentence," the court may place the defendant on probation for the full maximum term, although it imposes a lesser sentence. *In re Giannini*, 18 *Cal. App.* 166, 122 *Pac.* 831.

[b] **The failure to fix the time of suspension is equivalent to a suspension for period fixed by the statute as the time beyond which the court cannot suspend execution.** *In re Giannini*, 18 *Cal. App.* 166, 169, 122 *Pac.* 831.

20. See *infra*, this note.

[a] **A failure of the court to place the defendant in charge of a probation officer, as directed by the statute, does not invalidate the order of suspension.** *In re Giannini*, 18 *Cal. App.* 166, 122 *Pac.* 831.

21. *In re Giannini*, 18 *Cal. App.* 166, 122 *Pac.* 831.

22. *In re Giannini*, 18 *Cal. App.* 166, 122 *Pac.* 831.

[a] **The statute confers the power of revocation and modification upon the court.** *In re Giannini*, 18 *Cal. App.* 166, 122 *Pac.* 831.

23. *In re Giannini*, 18 *Cal. App.* 166, 122 *Pac.* 831.

24. *In re Giannini*, 18 *Cal. App.* 166, 122 *Pac.* 831.

the duration of the probation is not to be counted in reduction of the sentence.<sup>25</sup> But when the defendant has fulfilled the conditions of his probation for the entire period thereof, which cannot, under statute, exceed the maximum possible term of sentence, the power of the court to enforce the original judgment is at an end.<sup>26</sup>

(III.) *Parole.* — Some statutes provide that after the pronouncing of sentence, the court, in its discretion, may parole the defendant if satisfied that he will not again violate the law.<sup>27</sup>

(IV.) *Effect of Statute on Court's Inherent Power.* — It has been held that a statute providing a manner in which a defendant may obtain a stay of execution does not exclude the inherent power of the court to grant a stay.<sup>28</sup>

c. *Insanity of Defendant.* — The insanity of the defendant convicted of crime after sentence imposed, is a ground for suspending or staying execution until recovery, both at common law,<sup>29</sup> and under statute.<sup>30</sup> The manner of trying the issue of insanity is elsewhere treated.<sup>31</sup>

#### IV. SUPERSEDEAS AS SUBSTITUTE FOR AUDITA QUERELA.

In one state, at least, the remedy of supersedeas is a substitute for the ancient writ of audita querela.<sup>32</sup> It is not, in a strict sense, a proceeding at common law,<sup>33</sup> but is in the nature of a suit,<sup>34</sup> but like a

25. *Belden v. Hugo*, 88 Conn. 500, 91 Atl. 369.

26. *Ex parte Slattery*, 163 Cal. 176, 124 Pac. 856.

27. See the statutes and *Ex parte Foister*, 203 Mo. 687, 102 S. W. 542.

[a] *Corporations* are not embraced by the statute. *State ex rel. Howell Co. v. West Plains Tel. Co.*, 232 Mo. 579, 135 S. W. 20.

28. *State ex rel. Cary v. Langum*, 112 Minn. 121, 127 N. W. 465. But compare *In re Collins*, 8 Cal. App. 367, 97 Pac. 188, holding that a special provision in the statute respecting staying execution in criminal cases, justifies the inference of a legislative intent to limit the power of the court to the specially provided cases.

29. *Ark.*—*Ferguson v. Martineau*, 115 Ark. 317, 171 S. W. 472, Ann. Cas. 1916E, 421. *Colo.*—See *Bulger v. People*, 61 Colo. 187, 192, 156 Pac. 800. *Tenn.*—*Fults v. State*, 2 Sneed 232.

See also Bl. Com., Book 4, ch. 2, p. 24.

[a] *The court or judge has inherent power, in vacation, to say that the execution of the judgment was not in force upon a person who was insane at the time set for his execution.* *Ferguson v. Martineau*, 115 Ark. 317, 326, 171 S. W. 472, Ann. Cas. 1916E, 421.

30. See the statutes and *U. S. Nobles v. Georgia*, 168 U. S. 398, 18 Sup. Ct. 87, 42 L. ed. 515, under Georgia practice. *Ariz.*—*State v. Sims*, 17 Ariz. 410, 153 Pac. 451. *Colo.*—*Bulger v. People*, 61 Colo. 187, 156 Pac. 800. *Neb.*—*Barker v. State*, 75 Neb. 289, 103 N. W. 1134, 106 N. W. 450. *N. J.* *Lang v. State*, 76 N. J. L. 829, 72 Atl. 1118. *N. Y.*—*People v. Skwisky*, 213 N. Y. 151, 107 N. E. 47.

31. See generally the title "Insane Persons."

32. *Wallace v. F. W. Cook Brew. Co.*, 196 Ala. 245, 72 So. 93; *Thompson v. Lassiter*, 86 Ala. 536, 6 So. 33; *Moore v. Bell*, 13 Ala. 469, 472; *Campbell v. Byers*, 6 Ala. App. 292, 60 So. 737.

[a] *Purpose.* — The petition and supersedeas is intended merely to arrest the execution until it is ascertained whether it has been properly issued. *Bruce v. Barnes*, 20 Ala. 219.

As to audita querela, see the title "Audita Querela."

33. *Branch Bank v. Coleman*, 20 Ala. 140.

34. *Edwards v. Lewis*, 16 Ala. 813.

[a] *And Therefore Costs Are Due the Successful Party.*—*Eslava v. Farley*, 72 Ala. 214; *Shearer v. Boyd*, 10 Ala. 279.



writ of audita querela is in the nature of a bill in equity.<sup>35</sup> It is in effect and may be treated as a motion to quash also.<sup>36</sup>

**Grounds.** — The writ of supersedeas will lie in cases in which a writ of audita querela would lie at common law.<sup>37</sup>

**By Whom Issued.** — Being in the nature of an audita querela, the writ should be granted out of the court where the record remains or be returnable to that court.<sup>38</sup>

**Proceedings.** — The petition for supersedeas is equivalent to a declaration upon the ancient audita querela.<sup>39</sup> The defendant may plead thereto,<sup>40</sup> and a right to a jury trial upon issues of facts

[b] **Right to open and close argument** is with petitioner. *Pearsall v. McCartney*, 28 Ala. 110.

35. *Thompson v. Lassiter*, 86 Ala. 536, 6 So. 33; *Campbell v. Byers*, 6 Ala. App. 292, 60 So. 737.

[a] **But Not so Far as to Require the Same Strictness in Pleading.** *Thompson v. Lassiter*, 86 Ala. 536, 6 So. 33.

36. *Rice v. Dillahunt*, 20 Ala. 399; *Oswitchee Co. v. Hope & Co.*, 5 Ala. 629.

[a] **Even when the supersedeas is quashed** because improvidently issued, the petition might be considered as a motion. *Shearer v. Boyd*, 10 Ala. 279; *Oswitchee Co. v. Hope & Co.*, 5 Ala. 629.

37. *Henderson v. Planters' & M. Bank*, 178 Ala. 420, 59 So. 493; *Thompson v. Lassiter*, 86 Ala. 536, 6 So. 33; *Branch Bank v. Coleman*, 20 Ala. 140.

[a] **When an execution is improperly issued**, (1) writ will lie. *Ex parte Pearl Roller Mill Co.*, 154 Ala. 232, 45 So. 423; *Cobb v. Thompson*, 87 Ala. 381, 6 So. 373. (2) Where impropriety results from mere irregularity in issuance, and because plaintiff has no just right to enforce process. *Shearer v. Boyd*, 10 Ala. 279, 281. (3) Where execution issues against sureties before return of no property as to the party. *Payne v. Thompson*, 48 Ala. 535.

[b] **When an improper use of the execution is attempted to be made** the writ will lie. *Lockhart v. McElroy*, 7 Ala. 572.

[c] **Matters operating as an equitable satisfaction of the judgment** may be inquired into. *Henderson v. Planters' & M. Bank*, 178 Ala. 420, 59 So. 493; *Thompson v. Lassiter*, 86 Ala. 536, 6 So. 33; *Rice v. Dillahunt*, 20 Ala. 399.

[d] **Matters going behind the judgment** cannot be inquired into, as a general rule. *Thompson v. Lassiter*, 86 Ala. 536, 6 So. 33.

[e] **But antecedent facts such as fraud in the decree, want of jurisdiction of the court apparent on the record, or an absence of the relation authorizing execution, justify relief by supersedeas.** *Randall v. Wadsworth*, 130 Ala. 633, 31 So. 553; *Gravett v. Malone*, 54 Ala. 19.

[f] **Omission of guardian to bring forth at the settlement credits** does not justify relief by supersedeas. *Randall v. Wadsworth*, 130 Ala. 633, 31 So. 555.

38. *Payne v. Thompson*, 48 Ala. 535. See 3 STANDARD PROC. 879, note 8.

[a] **A judge of the circuit court** may grant a writ returnable in term time. *Ex parte Pearl Roller Mill Co.*, 154 Ala. 232, 45 So. 423.

39. *Bruce v. Barnes*, 20 Ala. 219.

[a] **Pleadings to be in names of parties** (1) to the judgment. *Edwards v. Lewis*, 16 Ala. 813. (2) Assignee must resist in name of assignor. *Edwards v. Lewis*, 16 Ala. 813.

[b] **May Be Verified by an Agent.** *Branch Bank v. Coleman*, 20 Ala. 140.

[c] **May be amended by leave of court.** *Pearsall v. McCartney*, 28 Ala. 110.

40. *Bruce v. Barnes*, 20 Ala. 219; *Moore v. Bell*, 13 Ala. 469.

[a] **May Plead or Demur.**—*Bruce v. Barnes*, 20 Ala. 219.

[b] **Great latitude in making up the issue** is allowed. *Branch Bank v. Coleman*, 20 Ala. 140.

[c] **By appearance and filing of answer irregularities in the issuing and return of the writ is waived.** *Ex parte Pearl Roller Mill Co.*, 154 Ala. 232, 45 So. 423.

exists.<sup>41</sup> The application to the judge in vacation may be *ex parte*, but notice of the hearing in term time must be given.<sup>42</sup> A bond by the applicant is required.<sup>43</sup>

**Intervention.** — A stranger to the record cannot intervene.<sup>44</sup>

**Service.** — The writ need not be executed by an officer.<sup>45</sup> Actual notice of the supersedeas is necessary to make an officer executing the supersedeas process a trespasser.<sup>46</sup>

**V. SUPERSEDEAS OR STAY PENDING APPEAL.** — **A. IN CIVIL CASES.** — **1. Generally.**<sup>47</sup> — A supersedeas pending appeal, as already defined, is a suspension of the power of the court below to issue execution on the judgment appealed from, and a prohibition against the execution of the writ if final process has issued.<sup>48</sup> Under the common law of England a writ of error operated as a supersedeas and stayed all action of the inferior court, without an undertaking or other security;<sup>49</sup> but by statutes of James I., and Charles II., security was required in numerous classes of cases specified therein.<sup>50</sup>

Under the English chancery practice an appeal has the effect of wholly suspending all proceedings in the court below on the decree appealed from,<sup>51</sup> but later, it was decided that an order of the chancellor or of the appellate court was essential.<sup>52</sup> In the absence of

41. *Bruce v. Barnes*, 20 Ala. 219.

42. *Ex parte Pearl Roller Mill Co.*, 154 Ala. 232, 45 So. 423.

43. *Lockhart v. McElroy*, 4 Ala. 572; *Hester v. Keith*, 1 Ala. 316.

44. *Edwards v. Lewis*, 16 Ala. 813.

45. *Welch v. Jones*, 11 Ala. 660.

46. *Welch v. Jones*, 11 Ala. 660.

[a] Notice to deputy is not notice to officer himself. *Morrison v. Wright*, 7 Port. (Ala.) 67.

47. In admiralty, see 1 STANDARD PROC. 560.

On appeals from justice's court, see 18 STANDARD PROC. 269.

In eminent domain, see 8 STANDARD PROC. 337.

48. See *supra*, I, A.

49. See the following cases: **U. S.** *Hunnicut v. Peyton*, 102 U. S. 333, 356, 26 L. ed. 113; *Kitchen v. Randolph*, 93 U. S. 86, 23 L. ed. 810. **Conn.** *Dutton v. Tracy*, 4 Conn. 365. **Minn.** *Allen v. Robinson*, 17 Minn. 113. **Mont.** *First Nat. Bank v. McAndrews*, 7 Mont. 434, 17 Pac. 554. **Okla.**—In the Matter of *Epley*, 10 Okla. 631, 64 Pac. 18.

Writ of error coram nobis as supersedeas, see 15 STANDARD PROC. 373.

[a] No formal order of supersedeas is made on the granting of a writ of error. *Hopkinson v. Sears*, 14 Vt. 494, 39 Am. Dec. 236.

[b] A writ of error allowed before judgment rendered, is a supersedeas of

execution. *Dutton v. Tracy*, 4 Conn. 365.

[c] But a writ obviously for delay is no supersedeas. *Brewster v. Cowen*, 55 Conn. 152, 10 Atl. 509; *Dutton v. Tracy*, 4 Conn. 365.

[d] Where a writ of error abates (1) through an act of the plaintiff in error or is in any way put an end to by his act, a second writ of error brought in the same court, is not a supersedeas. *Brewster v. Cowen*, 55 Conn. 152, 10 Atl. 509. (2) But a second writ of error promptly brought on abatement of the first without an intention of producing delay is a supersedeas. *Dutton v. Tracy*, 4 Conn. 365.

Execution issued is not stayed, see *infra*, V, A, 9, c.

50. *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. 911, 27 L. ed. 609; *Sts. 3 James I.*, c. 8; 13 Car. II., c. 2; 16 & 17 Car. II., c. 8.

[a] As to necessity for writ of supersedeas, see *Sampson v. Brown*, 2 East 439, 102 Eng. Reprint 436.

51. See the following cases: **U. S.** *Hovey v. McDonald*, 109 U. S. 150, 160, 3 Sup. Ct. 136, 27 L. ed. 888. **N. J.**—*Pennsylvania R. Co. v. National Docks & N. J. J. C. Ry. Co.*, 54 N. J. Eq. 647, 654, 35 Atl. 433. **Wis.** *Hudson v. Smith*, 9 Wis. 122.

52. **U. S.**—*Hovey v. McDonald*, 109

specific statute some American equity courts followed the early rule of the English equity practice,<sup>53</sup> whereas others followed the later rule.<sup>54</sup> And furthermore in cases in which the statute regulating the subject omits to make provision for a stay in a particular case and when necessary to preserve the status quo, pending appeal, a stay or supersedeas may be had by order of court.<sup>55</sup>

**2. Under Statute.**—*a. Generally.*—The subject of supersedeas and stay of proceedings on error or appeal is generally a matter of statutory regulation under the modern practice in the United States.<sup>56</sup> Supersedeas or stay, under the statutes, is generally a matter of right, on compliance with the provisions of the statute,<sup>57</sup> except in certain actions specifically excepted from its operation, such as unlawful detainer suits,<sup>58</sup> and in those cases not covered by the statute.<sup>59</sup>

U. S. 150, 3 Sup. Ct. 136, 27 L. ed. 888. **Minn.**—Allen v. Robinson, 17 Minn. 113. **N. Y.**—Hart v. Mayor, etc. Albany, 3 Paige 381, 383.

[a] This rule was announced in 1807. Hart v. Mayor, etc. of Albany, 3 Paige (N. Y.) 381.

[b] Terms were generally imposed in granting a stay. Ringgold's Case, 1 Bland (Md.) 5, 16.

53. Green v. Winter, 1 Johns. Ch. (N. Y.) 77; Hart v. Mayor, etc. of Albany, 3 Paige (N. Y.) 381, 384; Northwestern Mut. L. Ins. Co. v. Park Hotel Co., 37 Wis. 125; Hudson v. Smith, 9 Wis. 122, an appeal from an order appointing a receiver.

[a] Leave to proceed notwithstanding appeal may be granted. Green v. Winter, 1 Johns. Ch. (N. Y.) 77.

54. National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. Co., 54 N. J. Eq. 167, 33 Atl. 936; Doughty v. Somerville & E. R. Co., 7 N. J. Eq. 629, 51 Am. Dec. 267; Chegary v. Scofield, 5 N. J. Eq. 525; Clark's Son & Co. v. Pittsburgh Natural Gas Co., 6 Pa. Dist. 173.

[a] It is a matter of discretion whether order shall be made. Clark's Son & Co. v. Pittsburgh Natural Gas Co., 6 Pa. Dist. 173.

[b] When not necessary to preserve rights of appellant, a stay will not be granted. Ratzer v. Ratzer, 29 N. J. Eq. 162.

55. See *infra*, V, A, 3.

56. See the statutes and U. S. Hunnicutt v. Peyton, 102 U. S. 333, 356, 26 L. ed. 113; McCourt v. Singers-Bigger, 150 Fed. 102, 80 C. C. A. 56. **Ia.**—Allen v. Church, 101 Iowa 116, 123, 70 N. W. 127. **Ky.**—Hey v. Harding, 25 Ky. L. Rep. 1454, 78 S. W.

136. **Neb.**—Home Fire Ins. Co. v. Dutcher, 48 Neb. 755, 67 N. W. 766.

See *infra*, this section and *infra*, III, A, 6, d.

[a] The right does not exist, unless given by statute, except as the trial or appellate court calls into exercise its inherent powers. Allen v. Church, 101 Iowa 116, 123, 70 N. W. 127. As to inherent power, see *infra*, V, A, 3.

57. **U. S.**—Mccourt v. Singers-Bigger, 150 Fed. 102, 80 C. C. A. 56. **Neb.** State v. Fawcett, 58 Neb. 371, 78 N. W. 636; State v. Cook, 51 Neb. 822, 71 N. W. 733. **Wis.**—Janesville v. Janesville Water Co., 89 Wis. 159, 61 N. W. 770; Northwestern Mut. L. Ins. Co. v. Park Hotel Co., 37 Wis. 125; Gaertner v. Fond du Lac, 34 Wis. 497.

[a] The only function of the judge is to determine whether the security offered is sufficient. McCourt v. Singers-Bigger, 150 Fed. 102, 80 C. C. A. 56.

[b] Dismissal of appeal from judgment does not impair right to stay on an appeal from an order denying new trial. Tompkins v. Montgomery, 116 Cal. 120, 47 Pac. 1006.

[c] It is optional with the appellant whether there shall be a supersedeas. **U. S.**—Mccourt v. Singers-Bigger, 150 Fed. 102, 80 C. C. A. 56. **Ga.**—Montgomery v. King, 125 Ga. 388, 54 S. E. 135; Jordan v. Jordan, 16 Ga. 446. **Wis.**—Bird v. Morrison, 9 Wis. 551.

58. See *infra*, V, A, 3 and 6.

59. State v. Fawcett, 58 Neb. 371, 78 N. W. 636; Home Fire Ins. Co. v. Dutcher, 48 Neb. 755, 67 N. W. 766; State v. Judges, 19 Neb. 149, 26 N. W. 723; Palmer v. Harris, 23 Okla. 500, 101 Pac. 852, 138 Am. St. Rep. 822;



**Compliance With Statute.**—When proceeding under statute, a supersedeas is only obtained by a strict compliance with the statute regulating the procedure.<sup>60</sup>

b. *Stay on Giving Security.*—(I.) **In General.**—A majority of the statutes though varying considerably as to details, provide in the main that the perfecting of an appeal by giving the prescribed undertaking or a deposit or affidavit in lieu thereof, operates to stay proceedings in the court below upon the judgment appealed from.<sup>61</sup> Under such statutes an order directing a stay is not required,<sup>62</sup> except in certain actions specifically excepted<sup>63</sup> from the operation of the

*In re Epley*, 10 Okla. 631, 64 Pac. 18. See *infra*, V, A, 3.

60. **U. S.**—*Sage v. Central R. Co.*, 93 U. S. 412, 23 L. ed. 933; *Kitchen v. Randolph*, 93 U. S. 86, 23 L. ed. 810; *Baltimore & O. R. Co. v. Harris*, 7 Wall. 574, 19 L. ed. 100. **Ga.**—*Wheeler v. Wheeler*, 139 Ga. 608, 77 S. E. 817. **Mo.**—*State ex rel. Wolff v. Vogel*, 6 Mo. App. 526. **Neb.**—*Creighton v. Keith*, 50 Neb. 810, 70 N. W. 406; *Whitaker v. McBride*, 5 Neb. (Unof.) 411, 98 N. W. 877. **N. M.**—*Mundy v. Irwin*, 19 N. M. 170, 141 Pac. 877. **Wash.**—*Morrison v. Fidelity & Deposit Co.*, 97 Wash. 623, 166 Pac. 1122.

[a] **Limitations as to time** must be observed. *Sage v. Central R. Co.*, 93 U. S. 412, 23 L. ed. 933; *Whitaker v. McBride*, 5 Neb. (Unof.) 411, 98 N. W. 877. See *infra*, V, A, 7.

61. **U. S.**—*Hovey v. McDonald*, 109 U. S. 150, 160, 3 Sup. Ct. 136, 27 L. ed. 888. **Cal.**—*Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 33 Pac. 123. **Fla.**—*Mitchell v. Mason*, 63 Fla. 538, 57 So. 604; *Johnson v. Turner*, 44 Fla. 244, 33 So. 238; *Smith v. Curtis*, 19 Fla. 786, appeals in chancery taken within a specified time operate as a supersedeas, those taken afterwards upon order of court; but in any event a bond is required. **Ga.**—*Montgomery v. King*, 125 Ga. 388, 54 S. E. 135; *Doe ex dem. Truluck v. Peeples*, 1 Ga. 1. **Ill.**—An appeal perfected by filing an appeal bond operates as a supersedeas. *Merrifield v. Western C. P. & O. Co.*, 238 Ill. 526, 87 N. E. 379, 128 Am. St. Rep. 148; *Cowan v. Curran*, 216 Ill. 598, 622, 75 N. E. 322; *Anderson v. Anderson*, 124 Ill. App. 613; *Heyman v. Heyman*, 117 Ill. App. 542. But a writ of error does not operate as a supersedeas unless so ordered, nor until filing of a proper bond. *Lancaster v. Snow*, 184 Ill. 163, 56 N. E. 416. **Ind.**

*Waring v. Fletcher*, 152 Ind. 620, 52 N. E. 203; *McKinney v. Hartman*, 143 Ind. 224, 42 N. E. 681; *June v. Payne*, 107 Ind. 307, 7 N. E. 370, 8 N. E. 556, an appeal taken in term time operates as a stay upon filing of a proper bond, but as to appeals taken after the close of the term, an order of stay must be granted by the supreme court. **Minn.** *State ex rel. Matthews v. Webber*, 31 Minn. 211, 17 N. W. 339. **Mo.**—The supersedeas on appeal becomes effective on filing of bond and allowance of the appeal. *Pickel v. Pickel*, 251 Mo. 197, 158 S. W. 8; *State ex rel. Duggan v. Dillon*, 98 Mo. 90, 11 S. W. 255. But no writ of error operates as a stay unless an order to that effect is made. *Chapman v. Yancey*, 173 Mo. App. 132, 143, 155 S. W. 1087. **N. Y.**—*Midwood Park Co. v. Baker*, 142 App. Div. 495, 127 N. Y. Supp. 48. **Wis.**—*Tilley v. Washburn*, 91 Wis. 105, 64 N. W. 312. 62. **Cal.**—*Born v. Horstmann*, 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. A. 577. **Fla.**—*Johnson v. Turner*, 44 Fla. 244, 251, 33 So. 238, when the appeal is taken within thirty days. **Ga.** *Wheeler v. Wheeler*, 139 Ga. 608, 77 S. E. 817. **N. Y.**—*Walz v. Humrich*, 158 App. Div. 584, 143 N. Y. Supp. 806; *Dady v. O'Rourke*, 65 App. Div. 465, 72 N. Y. Supp. 827. **Wis.**—*Harris v. Snyder*, 113 Wis. 451, 89 N. W. 660.

[a] **The perfecting of an appeal ipso facto** operates as a supersedeas. *Born v. Horstmann*, 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. A. 577.

**Stay on order of court**, see *infra*, V, A, 3.

63. *State ex rel. Chicago St. P. M. & O. Ry. Co. v. District Court*, 136 Minn. 455, 161 N. W. 164, in proceeding before railroad commission as to unlawful charges by carriers. See generally the codes and statutes, and *infra*, V, A, 3.

statute, or in cases not covered by the statute.<sup>64</sup> Some statutes provide for a stay on giving an ordinary appeal bond in all actions where a stay bond is not specifically required.<sup>65</sup>

**Necessity for Writ of Supersedeas.**—Under statutes providing for a supersedeas or stay upon the giving of security, the issuance of a writ of supersedeas is not necessary,<sup>66</sup> except where the statute specifically requires it, as it does in some states,<sup>67</sup> or, according to some authorities, where the execution has been issued.<sup>68</sup>

**(II.) Necessity for Stay Bond.**—The necessity for a stay bond is governed by the statute, which generally require a bond or other security to stay execution, in addition to the ordinary appeal or cost bond.<sup>69</sup> But some statutes provide that in all cases in which a stay bond is not specifically required the perfection of the appeal by the execution of the ordinary cost bond or the making of the deposit in lieu thereof operates as a stay.<sup>70</sup>

[a] **Unlawful Detainer.**—*Bateman v. Superior Court*, 139 Cal. 140, 72 Pac. 922; *Gross v. Kelleher*, 73 Cal. 639, 15 Pac. 362; and see 8 STANDARD PROC. 1131.

64. *Matter of Meyer*, 209 N. Y. 59, 66, 102 N. E. 606; *Taft v. Marsily*, 49 Hun 163, 1 N. Y. Supp. 621, 14 Civ. Proc. 415, 16 N. Y. St. 962; *Watkins v. Justice*, 256 Pa. 42, 100 Atl. 489.

65. See *infra*, V, A, 2, b, (II).

66. *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 3 Ind. 8, 12; *American Brew. Co. v. Talbot*, 135 Mo. 170, 36 S. W. 657.

67. **Ark.**—*Kirby's Dig.* §1217. **Ia.** *Allen v. Church*, 101 Iowa 116, 123, 70 N. W. 127; *Pratt v. Western Stage Co.*, 26 Iowa 241, the clerk issues an "order" staying proceedings. **Ky.** *Turner v. Wickliffe*, 146 Ky. 776, 143 S. W. 406; *Trustees Eddyville Graded Com. School Dist. v. Board of Education*, 138 Ky. 180, 127 S. W. 767.

[a] **In Virginia**, the supersedeas informs the sheriff that the record has been removed into the appellate court and enjoins him to give notice to the party to appear and answer the complainant in error. *Bristow v. Home Bldg. Co.*, 91 Va. 18, 29, 20 S. E. 946, 947.

[b] **Clerk of appellate court** must issue writ (1) after expiration of time for filing record on appeal, under statute. *Turner v. Wickliffe*, 146 Ky. 776, 143 S. W. 406. (2) Previous to that time, clerk of lower court must issue it. *Louisville & N. R. Co. v. Lucas*, 120 Ky. 359, 86 S. W. 682.

68. See *Ft. Worth Driving Club v.*

*Ft. Worth Fair Assn.*, 56 Tex. Civ. App. 162, 121 S. W. 213, quoting statute. See *Ismond v. Scougale*, 119 Mich. 501, 78 N. W. 546, certificate of service of writ and filing of bond is served on sheriff.

69. See the statutes and *infra*, this section.

70. **Cal.**—*Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 258, 139 Pac. 69; *Owen v. Pomona Land & Water Co.*, 124 Cal. 331, 57 Pac. 71; *Hoppe v. Hoppe*, 99 Cal. 536, 34 Pac. 222. **Mont.**—*Coombs v. Barker*, 33 Mont. 74, 81 Pac. 737. **Ore.**—*State v. Small*, 49 Ore. 595, 90 Pac. 1110.

As to the form and sufficiency of such bonds, see the title, "Undertakings."

[a] **No court can require a stay bond** in such case. *Jameson v. Chancellor-Canfield M. Oil Co.*, 173 Cal. 612, 616, 160 Pac. 1066.

[b] **Where appellant is required to perform the directions of the order or judgment appealed from**, (1) he must give a stay bond, but it is otherwise when he is not required to do anything. *Halsted v. First Sav. Bank*, 173 Cal. 605, 160 Pac. 1075; *Born v. Horstmann*, 80 Cal. 452, 22 Pac. 169, 338, 5 L. R. A. 577; *In re Schedel's Est.*, 69 Cal. 241, 10 Pac. 334; *Coombs v. Barker*, 33 Mont. 74, 81 Pac. 737. (2) Thus where the fund is in possession of the court, a stay bond is not required. *Zappettini v. Buckles*, 167 Cal. 27, 138 Pac. 696; *McCallion v. Hibernia Sav. & L. Soc.*, 98 Cal. 442, 33 Pac. 329, followed in *Broder v. Conklin*, 121 Cal. 289, 53 Pac. 797.

A supersedeas bond may be waived by the appellee.<sup>71</sup>

(III.) The Bond or Security. — (A.) FORM OF SECURITY. — (1.) Generally.

To procure a stay of proceedings pending appeal under statutes of this character, it is generally necessary, with certain exceptions,<sup>72</sup> that the appellant execute a supersedeas bond in compliance with the statute,<sup>73</sup> or in lieu thereof, when authorized by law, make a deposit of money in court,<sup>74</sup> or file an affidavit in forma pauperis,<sup>75</sup> or where

[c] On an appeal from a judgment foreclosing a pledge, an ordinary undertaking on appeal operates as a stay bond. *Rohrbacher v. Superior Court*, 144 Cal. 631, 78 Pac. 22.

[d] On judgments foreclosing mortgages, a stay bond is required. *Tolle v. Heydenfeldt*, 138 Cal. 56, 70 Pac. 1013.

[e] On appeal by a legatee from a decree of distribution, a stay bond is not required. *In re Schedel's Est.*, 69 Cal. 241, 10 Pac. 334.

[f] On judgment on application for mandamus, a stay bond is not required. *Palache v. Hunt*, 64 Cal. 473, 2 Pac. 245.

[g] On appeal from order removing an officer from office because of malfeasance, a stay bond is not required. *Covarrubias v. Board of Suprs. of Santa Barbara Co.*, 52 Cal. 622.

[h] On judgment awarding costs a stay bond is not required, the appeal bond being sufficient. *McCallion v. Hibernia Sav. & L. Soc.*, 98 Cal. 442, 33 Pac. 329.

[i] A stay bond given when the undertaking on appeal operates as a stay bond is without consideration and cannot be enforced by summary proceedings. *McCallion v. Hibernia Sav. & L. Soc.*, 98 Cal. 442, 33 Pac. 329.

71. *Wilson v. Dean*, 10 Ark. 308; *Carit v. Williams*, 67 Cal. 580, 8 Pac. 93.

72. See *infra*, this section.

73. *Ala.*—*Ex parte Sibert*, 67 Ala. 349. *Ark.*—*Fowler v. Thorn*, 4 Ark. 208; *Childress v. Foster*, 2 Ark. 123. *Fla.*—*Tampa St. Ry. & P. Co. v. Tampa Sub. R. Co.*, 30 Fla. 400, 11 So. 908; *Bauknight v. A. M. Sloan & Co.*, 17 Fla. 281. *Ga.*—*Harris v. Atlanta Northern Ry. Co.*, 144 Ga. 701, 87 S. E. 1041; *Johnston v. Pinkston*, 12 Ga. App. 585, 77 S. E. 1075. *Ia.*—*Boynton v. Church*, 148 Iowa 197, 127 N. W. 210; *Harrison v. Stebbins*, 104 Iowa 462, 73 N. W. 1034. *Kan.*—*Stillings v. Porter*, 22 Kan. 17. *Mich.*—*Pinel v.*

*Pinel*, 172 Mich. 611, 138 N. W. 219; *Douglass v. Manistee Circuit Judge*, 42 Mich. 495, 4 N. W. 225. *Minn.*—*State ex rel. Chicago St. P. M. & O. Ry. Co. v. District Court*, 136 Minn. 455, 161 N. W. 164. *Mo.*—*Forsee v. Gates*, 89 Mo. App. 577. *Neb.*—*State v. Ramsey*, 50 Neb. 166, 69 N. W. 758; *Welton v. Balteore*, 17 Neb. 399, 23 N. W. 1. *N. M.*—*Llewellyn v. First State Bank*, 22 N. M. 358, 161 Pac. 1185. *S. C.*—*Muckenfuss v. Fishburne*, 68 S. C. 41, 46 S. E. 537. *Tex.*—*Figures v. Dunklin*, 68 Tex. 644, 5 S. W. 503; *Gibbs v. Belcher*, 30 Tex. 79; *Crumley v. McKinney*, 9 S. W. 157.

In justice's court, see 18 STANDARD PROC. 235, 269.

In proceedings by landlord to recover premises, see 18 STANDARD PROC. 609.

[a] A bond given to obtain a stay of execution may by statute, be used to supersede execution on writ of error. *Hogle v. Wayne Cir. Judge*, 160 Mich. 573, 125 N. W. 712.

[b] Court cannot dispense with bond, when statute requires one. *Bank of Woodland v. Stephens*, 137 Cal. 458, 70 Pac. 293; *Mokelumne Hill Canal & Min. Co. v. Woodbury*, 10 Cal. 188.

Requisites of bond, see *infra*, V, A, 2, b, (III), (C).

[c] The test of a good supersedeas bond is that it not only confers jurisdiction on the appellate court but will authorize a judgment on appeal against the sureties. *White v. Harris*, 85 Tex. 42, 19 S. W. 1077.

74. *State ex rel. Rayssiguier v. Monroe*, 37 La. Ann. 113. But see *Thwing v. McDonald*, 134 Minn. 148, 156 N. W. 780, 158 N. W. 820, 159 N. W. 564, Ann. Cas. 1918E, 420.

[a] Must be made within time within which bond must be filed. *State ex rel. Rayssiguier v. Monroe*, 37 La. Ann. 113.

75. *Wheeler v. Wheeler*, 139 Ga. 608, 77 S. E. 817; *Parker-Hensel Engineering Co. v. Schuler*, 133 Ga. 696,



the judgment directs the execution of instruments, execute and deposit the instrument with the clerk to abide the appeal.<sup>76</sup> A cost bond on appeal is insufficient to operate as a stay,<sup>77</sup> except under statutes which provide for a stay upon the perfection of an appeal by giving such a bond.<sup>78</sup>

(2.) *Combining Different Kinds of Bonds in One Instrument.* — The ordinary cost or appeal bond and the bond to stay execution may be combined in one instrument.<sup>79</sup> So may the different kinds of stay bonds required by the different classes of cases embraced in the judgment or order appealed from.<sup>80</sup>

(B.) *WHO NEED NOT GIVE STAY BONDS.* — The state is not required to give a stay bond;<sup>81</sup> but counties<sup>82</sup> and municipal corporations<sup>83</sup> must give a bond unless specifically excepted by statute from its operation.<sup>84</sup>

When a judgment is against an executor or guardian or other person acting in another's behalf, in his representative capacity,<sup>85</sup> some statutes dispense with a stay bond,<sup>86</sup> or authorize the giving of a limited bond,<sup>87</sup> whereas others authorize the court to dispense with or limit the security in such case.<sup>88</sup>

66 S. E. 800; *Johnston v. Pinkston*, 12 Ga. App. 585, 77 S. E. 1075. See the title "Paupers."

[a] But an order allowing prosecution of an appeal in forma pauperis does not dispense with a stay bond. *Leach v. Jones*, 86 N. C. 404.

76. See *infra*, V, A, 2, b, (IV).

77. Ala.—*Garrett v. Mayfield Woolen Mills Co.*, 153 Ala. 602, 44 So. 1026; *Ex parte Floyd*, 40 Ala. 116, in unlawful detainer. Minn.—*Scotfield v. Schaeffer*, 104 Minn. 127, 116 N. W. 211. N. Y.—*Sagehomme v. Paul B. Pugh & Co.*, 102 N. Y. Supp. 923. Tex.—*Jameson v. O'Neill* (Tex. Civ. App.), 145 S. W. 680.

78. See *supra*, V, A, 2, b, (II).

79. *Englund v. Lewis*, 25 Cal. 337; *Sumner v. Rogers*, 21 Wash. 361, 58 Pac. 214. Compare *Duncan v. Times-Mirror Co.*, 109 Cal. 602, 42 Pac. 147.

In justice's court, see 15 STANDARD PROC. 235.

80. *Englund v. Lewis*, 25 Cal. 337.

81. *Harrison v. Stebbins*, 104 Iowa 462, 73 N. W. 1034.

82. *Harrison v. Stebbins*, 104 Iowa 462, 73 N. W. 1034.

83. *Harrison v. Stebbins*, 104 Iowa 462, 73 N. W. 1034.

84. See the statutes and the following: N. Y.—*Croker v. Sturgis*, 38 Misc. 596, 78 N. Y. Supp. 77. S. D.—*Quarnberg v. Chamberlain*, 29 S. D. 377, 388, 137 N. W. 405. Wash.—*Jordan v. Seattle*, 29 Wash. 581, 70 Pac. 54.

85. See *infra*, this section.

[a] When judgment is against him individually, (1) bond is necessary. *Hand v. Haughland*, 87 Ark. 105, 112 S. W. 184. (2) The judgment need not be rendered against the executor in his representative capacity, to make the rule applicable. If the matter in litigation really involves the rights of the estate it is sufficient. *Kirsch v. Derby*, 93 Cal. 573, 29 Pac. 218.

86. Cal.—*In re Skerrett's Est.*, 80 Cal. 62, 22 Pac. 85, in proceedings had on the estate. Neb.—*Kerr v. Lowenstein*, 65 Neb. 43, 90 N. W. 931. Pa.—*Spang v. Mattes*, 253 Pa. 101, 97 Atl. 1026. Tex.—*Dawson v. Hardy*, 33 Tex. 198.

[a] Guardian ad litem is included in statute. *Unknown Heirs of Tutt v. Morgan*, 18 Tex. Civ. App. 627, 42 S. W. 578, 46 S. W. 122.

87. *Wilson v. Yonge*, 54 Ark. 353, 15 S. W. 898, by executors.

88. See *infra*, this note.

[a] Executors.—*Fishback v. Weaver*, 34 Ark. 569; *Ex parte Orford*, 102 Cal. 656, 36 Pac. 928; *Kirsch v. Derby*, 93 Cal. 573, 29 Pac. 218.

[b] Guardian.—*Hand v. Haughland*, 87 Ark. 105, 112 S. W. 184.

[c] Trustee.—*Mercantile Trust Co. v. Miller*, 166 Cal. 563, 137 Pac. 913.

[d] Superintendent of banks is a trustee and a person acting in another's right within the rule. *Mercantile Trust Co. v. Miller*, 166 Cal. 563, 568, 137 Pac. 913.

(C.) REQUISITES OF BOND.—The supersedeas or stay bond should follow the language of the statute,<sup>89</sup> and must identify with certainty the decree appealed from,<sup>90</sup> and the cause in which it is rendered.<sup>91</sup> It must be in a sufficient amount,<sup>92</sup> payable to the obligee designated by law,<sup>93</sup> conditioned as prescribed by statute,<sup>94</sup> and with the number of competent obligors prescribed by law.<sup>95</sup>

The condition of the bond varies with the nature of the judgment or order to be stayed.<sup>96</sup> Generally the bond must be conditioned to prosecute the appeal or writ of error with effect,<sup>97</sup> and to perform the judgment of the appellate court against the appellant,<sup>98</sup> and pay all damages and costs awarded against him.<sup>99</sup> Where the statute

[e] **An order dispensing with undertaking** is essential under this statute; and it must be made within the time for filing an appeal bond. *In re Skerrett's Est.*, 80 Cal. 62, 22 Pac. 85.

89. *American Brew. Co. v. Talbot*, 125 Mo. 388, 28 S. W. 585.

**Form of undertaking**, see 9 STAND-ARD PROC. 76.

90. *Ala.*—*Strain v. Irwin*, 75 So. 151. *Cal.*—*Duncan v. Times-Mirror Co.*, 109 Cal. 602, 42 Pac. 147. *Fla.* *Jackson v. Relf*, 24 Fla. 198, 4 So. 534. *Tex.*—*White v. Harris*, 85 Tex. 42, 19 S. W. 1077.

91. *Jackson v. Relf*, 24 Fla. 198, 4 So. 534.

92. *White v. Harris*, 85 Tex. 42, 19 S. W. 1077. See *infra*, this section.

93. *Acker v. Alexandria & F. Ry. Co.*, 84 Va. 648, 5 S. E. 688 to commonwealth.

[a] **But bond payable to clerk instead of a party** may be enforced as a common-law obligation. *Babcock v. Carter*, 117 Ala. 575, 23 So. 487, 67 Am. St. Rep. 193.

94. See *infra*, this section.

95. *State ex rel. Lion Ins. Co. v. Baker*, 45 Neb. 39, 63 N. W. 139.

[a] **A less number** is insufficient. *Tampa St. Ry. & P. Co. v. Tampa Sub. R. Co.*, 30 Fla. 400, 418, 11 So. 908; *Harris v. Regester*, 70 Md. 109, 16 Atl. 386.

[b] **Statutory requirement that surety make affidavit of his qualifications** is directory merely. *Ryndak v. Seawell*, 23 Okla. 759, 102 Pac. 125.

96. See the statutes and the following: *Ala.*—*Espy v. Balkum*, 45 Ala. 256. *Fla.*—*State ex rel. Purvis v. Palmer*, 57 Fla. 541, 48 So. 638; *Dell v. Marvin*, 31 Fla. 152, 12 So. 216; *Tampa St. Ry. & P. Co. v. Tampa Sub. R. Co.*, 30 Fla. 400, 11 So. 908. *Ind.*—*McKinney v.*

*Hartman*, 143 Ind. 224, 42 N. E. 681. *Minn.*—*State ex rel. Matthews v. Webber*, 31 Minn. 211, 17 N. W. 339. *Neb.* *In re Jones' Estate*, 83 Neb. 841, 120 N. W. 439; *State v. Ramsey*, 50 Neb. 166, 69 N. W. 758. *Tex.*—*White v. Harris*, 85 Tex. 42, 19 S. W. 1077; *Reid v. Fernandez*, 52 Tex. 379. *Wis.*—*Neuman v. State*, 76 Wis. 112, 45 N. W. 30. See *supra*, V, A, 6, b.

**Combining different bonds**, see *supra*, V, A, 2, b, (III), (A), (2).

[a] **The court determines the conditions of the bond** where the judgment is other than a money judgment in some states. *Palmer v. Palmer*, 41 Fla. 184, 26 So. 640; *Carson v. Jansen*, 65 Neb. 423, 91 N. W. 398.

[b] **A judgment for the recovery of money or of personal property or its value**, within the statute, includes a final order in supplementary proceedings. *State v. Downing*, 40 Ore. 309, 58 Pac. 863, 66 Pac. 917.

[c] **Under a statute requiring appellant to give a bond for payment of the deficiency judgment**, the appellant must give such bond whether he be the mortgagor or a party claiming the premises and whether he be in or out of possession. *Spence v. Scott*, 95 Cal. 152, 30 Pac. 202; *Johnson v. King*, 91 Cal. 307, 27 Pac. 644.

97. *Ark.*—*Fowler v. Thorn*, 4 Ark. 208. *Mo.*—*Campbell v. Harrington*, 93 Mo. App. 315, 326. *Tex.*—*Figures v. Dunklin*, 68 Tex. 644, 5 S. W. 503.

98. *Carter v. Forbes etc. Mfg. Co.*, 22 Tex. Civ. App. 373, 54 S. W. 926.

99. *U. S.*—*Seward v. Comeau*, 102 U. S. 161, 26 L. ed. 86; *Ferguson v. Dent*, 29 Fed. 1. *Mo.*—*Campbell v. Harrington*, 93 Mo. App. 315. *Tex.* *Reid v. Fernandez*, 52 Tex. 379; *Carter v. Forbes, etc. Mfg. Co.*, 22 Tex. Civ. App. 373, 54 S. W. 926.

prescribes the conditions of the bond, the judge cannot require additional conditions.<sup>1</sup>

**Amount.** — Except where the amount of the stay bond is fixed by statute,<sup>2</sup> the judge must fix the amount,<sup>3</sup> unless stipulated to by the parties.<sup>4</sup> If he refuses to do so, a writ of mandamus will be issued on application.<sup>5</sup>

1. *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 396, 2 Sup. Ct. 911, 27 L. ed. 609.

2. See generally the statutes.

[a] **Court cannot require bond to be in a greater amount**, or permit filing of a bond in an amount less than the statutory amount. *Sauer v. Union Oil Co.*, 43 La. Ann. 699, 9 So. 566.

[b] **A bond in a greater amount** is sufficient. *Gilbert Co. v. Husted*, 50 Wash. 61, 96 Pac. 835; *West Coast M. & Inv. Co. v. West Coast Imp. Co.*, 25 Wash. 627, 66 Pac. 97, 62 L. R. A. 763.

[c] **A bond in a less amount operates as a supersedeas until set aside.** *Forsee v. Gates*, 89 Mo. App. 577.

[d] **On appeal from order directing payment of money**, (1) the bond must be double the amount of money named in the order. *Ala.*—*Powell v. Central Plank-Road Co.*, 24 Ala. 441. *Cal.*—*Credits Com. Co. v. Superior Court*, 140 Cal. 82, 73 Pac. 1009; *Bateman v. Superior Court*, 139 Cal. 140, 72 Pac. 922. *Tex.*—*Crumley v. McKinney*, 9 S. W. 157. *Wash.*—*Sumner v. Rogers*, 21 Wash. 361, 58 Pac. 214. But see *Laughlin v. King*, 22 Wyo. 8, 16, 133 Pac. 1073. (2) This does not refer to a judgment enforceable in either of two or more modes or which cannot be enforced until exhaustion of another remedy and where the defendant is personally liable only for a deficiency after sale of property primarily liable. *Kreling v. Kreling*, 116 Cal. 458, 48 Pac. 383.

[e] **A judgment for costs is a money judgment within the statute.** *West Coast M. & I. Co. v. West Coast Imp. Co.*, 25 Wash. 627, 66 Pac. 97, 62 L. R. A. 763.

3. *U. S.*—*French v. Shoemaker*, 12 Wall. 86, 99, 20 L. ed. 270. *Cal.*—*Doudell v. Shoo*, 159 Cal. 448, 453, 114 Pac. 579; *Winsor Pottery Wks. v. Superior Court*, 13 Cal. App. 360, 109 Pac. 843. *La.*—*Ruppert v. Fontenot*, 138 La. 375, 70 So. 331; *Layman v. Succession of Woulfe*, 136 La. 767, 67 So. 823; *Long v. Kaufman Co.*, 127 La. 8, 53 So. 366;

*Fitzpatrick v. Letten*, 123 La. 748, 49 So. 494, must exceed by one-half the amount of the judgment. *Mo.*—*State ex rel. Duggan v. Dillon*, 98 Mo. 90, 11 S. W. 255 (when allowing the appeal, the judge must fix the amount of the bond); *Forsee v. Gates*, 89 Mo. 577, he must fix the amount in a sum at least double the judgment and as much more as he thinks proper to make it double the judgment and future interest costs and damages. *Nev.*—*Silver Peak Mines v. Second Jud. Dist. Ct.*, 33 Nev. 97, 110 Pac. 503, Ann. Cas. 1913D, 587. *Tex.*—*Aetna Club v. Jackson* (Tex. Civ. App.), 187 S. W. 971.

[a] **Trial judge must fix amount**; the appellate court has no power to do so. *Cal.*—*Doudell v. Shoo*, 158 Cal. 50, 109 Pac. 615. *Fla.*—*Johnson v. Turner*, 44 Fla. 244, 33 So. 238. *La.*—*Fitzpatrick v. Letten*, 123 La. 748, 49 So. 494. *Mo.*—*State ex rel. Heckel v. Klein*, 137 Mo. 673, 39 S. W. 272; *Kreyling v. O'Reilly*, 95 Mo. App. 561, 75 S. W. 694. *N. Y.*—*Dady v. O'Rourke*, 65 App. Div. 465, 72 N. Y. Supp. 827.

[b] **Amount of bond for deficiency on foreclosure sale** (1) is to be fixed by the judge. *Boob v. Hall*, 105 Cal. 413, 38 Pac. 977. See *German Sav. & Loan Soc. v. Kern*, 38 Ore. 232, 62 Pac. 788, 63 Pac. 1052. (2) But parties may waive such an order by a promise to pay any deficiency not exceeding the amount of the judgment. *Johnson v. Noonan*, 16 Wis. 687. (3) Discretion of judge in fixing the sum is limited by the judgment. *Johnson v. Noonan*, 16 Wis. 687.

[c] **Notice.**—(1) The amount may be fixed *ex parte*. *Hubbard v. University Bank*, 120 Cal. 632, 52 Pac. 1070. (2) The statutory notice is not jurisdictional. *Beyer v. Robinson*, 32 N. D. 560, 156 N. W. 203.

4. *Hammond v. United States F. & G. Co.*, 29 Cal. App. 464, 155 Pac. 1023. See also *Johnson v. Noonan*, 16 Wis. 687.

5. *Cal.*—*Doudell v. Shoo*, 158 Cal. 50, 109 Pac. 615; *De Leonis v. York*,



(D.) EXECUTION OF BOND. — The bond must be executed before the person specified in the statute,<sup>6</sup> within the time limited thereby.<sup>7</sup>

(E.) APPROVAL OF BOND. — The supersedeas or stay bond must be approved by the officer named in the statute.<sup>8</sup>

(F.) FILING OF BOND. — The bond must be filed<sup>9</sup> within the time fixed by statute if any.<sup>10</sup> If no time is prescribed, the bond may be given

140 Cal. 333, 73 Pac. 1058 (holding petition insufficient); *Spencer v. Troutt*, 133 Cal. 605, 65 Pac. 1083. Mich. *Hogle v. Wayne Cir. Judge*, 160 Mich. 573, 125 N. W. 712. Neb.—*State v. Fawcett*, 58 Neb. 371, 78 N. W. 636; *McBride v. Whitaker*, 5 Neb. (Unof.) 399, 98 N. W. 847. Tex.—*Aetna Club v. Jackson* (Tex. Civ. App.), 187 S. W. 971.

[a] Except where the right to a supersedeas rests in the discretion of the court. *State v. Scott*, 60 Neb. 98, 82 N. W. 320; *State v. Judges*, 19 Neb. 149, 26 N. W. 723.

[b] But discretion as to amount cannot be controlled. *State ex rel. Purvis v. Palmer*, 57 Fla. 541, 48 So. 638; *State ex rel. Heckel v. Klein*, 137 Mo. 673, 39 S. W. 272.

6. See *In re Epley*, 10 Okla. 631, 641, 64 Pac. 18, construing §6081 of Okla. Comp. Laws, 1909.

[a] Before the clerk of the court rendering the judgment, except where the appeal is not granted by that court. *Louisville & N. R. Co. v. Smith*, 178 Ky. 681, 199 S. W. 805; *Turner v. Wickliffe*, 146 Ky. 776, 143 S. W. 406; *Louisville & N. R. Co. v. Lucas' Admr.*, 120 Ky. 359, 86 S. W. 682.

7. *Dovey v. McCullough*, 60 Neb. 376, 83 N. W. 171; *Van Dorn v. Mengedoh*, 41 Neb. 525, 59 N. W. 800. See *Anderson v. Likens*, 20 Ky. L. Rep. 471, 46 S. W. 512, quashing bond executed prematurely.

[a] In federal courts, stay bonds are regularly taken on issuance of citations. *McClellan v. Pyeatt*, 49 Fed. 259, 1 C. C. A. 241.

8. Ala.—*Crowder v. Morgan*, 72 Ala. 535. Ky.—*Anderson v. Likens*, 20 Ky. L. Rep. 471, 46 S. W. 512. Minn. *Sweeney v. Ellsworth*, 135 Minn. 474, 159 N. W. 1067. Neb.—See *State v. Cook*, 51 Neb. 822, 71 N. W. 733. Tex. *Dillard v. First Nat. Bank* (Tex. Civ. App.), 143 S. W. 682.

Approval by judge pro tem., see 16 STANDARD PROC. 638.

[a] The approval determines the

question of sufficiency of a bond to stay the proceedings. *State ex rel. Heckel v. Klein*, 137 Mo. 673, 39 S. W. 272; *State ex rel. Duggan v. Dillon*, 98 Mo. 90, 11 S. W. 255.

[b] An approval of the bond by the clerk is tantamount to an order of court and supersedes the judgment. *Deming Inv. Co. v. Fariss* (Okla.), 50 Pac. 130.

[c] Statutory requirement as to indorsement of approval is directory, and an omission does not vitiate the bond. *Leach v. Altus State Bank*, 56 Okla. 102, 155 Pac. 875; *Ryndak v. Seawell*, 23 Okla. 759, 102 Pac. 125.

[d] The order approving the bond and allowing appeal need not say the execution is thereby stayed. *State ex rel. Duggan v. Dillon*, 98 Mo. 90, 11 S. W. 255.

[e] On refusal of a federal circuit judge to accept a supersedeas bond, the bond may be approved by a justice of the supreme court. *Sage v. Central R. R. Co.*, 96 U. S. 712, 24 L. ed. 641.

[f] Mandamus to compel approval (1) will lie. *State v. Cook*, 51 Neb. 822, 71 N. W. 733. (2) But discretion in approving bonds will not be controlled unless abused. *Ex parte Milwaukee R. Co.*, 5 Wall. (U. S.) 188, 18 L. ed. 676; *Harris v. Barfield Music House*, 147 Ga. 321, 93 S. E. 876. (3) Writ cannot issue from appellate court having no original jurisdiction to issue writ. *Ex parte Floyd*, 40 Ala. 116.

[g] A writ of supersedeas may be issued from the appellate court where the trial court improperly refuses to approve a sufficient bond. *Ex parte Milwaukee R. Co.*, 5 Wall. (U. S.) 188, 18 L. ed. 676.

9. See the statutes.

10. Fla.—*Mitchell v. Mason*, 63 Fla. 538, 57 So. 604; *International Kaolin Co. v. Vause*, 60 Fla. 324, 53 So. 644. Ga.—*Parker-Hensel Engineering Co. v. Schuler*, 133 Ga. 696, 66 S. E. 800, must be given on or before filing of bill of exceptions. Mich.—*Howard v. Hess*, 63 Mich. 725, 30 N. W. 333;

at any time before execution of the judgment.<sup>11</sup> The bond should not be filed prematurely, however.<sup>12</sup>

(G.) **JUSTIFICATION OF SURETIES.** — The respondent may except to the sureties, within a limited time after filing the bond,<sup>13</sup> and then they or other sureties must justify within a specified time,<sup>14</sup> or the proceedings on the judgment or order appealed from are no longer stayed.<sup>15</sup>

(H.) **NEW AND ADDITIONAL BONDS AND SECURITY.** — **Where Original Bond Is Defective.** — If the bond fails to comply with the statute, a new stay bond may be filed in the trial court,<sup>16</sup> without a previous authorization by the appellate court.<sup>17</sup> And in some jurisdictions the appellate court may require or authorize the filing of a proper bond.<sup>18</sup>

**Increasing or Diminishing Security.** — After compliance with an order fixing the amount of a stay bond, the trial court has no power to increase the amount.<sup>19</sup> But the appellate court may increase<sup>20</sup> or dimin-

People *ex rel.* Worden *v.* Judge, 33 Mich. 111, must be filed at time of serving writ of error. **N. M.**—Mundy *v.* Irwin, 19 N. M. 170, 141 Pac. 877, within sixty days.

[a] **Filing nunc pro tunc** may be allowed. Pinel *v.* Pinel, 172 Mich. 611, 138 N. W. 219.

11. **Ala.**—*Ex parte* Du Bose, 54 Ala. 278. **Cal.**—Bradley Co. *v.* Mulerevy, 166 Cal. 325, 136 Pac. 60. **Nev.**—Silver Peak Mines *v.* Second Jud. Dist. Ct., 33 Nev. 97, 110 Pac. 503, Ann. Cas. 1913D, 587. **Tex.**—Patrick *v.* Laprelle (Tex. Civ. App.), 37 S. W. 872, when filed in addition to the cost bond.

[a] **At any time before the sale** under execution. Hill *v.* Finnigan, 54 Cal. 493.

[b] **After Appeal.**—Hill *v.* Finnigan, 54 Cal. 493.

12. McClellan *v.* Pyeatt, 49 Fed. 259, 1 C. C. A. 241. See Atchison, T. & S. F. Ry. Co. *v.* Baker (Ind. Ter.), 104 S. W. 1182.

[a] **Filing of undertaking before filing of petition in error** is not premature. Stillings *v.* Porter, 22 Kan. 17. But see McClellan *v.* Pyeatt, 49 Fed. 259, 1 C. C. A. 241, holding that while the filing of the bond before the allowance of the writ of error is irregular, the court may reapprove the bond on issuance of the citation and will be presumed to have done so.

13. Lee Chuck *v.* Quan Wo Chong Co., 81 Cal. 222, 22 Pac. 594, 15 Am. St. Rep. 50.

14. Brown *v.* Rouse, 115 Cal. 619, 47 Pac. 601; Lee Chuck *v.* Quan Wo Chong Co., 81 Cal. 222, 228, 22 Pac.

594, 15 Am. St. Rep. 50. See the title "Justification of Sureties."

[a] **Second justification** cannot be ordered by the trial court. Boyer *v.* Superior Court, 110 Cal. 401, 42 Pac. 892.

[b] **Trial judge cannot review action of clerk** in (1) passing on sureties, their authority being equal. Boyer *v.* Superior Court, 110 Cal. 401, 42 Pac. 892. (2) Nor can the appellate court do so. Kreling *v.* Kreling, 116 Cal. 458, 48 Pac. 383.

15. See 18 STANDARD PROC. 407.

16. Bradley Co. *v.* Mulerevy, 166 Cal. 325, 136 Pac. 60, since the statute prescribes no time within which the stay must be filed.

**Remedy for defective bond**, see *infra*, V, A, 2, b, (III), (I).

17. Bradley Co. *v.* Mulerevy, 166 Cal. 325, 136 Pac. 60.

18. **U. S.**—McClellan *v.* Pyeatt, 49 Fed. 259, 1 C. C. A. 241. **Mich.**—Coeling *v.* Barnard, 159 Mich. 634; 124 N. W. 533. **Mo.**—American Brew. Co. *v.* Talbot, 125 Mo. 388, 28 S. W. 585.

[a] **Leave to file new bond within reasonable time** to be fixed by the appellate court may be granted. Hudson *v.* Parker, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. ed. 424; Bigler *v.* Waller, 12 Wall. (U. S.) 142, 20 L. ed. 260.

19. **U. S.**—Kendrick *v.* Roberts, 214 Fed. 268; Clarke *v.* Eureka Co. Bank, 131 Fed. 145. **Cal.**—Hubbard *v.* University Bank, 120 Cal. 632, 52 Pac. 1070. **Minn.**—Bock *v.* Sauk Center Groc. Co., 100 Minn. 71, 110 N. W. 257, 9 L. R. A. (N. S.) 1054, 10 Ann. Cas. 802, note.

20. **U. S.**—Providence Rubber Co. *v.*

ish the amount of the bond,<sup>21</sup> except where the fixing of the amount of the bond is by the statute placed entirely in the hands of the trial court.<sup>22</sup>

When the sureties become insufficient, as by reason of insolvency, the appellate court,<sup>23</sup> or in some states, the trial court,<sup>24</sup> may require additional security or a new bond.

**After Sureties Fail To Justify.**—Except where there still remains enough time for a second justification within the statutory period for justifying sureties,<sup>25</sup> a new bond or sureties cannot be furnished after the sureties fail to justify if the first bond was otherwise sufficient,<sup>26</sup> unless the appellate court permits it.<sup>27</sup>

(I.) EFFECT OF INSUFFICIENCY OF BOND OR SURETIES AND REMEDY.—A bond not in compliance with the statute is not effective to stay execution,<sup>28</sup> and the court,<sup>29</sup> or the clerk,<sup>30</sup> may be compelled by mandamus to issue execution. But it has been held that where the statute provides for the approval of the bond, as by the clerk of the court, an approved bond, though defective and insufficient, is not a nullity and operates as a supersedeas until its insufficiency has been determined by a direct attack.<sup>31</sup> And where a writ of supersedeas is issued, the respondent

Goodyear, 6 Wall. 153, 18 L. ed. 762; Clarke v. Eureka Co. Bank, 131 Fed. 145. **Minn.**—Bock v. Sauk Center Groc. Co., 100 Minn. 71, 110 N. W. 257, 9 L. R. A. (N. S.) 1054, 10 Ann. Cas. 802, note. **Neb.**—Tulleys v. Keller, 42 Neb. 788, 60 N. W. 1015.

21. Providence Rubber Co. v. Goodyear, 6 Wall. (U. S.) 153, 18 L. ed. 762.

22. Jameson v. Chanslor-Canfield M. Oil Co., 173 Cal. 612, 160 Pac. 1066.

23. American Brew. Co. v. Talbot, 135 Mo. 170, 36 S. W. 657. See Williams v. Clafin, 103 U. S. 753, 26 L. ed. 606; Jerome v. McCarter, 21 Wall. (U. S.) 17, 22 L. ed. 515.

[a] **Court Has Inherent Power.** American Brew. Co. v. Talbot, 135 Mo. 170, 36 S. W. 657.

[b] **May vacate the supersedeas** unless a new bond is filed. American Brew. Co. v. Talbot, 135 Mo. 170, 36 S. W. 657.

24. Boyer v. Superior Court, 110 Cal. 401, 42 Pac. 892, by statute.

25. Brown v. Rouse, 115 Cal. 619, 47 Pac. 601.

26. McBroom v. Young, 14 Ariz. 521, 132 Pac. 300; Hill v. Finnigan, 54 Cal. 493 (distinguished in Bradley Co. v. Mulcrevy, 166 Cal. 325, 136 Pac. 60). See also Brown v. Rouse, 115 Cal. 619, 47 Pac. 601.

27. Nonpareil Mfg. Co. v. McCourtney, 143 Cal. 1, 76 Pac. 653; Tompkins v. Montgomery, 116 Cal. 120,

47 Pac. 1006; Hill v. Finnigan, 54 Cal. 493. See also Bradley Co. v. Mulcrevy, 166 Cal. 325, 136 Pac. 60.

28. **Cal.**—Bradley Co. v. Mulcrevy, 166 Cal. 325, 136 Pac. 60, the respondent has a right to enforce execution at once, just the same as if no bond had been filed. **Mo.**—State ex rel. Wolff v. Vogel, 6 Mo. App. 526. **Wis.**—Pierce v. Kneeland, 7 Wis. 224.

[a] **However effectual it may be as a common law bond**, a bond not in compliance with the statute does not stay execution. State ex rel. Wolff v. Vogel, 6 Mo. App. 526.

[b] **No order of court is necessary for issuance of execution** where the bond fails to comply with the statute. Wheeler v. Wheeler, 139 Ga. 608, 77 S. E. 817.

[c] **On refusal of the sheriff to execute the judgment** when the bond is insufficient, an ex parte order directing him to proceed is proper. La Societe Francaise D'Epargnes v. McHenry, 49 Cal. 351.

29. In the matter of Stafford v. Union Bank, 17 How. (U. S.) 275, 15 L. ed. 101. Compare Ferguson v. Dent, 29 Fed. 1. See 16 STANDARD PROC. 787.

30. State ex rel. Wolff v. Vogel, 6 Mo. App. 526. See 16 STANDARD PROC. 785.

31. Ward v. Buell, 18 Ind. 104, 81 Am. Dec. 349; Deming Inv. Co. v. Far-



or appellee may apply to the appellate court or judge for a discharge of the supersedeas unless a proper bond is executed.<sup>32</sup> A properly perfected appeal cannot be dismissed because of a defective or insufficient stay bond.<sup>33</sup>

Though the sureties are insufficient, a bond in compliance with the statute operates as a stay until their failure to justify after exception.<sup>34</sup>

(J.) ENFORCEMENT OF BOND.—On breach of a supersedeas or stay bond, it may be enforced by action,<sup>35</sup> or, under statute, by summary proceedings as by motion for judgment.<sup>36</sup>

(IV.) Execution and Deposit of Required Conveyance.—To stay a judgment directing the execution of a conveyance or other instrument, some statutes require that the instrument be executed and deposited with the clerk to abide the judgment of the appellate court.<sup>37</sup>

(V.) Payment of Costs.—Some statutes require the payment of all costs,<sup>38</sup> or the filing of an affidavit in forma pauperis in lieu thereof,<sup>39</sup> on or before filing of the bill of exceptions,<sup>40</sup> in order that the latter may operate as a supersedeas.

iss (Okla.), 50 Pac. 130. See *Clinton v. Phillips' Admr.*, 7 Mon. (Ky.) 117.

[a] **Supersedeas Will Be Vacated on Motion.**—*Wheeler & Wilson Mfg. Co. v. Johns*, 37 Fla. 262, 20 So. 236.

32. *Johnson v. Williams*, 82 Ky. 45.

33. *Bigler v. Waller*, 12 Wall. (U. S.) 142, 149, 20 L. ed. 260; *Mersfelder v. Spring*, 136 Cal. 619, 69 Pac. 251; *Dobbins v. Dollarhide*, 15 Cal. 374. See *Birmingham Trust & Sav. Co. v. Currey*, 175 Ala. 373, 57 So. 962, Ann. Cas. 1914D, 81.

34. *Bradley Co. v. Mulcrevy*, 166 Cal. 325, 136 Pac. 60; *Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 222, 22 Pac. 594, 15 Am. St. Rep. 50. Justification of, see *supra*, V, A, 2, b, (III), (G).

35. See *infra*, this note.

[a] **The United States courts have jurisdiction** of actions to enforce supersedeas bonds given under the federal statutes regardless of citizenship of parties, since such suits are of a civil nature arising under the constitution and laws of the United States. *American Sur. Co. v. Schultz*, 237 U. S. 159, 35 Sup. Ct. 525, 59 L. ed. 892.

[b] **Rendition of money judgment by appellate court** need not be alleged. *Ryndak v. Seawell*, 23 Okla. 759, 102 Pac. 125.

36. Cal.—*Meredith v. Santa Clara Min. Assn.*, 60 Cal. 617. Ia.—*Swift v. Comboy*, 12 Iowa 444, when the supreme court affirms the judgment, it shall also render judgment on the bond

if moved for. Tex.—*White v. Harris*, 85 Tex. 42, 19 S. W. 1077.

See generally the title "Summary Proceedings."

[a] **Otherwise as to bonds invalid as statutory bonds but valid as a common-law bond.** *Central Lumb. & M. Co. v. Center*, 107 Cal. 193, 40 Pac. 334.

[b] **Notice is not required.** *Meredith v. Santa Clara Min. Assn.*, 60 Cal. 617; *Phelan v. Johnson*, 80 Iowa 727, 46 N. W. 68.

37. See generally the statutes, and Cal.—*Englund v. Lewis*, 25 Cal. 337. Kan.—*Central Branch Union Pac. R. Co. v. Andrews*, 34 Kan. 563, 9 Pac. 213. N. Y.—*Walz v. Humrich*, 158 App. Div. 584, 143 N. Y. Supp. 806.

Compare V, A, 6, b.

[a] **A perfected appeal is necessary** to obtain a stay under this statute. *Walz v. Humrich*, 158 App. Div. 584, 143 N. Y. Supp. 806.

38. *Harris v. Atlanta Northern R. Co.*, 144 Ga. 701, 87 S. E. 1041; *Wheeler v. Wheeler*, 139 Ga. 608, 77 S. E. 817.

[a] **Even though the bond is given**, the bill of exceptions does not operate as a supersedeas unless costs are paid on or before filing the bill. *Harris v. Atlanta Northern R. Co.*, 144 Ga. 701, 87 S. E. 1041.

39. *Wheeler v. Wheeler*, 139 Ga. 608, 77 S. E. 817.

40. *Wheeler v. Wheeler*, 139 Ga. 608, 77 S. E. 817; *Parker-Hensel En-*

c. *Stay Under Federal Statute.*—The federal statute provides that the defendant may obtain a supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office within a specified time and giving the security required by law on the issuing of the citation.<sup>41</sup> Or the writ having been served within that time, a stay may be had as a matter of favor by giving the required security afterwards.<sup>42</sup> In case of appeals, the appeal must be taken and allowed and security given within the same time as on writs of error.<sup>43</sup> The rule is the same on error from the United States supreme court to a state court.<sup>44</sup> The issuance of a writ of supersedeas is not required,<sup>45</sup> except under special circumstances,<sup>46</sup>

gineering Co. v. Schuler, 133 Ga. 696, 66 S. E. 800.

41. Title Guar. & Sur. Co. v. United States, 222 U. S. 401, 32 Sup. Ct. 168, 56 L. ed. 248; *In re Claassen*, 140 U. S. 200, 208, 11 Sup. Ct. 733, 35 L. ed. 409; *Bigler v. Waller*, 12 Wall. (U. S.) 142, 148, 20 L. ed. 260.

[a] *The Writ of Error Must Be Served.*—(1) *McCarley v. McGhee*, 108 Fed. 494; *North Shore Boom & D. Co. v. Nicomen Boom Co.*, 52 Wash. 564, 101 Pac. 48. (2) But service in a particular manner is not necessary. *McCarley v. McGhee*, 108 Fed. 494.

[b] *The lodging with the clerk of the original instead of a copy of the writ is a sufficient compliance with the statute.* *McCarley v. McGhee*, 108 Fed. 494. But see *Baltimore & O. R. Co. v. Harris*, 7 Wall. (U. S.) 574, 19 L. ed. 100.

[c] *A judge of the appellate court cannot grant a stay if the writ is not served within sixty days, Sundays exclusive, or the appeal allowed within that time.* U. S.—Title Guar. & Sur. Co. v. United States, 222 U. S. 401, 32 Sup. Ct. 168, 56 L. ed. 248; *Peugh v. Davis*, 110 U. S. 227, 4 Sup. Ct. 17, 28 L. ed. 127; *Kitchen v. Randolph*, 93 U. S. 86, 23 L. ed. 810. Mont.—First Nat. Bank v. McAndrews, 7 Mont. 434, 17 Pac. 554. Neb.—Whitaker v. McBride, 5 Neb. (Unof.) 411, 98 N. W. 877. Wash.—Morrison v. Fidelity & Deposit Co., 97 Wash. 623, 166 Pac. 1122.

[d] *Appeal Nunc Pro Tunc.*—Court cannot make an order that appeal be regarded as taken within sixty days, where the delay is not that of the court. *Sage v. Central R. R. Co.*, 93 U. S. 412, 23 L. ed. 933.

42. *Peugh v. Davis*, 110 U. S. 227, 4 Sup. Ct. 17, 28 L. ed. 127; *Kitchen*

*v. Randolph*, 93 U. S. 86, 23 L. ed. 810; *North Shore Boom & D. Co. v. Nicomen Boom Co.*, 52 Wash. 564, 101 Pac. 48.

43. *Bigler v. Waller*, 12 Wall. (U. S.) 142, 20 L. ed. 260.

[a] *Only when the appeal is allowed by a court acting judicially and in term time and within the prescribed time, can the supreme court grant a supersedeas on filing of a bond after sixty days.* *Peugh v. Davis*, 110 U. S. 227, 4 Sup. Ct. 17, 28 L. ed. 127.

44. Cal.—*Tyler v. Presley*, 72 Cal. 290, 13 Pac. 856; *Magraw v. McGlynn*, 32 Cal. 257. Fla.—*Carter v. Bennett*, 5 Fla. 92. Mont.—First Nat. Bank v. McAndrews, 7 Mont. 434, 17 Pac. 554.

[a] *Chief Justice Issuing Citation Must Take Good and Sufficient Security.*—*Carter v. Bennett*, 5 Fla. 92.

45. *In re McKenzie*, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. ed. 656; *Western Air-Line Const. Co. v. McGillis*, 127 U. S. 776, 8 Sup. Ct. 1390, 32 L. ed. 324; *Slaughter House Cases*, 10 Wall. (U. S.) 273, 19 L. ed. 915; *Tyler v. Presley*, 72 Cal. 290, 13 Pac. 856.

46. *In re McKenzie*, 180 U. S. 536, 540, 21 Sup. Ct. 468, 45 L. ed. 657; *Western Air-Line Const. Co. v. McGillis*, 127 U. S. 776, 8 Sup. Ct. 1390, 32 L. ed. 324.

[a] *Where the court below refuses to grant an appeal, a judge of the circuit court of appeals may award it and grant a supersedeas.* *In re McKenzie*, 180 U. S. 536, 21 Sup. Ct. 468, 45 L. ed. 657.

[b] *Where trial court improperly refuses to approve a proper bond, a writ of supersedeas will issue.* *French v. Shoemaker*, 12 Wall. (U. S.) 86, 20 L. ed. 270; *Ex parte Milwaukee R. Co.*, 5 Wall. (U. S.) 188, 18 L. ed. 676.

*Writ to prevent violation of stay,* see *infra*, V, A, 10, b.

and where an execution has been lawfully issued.<sup>47</sup>

**3. Stay on Order of Court.**<sup>48</sup> — a. *Of Trial Court.* — After perfection of an appeal from a judgment, the trial court has no general power to stay execution thereon.<sup>49</sup> It has been held, however, that it may in its discretion order a stay pending appeal where the statute makes no provision therefor.<sup>50</sup> And a court of equity has inherent power to accompany a decree with a provision preserving the status quo pending appeal.<sup>51</sup> Under some statutes, a stay in certain cases cannot be had pending appeal or writ of error except upon an order of the trial court.<sup>52</sup>

b. *Of Appellate Court.* — An appellate court has inherent power to order a stay of proceedings in the trial court touching any matter of appeal,<sup>53</sup> upon such terms as to security, etc., as the appellate court

47. *Hovey v. McDonald*, 109 U. S. 150, 159, 3 Sup. Ct. 136, 27 L. ed. 888.

48. In contempt proceedings, see 5 STANDARD PROC. 431.

49. *Mannix v. Superior Court*, 157 Cal. 730, 109 Pac. 264.

Authority of appellate court to stay execution in lower court, see *infra*, V, A, 3, b. See also VIII.

Effect of appeal on jurisdiction of trial court, see 2 STANDARD PROC. 324.

Effect of appeal on jurisdiction of appellate court, see 2 STANDARD PROC. 330.

50. *Palmer v. Harris*, 23 Okla. 500, 101 Pac. 852, 138 Am. St. Rep. 822; *Ex parte Epley*, 10 Okla. 631, 64 Pac. 18.

51. *Louisville & N. R. Co. v. United States*, 227 Fed. 273.

Suppending injunctions, see *supra*, V, A, 6, d.

52. See cases cited *supra*, V, A, 2, b, (I).

[a] **Where Judgment Directs Payment of Money.** — *Pelzer Mfg. Co. v. Cely*, 40 S. C. 430, 18 S. E. 790, rule is otherwise in most states.

On interlocutory orders, see *infra*, V, A, 6, b.

[b] **Whenever a writ of error is sued out**, the court or judge from whose judgment the writ is taken, shall on application stay the enforcement of judgment. *Potomac Inf Co. v. Dye*, 14 Cal. App. 674, 113 Pac. 126, 130, construing Arizona statute.

53. *U. S.* — *Hardeman v. Anderson*, 4 How. 640, 11 L. ed. 1138. Ark. — *Union Sawmill Co. v. Felsenthal Land & T. Co.*, 84 Ark. 494, 106 S. W. 676; *Davis v. Tarwater*, 13 Ark. 52. Cal. — *Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69; *Hill v. Finnigan*, 54

Cal. 493; *Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 667, 128 Pac. 9, 18. Ga. — *Yeates v. Roberson*, 4 Ga. App. 573, 62 S. E. 104. Idaho. — *Waters v. Dunn*, 18 Idaho 450, 110 Pac. 258. Kan. — *Central Nat. Bank v. Guthrie Mountain Portland Cement Co.*, 83 Kan. 630, 112 Pac. 332. Mich. — *Coeling v. Barnard*, 159 Mich. 634, 124 N. W. 533. Neb. — *Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755, 67 N. W. 766. N. Y. — *Fleischman v. Mengis*, 118 N. Y. Supp. 671. Okla. — *Ex parte Epley*, 10 Okla. 631, 641, 64 Pac. 18. Ore. — *Kollock & Co. v. Leyde*, 77 Ore. 569, 143 Pac. 621, 151 Pac. 733 (may issue temporary injunction to preserve status quo); *Livesley v. Krebs Hop Co.*, 57 Ore. 352, 97 Pac. 718, 107 Pac. 460, 112 Pac. 1. S. C. — *Andrews v. Sumter Com. & R. E. Co.*, 87 S. C. 301, 69 S. E. 604. Wash. — *Northwestern Imp. Co. v. McNeil*, 98 Wash. 1, 167 Pac. 115; *Campbell Lumb. Co. v. Deep River Log Co.*, 68 Wash. 431, 123 Pac. 596; *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 52 Pac. 317, 67 Am. St. Rep. 706, 40 L. R. A. 317. Wis. — *Levy v. Goldberg*, 40 Wis. 308; *Hudson v. Smith*, 9 Wis. 122; *Waterman v. Raymond*, 5 Wis. 185.

[a] **Stay of Execution.** — *Herrington v. Block*, 98 Ga. 236, 25 S. E. 426; *State v. Crawford*, 96 Minn. 95, 104 N. W. 768, 822, 1 L. R. A. (N. S.) 839. See *White v. Almy*, 34 R. I. 29, 82 Atl. 397, under statute.

[b] **Even though a recognizance to stay execution is not entered into** in the court below, the appellate court may order a stay upon appellant entering into a proper undertaking. *Davis v. Tarwater*, 13 Ark. 52.

[c] **Only in the particular case ap-**



may prescribe;<sup>54</sup> and this power is sometimes conferred, recognized and regulated by statute.<sup>55</sup> This power may be exercised in all cases when necessary to preserve the status quo pending an appeal, so that the rights involved in the appeal may not be lost or prejudiced by reason of the intervening execution of the judgment,<sup>56</sup> and in cases not expressly provided for by statute.<sup>57</sup> But when the statute prescribes the

pealed can a stay be granted. *Matson v. Matson*, 61 Ind. App. 520, 117 N. E. 636.

[d] A refusal of trial judge to grant a supersedeas does not affect power of appellate court. *Saxon v. Gamble*, 23 Fla. 408, 2 So. 664; *Yazoo & M. V. R. Co. v. James*, 108 Miss. 656, 67 So. 152. *Contra*, *Case v. Metropole Hotel & Restaurant*, 5 Phil. Isl. 49.

[e] But where the trial court has set aside an order staying proceedings, in a case where such order is required, the appellate court cannot allow the filing of a new undertaking and direct a stay. *Gross v. Kelleher*, 73 Cal. 639, 15 Pac. 362.

[f] A stay until disposition of an appeal from an order below denying a stay should not be granted by the appellate court. *People v. Manhattan R. Co.*, 9 Abb. N. C. (N. Y.) 448.

[g] When trial court refuses to allow an appeal, an appellate judge may stay proceedings below until court can act on a petition for mandamus, the judges being absent at the time. *State ex rel. Williams v. Monroe*, 51 La. Ann. 161, 24 So. 790.

[h] Any judge of the appellate court can issue (1) writs of supersedeas (*Ind.*—*Northern Ind. R. Co. v. Michigan Cent. R. Co.*, 2 Ind. 670. *Kan.* *Central Nat. Bank v. Guthrie Mountain P. Cement Co.*, 83 Kan. 630, 112 Pac. 332. *Miss.*—*Yazoo & M. V. R. Co. v. James*, 108 Miss. 656, 67 So. 152) in (2) term or vacation. *Strangways v. Ringgold*, 106 Ark. 433, 153 S. W. 619; *Northern Ind. R. Co. v. Michigan Cent. R. Co.*, 2 Ind. 670.

54. See cases in next preceding note, and *infra*, V, A, 7.

55. *Ark.*—*Ex parte Woods*, 3 Ark. 532. *Ind.*—*Matson v. Matson*, 61 Ind. App. 520, 117 N. E. 636. *Ky.*—See *Borrone v. Moseley Bros.*, 143 Ky. 812, 137 S. W. 531. *Miss.*—*Yazoo & M. V. R. Co. v. James*, 108 Miss. 656, 67 So. 152. *Okla.*—*Ex parte Epley*, 10 Okla. 631, 64 Pac. 18.

[a] Under statute authorizing issuance of writs not specifically provided for, a writ of supersedeas may be issued. *U. S.*—*In re McKenzie*, 180 U. S. 536, 549, 21 Sup. Ct. 468, 45 L. ed. 657; *Hudson v. Parker*, 156 U. S. 277, 15 Sup. Ct. 450, 39 L. ed. 424; *In re Claasen*, 140 U. S. 200, 207, 11 Sup. Ct. 735, 35 L. ed. 409. *Ark.* *Strangways v. Ringgold*, 106 Ark. 433, 153 S. W. 619. *Wash.*—*State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 52 Pac. 317, 67 Am. St. Rep. 706, 40 L. R. A. 317.

56. *U. S.*—*French v. Shoemaker*, 12 Wall. 86, 20 L. ed. 270. *Cal.*—*Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69. *Wash.*—*Northwestern Imp. Co. v. McNeil*, 98 Wash. 1, 167 Pac. 115.

[a] If trial court neglects or refuses to fix the amount of the bond, the appellate court may order a stay on proper statutory terms after appeal taken. *Northwestern Mut. L. Ins. Co. v. Park Hotel Co.*, 37 Wis. 125.

[b] Where the sureties below fail to justify, the appellate court may grant a stay on application. *Tompkins v. Montgomery*, 116 Cal. 120, 47 Pac. 1006.

57. *Ark.*—*Davis v. Tarwater*, 13 Ark. 52, 56. *Cal.*—*Halsted v. First Sav. Bank*, 173 Cal. 605, 160 Pac. 1075; *Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69. *Fla.* *McIver v. Marshall*, 24 Fla. 42, 4 So. 563, except when a writ of error operates as a supersedeas as of course, a special order of the appellate court is necessary. *Neb.*—*Penn Mut. Life Ins. Co. v. Creighton Theatre Bldg. Co.*, 51 Neb. 659, 71 N. W. 279; *Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755, 67 N. W. 766. *N. Y.*—*Midwood Park Co. v. Baker*, 142 App. Div. 495, 127 N. Y. Supp. 48. *Okla.*—*Palmer v. Harris*, 23 Okla. 500, 101 Pac. 852, 138 Am. St. Rep. 822; *Ex parte Epley*, 10 Okla. 631, 64 Pac. 18. *Wyo.*—*Laughlin v. King*, 22 Wyo. 8, 133 Pac. 1073, statute so provides.

method of procuring a stay in a particular case, the appellate court cannot fix the terms of the stay,<sup>58</sup> or at least will not do so, in the absence of excuse for failure to proceed under the statute.<sup>59</sup>

c. *Application and Notice*.—To obtain an order or writ of supersedeas the applicant must present a proper petition<sup>60</sup> which may be ex parte,<sup>61</sup> unless statute or rule of court provides otherwise.<sup>62</sup>

d. *Determination*.<sup>63</sup>—This power and discretion of the court should be cautiously exercised,<sup>64</sup> but it is the policy of the law to allow a stay of proceedings on giving proper security.<sup>65</sup> Before granting a supersedeas, the judge should see that there is an appeal,<sup>66</sup> that it is not frivolous,<sup>67</sup> and that the state of the case is such that a supersedeas is proper.<sup>68</sup> But the merits of the appeal should not be considered.<sup>69</sup>

e. *Issuance and Service of Writ of Supersedeas*.—After the order granting a supersedeas, it has been held that no writ of supersedeas need be sued out to make the supersedeas effectual.<sup>70</sup> But if issued the writ of supersedeas must conform to the order granting it.<sup>71</sup> And

58. *Ia.*—*Boynton v. Church*, 148 Iowa 197, 127 N. W. 210. *Ohio*.—*Hyde v. Bank*, 49 Ohio St. 60, 34 N. E. 720. *Wyo.*—*Laughlin v. King*, 22 Wyo. 8, 17, 133 Pac. 1073.

59. *Williams v. Borgwardt*, 115 Cal. 617, 47 Pac. 594.

60. *Watkins v. Justice*, 256 Pa. 42, 100 Atl. 489.

[a] *Petition by attorney* is sufficient. *Coeling v. Barnard*, 159 Mich. 634, 124 N. W. 533.

*Form of notice of motion and order*, see 9 STANDARD PROC. 77.

61. *Ark.*—See *Farrelly v. Cross*, 10 Ark. 197, 404. *Kan.*—*Central Nat. Bank v. Guthrie Mountain Portland Cement Co.*, 83 Kan. 630, 112 Pac. 332. *S. C.*—*Matthews v. Nance*, 49 S. C. 322, 27 S. E. 100.

62. See the statutes and rules of court and *Delahunty v. Canfield*, 106 App. Div. 386, 94 N. Y. Supp. 815.

63. *Form of order awarding writ of supersedeas*, see *Hardeman v. Anderson*, 4 How. (U. S.) 640, 11 L. ed. 1138.

64. *Yazoo & M. V. R. Co. v. James*, 108 Miss. 656, 67 So. 152.

65. *Halsted v. First Sav. Bank*, 173 Cal. 605, 160 Pac. 1075; *Levy v. Goldberg*, 40 Wis. 308; *Hudson v. Smith*, 9 Wis. 122.

66. *Tampa St. Ry. & P. Co. v. Tampa Sub. R. Co.*, 30 Fla. 400, 11 So. 908; *Williams v. Hilton*, 25 Fla. 608, 6 So. 452.

67. *Williams v. Hilton*, 25 Fla. 608, 6 So. 452.

68. *Williams v. Hilton*, 25 Fla. 608, 6 So. 452.

[a] *A supersedeas is not denied unless* it plainly appears that the questions raised are immaterial, or have been finally settled, or the case has been brought up for delay. *Northern Ind. R. Co. v. Michigan Cent. R. Co.*, 3 Ind. 8.

[b] *Where the loss occasioned by the delay cannot be met by a money award*, a supersedeas will not be granted. *Cooper v. Hindley*, 70 Wash. 331, 126 Pac. 916.

[c] *To entitle a party to the writ as an independent remedy to forever suspend execution of the judgment*, the lack of jurisdiction of the trial court must be shown. *Ex parte Caldwell*, 5 Ark. 390.

69. *Williams v. Hilton*, 25 Fla. 608, 6 So. 452; *Saxon v. Gamble*, 23 Fla. 408, 2 So. 664; *Levy v. Goldberg*, 40 Wis. 308. But compare *Crawford v. Gilchrist*, 64 Fla. 41, 50, 59 So. 963, Ann. Cas. 1914B, 916, considering the merits of the case where the granting of a supersedeas on appeal from an order granting injunction will virtually dispose of the case.

70. *Claiborne v. Crockett*, Meigs (Tenn.) 607, holding to be void a sale made under the decree after granting of a supersedeas, though no writ was served on the clerk. Compare *supra*, V, A, 2, b, (I).

71. *Ex parte Woods*, 3 Ark. 532, 539.

[a] *Form of Writ of Supersedeas*.

it may be delivered to the sheriff by a third person.<sup>72</sup>

**4. Necessity for Appellate Proceedings.**— Unless statute provides otherwise a supersedeas cannot be allowed except as an incident to an appeal actually taken or a writ of error actually sued out.<sup>73</sup> But an appeal operates as a supersedeas for the time being even though taken to an appellate court having no jurisdiction to entertain it.<sup>74</sup>

**5. Who May Obtain Supersedeas or Stay.**— As a general rule, it may be stated that none but parties or privies can procure a supersedeas.<sup>75</sup> A party to a decree is not entitled to a supersedeas of any feature of it which does not affect his interests.<sup>76</sup> Though several parties join in a writ of error, a less number may file stay bonds, the supersedeas in such case operating only as to those who file the proper bond.<sup>77</sup>

**6. What Judgments and Orders May Be Stayed.**— *a. Judgments of What Court.*— In addition to judgments of courts of general jurisdiction,<sup>78</sup> statutes relating to appeals and supersedeas authorize a stay of proceedings on judgments of justices of the peace,<sup>79</sup> and of intermediate appellate courts<sup>80</sup> pending appeal.

*b. As Dependent on the Nature of the Judgment.*<sup>81</sup>— Proceedings

Hardeman v. Anderson, 4 How. (U. S.) 640, 11 L. ed. 1138.

72. Welch v. Jones, 11 Ala. 660.

73. U. S.—*Ex parte* Ralston, 119 U. S. 613, 7 Sup. Ct. 317, 30 L. ed. 506. *Ariz.*—Inspiration Consol. Copper Co. v. Mendez, 19 Ariz. 151, 166 Pac. 278, 1183. *Ia.*—Maher v. Morrison, 178 Iowa 1318, 160 N. W. 924; Pratt v. Western Stage Co., 26 Iowa 241. *Kan.* Powell v. Bradley, 86 Kan. 198, 119 Pac. 543. *Ky.*—Greene v. Buckler, 19 Ky. L. Rep. 286, 40 S. W. 382.

[a] Supersedeas bond filed before giving notice of appeal does not operate as a stay until the notice is given. Inspiration Consol. Copper Co. v. Mendez, 19 Ariz. 151, 166 Pac. 278, 1183. But compare McKinney v. Hartman, 143 Ind. 224, 42 N. E. 681.

[b] But an appeal by a purchaser of the premises in the defendant's name with a stay bond, stays proceedings although the appeal is afterwards dismissed because of appellant's lack of interest. Baasen v. Eilers, 11 Wis. 277.

74. Smith v. Chrytraus, 152 Ill. 664, 38 N. E. 911; Simpson v. Com., 31 Ky. L. Rep. 821, 104 S. W. 269.

75. See *infra*, this note, and *supra*, V, A, 2, b, (III), (B).

[a] Where Supersedeas Is Analogous to a Writ of Error.—Wingfield v. Crenshaw, 3 Hen. & M. (13 Va.) 245.

[b] A person denied the right to

intervene cannot procure supersedeas. State *ex rel.* Bugbee v. Holmes, 59 Neb. 503, 81 N. W. 512.

76. Warner v. Watson, 27 Fla. 518, 8 So. 842.

77. U. S.—*Ex parte* French, 100 U. S. 1, 25 L. ed. 529. *Ala.*—Copeland v. Dixie Lumb. Co., 4 Ala. App. 230, 57 So. 124. *Tex.*—Frieberg, Klein & Co v. Embree, 1 White & W. Civ. Cas. §1095. Compare Welch v. Eyermann, 7 Mo. App. 588, holding an execution cannot issue against a defendant who has not the right of appeal.

[a] Where the executor executes a limited bond, a supersedeas in favor of other judgment defendants cannot be issued. Wilson v. Yonge, 54 Ark. 353, 15 S. W. 898.

[b] A Bond May Be Executed by One on Behalf of All.—Warner v. Whitaker, 5 Mich. 241.

[c] But where an appeal vacates the judgment, no execution can be issued after an appeal by one of several parties. Moore v. Jordan, 65 Tex. 395.

78. See the cases cited in this section.

79. See 18 STANDARD PROC. 269.

80. State *ex rel.* Wolff v. Vogel, 6 Mo. App. 526.

81. Orders in receivership cases, see the title, "Receivers."

Of commitment of insane person, see 13 STANDARD PROC. 546.



on final<sup>82</sup> and interlocutory<sup>83</sup> judgments may be superseded or stayed on compliance with statute, unless they are nonappealable.<sup>84</sup> Under statutes providing for a stay upon giving security,<sup>85</sup> it is a general rule that proceedings on those judgments only can be superseded which require the doing of some affirmative act.<sup>86</sup> If the judgment has been executed, there is nothing on which the supersedeas can act.<sup>87</sup> The same is true if the judgment is self-executing,<sup>88</sup> though in such

**Order appointing guardian**, see 10 STANDARD PROC. 808.

**Order removing a guardian**, see 10 STANDARD PROC. 816.

82. See *infra*, this section.

**Stay of order in habeas corpus proceeding**, see 10 STANDARD PROC. 956.

**Of order removing executor**, see 6 STANDARD PROC. 518.

[a] **On appeal from an order setting aside a final decree**, a supersedeas may be granted. *Saxon v. Gamble*, 23 Fla. 408, 2 So. 664.

83. *Yazoo & M. V. R. Co. v. James*, 108 Miss. 656, 67 So. 152; *Sam Werner v. Syrop*, 121 N. Y. Supp. 1120.

[a] **It is provided** (1) that appeals from interlocutory orders shall not operate as a supersedeas unless so ordered by the court. **Fla.**—*Johnson v. Turner*, 44 Fla. 244, 33 So. 238 (quot. statute): *Tampa St. Ry. & P. Co. v. Tampa Sub. R. Co.*, 30 Fla. 400, 11 So. 908. **N. D.**—*Devereaux v. Katz*, 22 N. D. 351, 133 N. W. 553. **Wis.**—*State ex rel. Pabst Brew. Co. v. Kotecki*, 164 Wis. 69, 159 N. W. 583. (2) Discretion is vested in lower court to refuse supersedeas. *Devereaux v. Katz*, 22 N. D. 351, 133 N. W. 553.

[b] **In Louisiana**, interlocutory orders not working irreparable injury to opposite party may not be suspensively appealed from. *State ex rel. Des Allemands Lumber Co. v. Allen*, 110 La. 853, 34 So. 804.

84. **Minn.**—*State ex rel. Norris v. District Court*, 52 Minn. 283, 53 N. W. 1157. **Neb.**—*State v. Fawcett*, 58 Neb. 371, 78 N. W. 636. **S. C.**—*Kirby v. Kelly*, 90 S. C. 378, 73 S. E. 780.

[a] **An appeal from a nonappealable order** does not operate as a supersedeas. *Kirby v. Kelly*, 90 S. C. 378, 73 S. E. 780.

[b] **In case of doubt as to appealability of order**, appellate court (1) will not stay proceedings below. *Gelpeke v. Milwaukee & H. R. Co.*, 11 Wis. 454, 467. (2) The court below should refrain from enforcing an order pend-

ing an appeal with stay bond, until its appealability is determined by the appellate court. A writ of supersedeas will be issued to prevent violation of the stay. *Hale & Norcross Silver M. Co. v. Fox*, 122 Cal. 56, 54 Pac. 270.

**Supersedeas on non-appealable interlocutory orders**, see *infra*, VIII.

85. See *infra*, V, A, 2, b.

86. **Cal.**—*Rogers v. Superior Court*, 126 Cal. 183, 58 Pac. 452; *Bliss v. Superior Court*, 62 Cal. 543. **Fla.**—*Saxon v. Gamble*, 23 Fla. 408, 2 So. 664. **Mo.** *State ex rel. Busch v. Dillon*, 96 Mo. 56, 8 S. W. 781; *State ex rel. Gray v. Hennings*, 194 Mo. App. 545, 185 S. W. 1153. **Tenn.**—*Mabry v. Ross*, 1 Heisk. 769. **Utah.**—*Elliot v. Whitmore*, 10 Utah 238, 243, 37 Pac. 459.

87. **Ala.**—*Ex parte Du Bose*, 54 Ala. 278. **Cal.**—*Hoppe v. Hoppe*, 99 Cal. 536, 34 Pac. 222. **Okl.**—*State Nat. Bank v. Ladd*, 162 Pac. 684.

[a] **Supersedeas does not operate as a writ of restitution** when decree has been executed. *Hudgins v. Marchant & Co.*, 28 Gratt. (69 Va.) 177.

88. **Cal.**—*Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 33 Pac. 123; *Tyler v. Presley*, 72 Cal. 290, 13 Pac. 856. **Ind.**—*Willis v. Willis*, 165 Ind. 332, 75 N. E. 655, 2 L. R. A. (N. S.) 244, 6 Ann. Cas. 772; *Randles v. Randles*, 67 Ind. 434. **Ia.**—*Allen v. Church*, 101 Iowa 116, 70 N. W. 127; *Lindsay v. Clayton Dist. Ct.*, 75 Iowa 509, 39 N. W. 817. **Mo.**—*State ex rel. Gray v. Hennings*, 194 Mo. App. 545, 185 S. W. 1153. **Wash.**—*Cooper v. Hindley*, 70 Wash. 331, 126 Pac. 916.

But compare *Sweeney v. Karsky*, 25 Nev. 197, 58 Pac. 813.

[a] **For example**, judgments granting or dissolving injunctions, or determining the status of individuals, granting or denying divorces, annulling marriages, quieting title to land, and setting aside the execution of deeds. *Dulin v. Pacific Wood & C. Co.*, 98 Cal. 304, 33 Pac. 123.

[b] **Judgments disbarring attor-**

case the court may grant a supersedeas,<sup>89</sup> or in case the order is an interlocutory order postpone the trial pending the disposition of the appeal.<sup>90</sup>

Usually the statutes, when prescribing the special conditions in bonds to stay proceedings on judgments and orders supersedable as of right, specifically enumerate judgments and final orders directing the payment of money,<sup>91</sup> judgments and final orders directing the execution of a conveyance or instrument,<sup>92</sup> judgments or orders directing the assignment or delivery of a document or of personal property,<sup>93</sup> judgments and orders directing the sale or delivery of possession of real estate,<sup>94</sup> and judgments for the foreclosure of liens on real

neys. *Tyler v. Presley*, 72 Cal. 290, 13 Pac. 856; *Walls v. Palmer*, 64 Ind. 493.

[c] **Judgment in Partition.**—*Randles v. Randles*, 67 Ind. 434.

[d] **Judgments Declaring Persons Elected.**—*Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 33 Pac. 123. Judgments in election contests, see 8 STANDARD PROC. 111.

[e] **An order awarding custody of a child** (1) is self executing. *Willis v. Willis*, 165 Ind. 332, 75 N. E. 655, 2 L. R. A. (N. S.) 244, 6 Ann. Cas. 772. *Contra, Ex parte Dupes*, 31 Cal. App. 698, 161 Pac. 276; *State ex rel. Gray v. Hennings*, 194 Mo. App. 545, 185 S. W. 1153. (2) But if the child is delivered before appeal, a return of the child cannot be demanded after giving of stay bond. *De Lemos v. Siddall*, 143 Cal. 313, 76 Pac. 1115.

[f] **Order denying motion to set cause down for trial as an equitable action.** *First Nat. Bank v. Dutcher*, 128 Iowa 413, 425, 104 N. W. 497, 1 L. R. A. (N. S.) 142.

89. *Strangways v. Ringgold*, 106 Ark. 433, 153 S. W. 619; *Palmer v. Harris*, 23 Okla. 500, 101 Pac. 852, 138 Am. St. Rep. 822. See *infra*, V, A, 5, d. and e.

90. *Allen v. Church*, 101 Iowa 116, 125, 70 N. W. 127; *Stanley v. Davenport*, 54 Iowa 463, 2 N. W. 1064, 6 N. W. 706, 37 Am. Rep. 216.

91. See generally the statutes.

[a] **Judgments obtained on money demands** are within the statute. *Pelzer Mfg. Co. v. Cely*, 40 S. C. 430, 18 S. E. 790.

[b] **Judgment for Costs.**—*West Coast M. & I. Co. v. West Coast Imp. Co.*, 25 Wash. 627, 66 Pac. 97, 62 L. R. A. 763.

[c] **Judgments foreclosing mechanic's liens** are not within this statute.

*Naylor v. Lewiston & S. E. Elec. R. Co.*, 14 Idaho 722, 95 Pac. 827.

92. See generally the statutes.

93. *Bailey v. Superior Court*, 31 Cal. App. 78, 159 Pac. 990; *Lamport v. Smedley*, 157 App. Div. 442, 142 N. Y. Supp. 350.

[a] **An order or judgment on appeal for restitution of property** is not within the statute. *Lamport v. Smedley*, 157 App. Div. 442, 142 N. Y. Supp. 350.

94. See generally the statutes and *Hoppe v. Hoppe*, 99 Cal. 536, 34 Pac. 222; *Zapp v. Michaelis*, 56 Tex. 395, "where judgment is for recovery of land."

[a] **This section is double**, and provides for distinct undertakings on different judgments, one directing the sale of realty, the other a delivery of possession. *Englund v. Lewis*, 25 Cal. 337.

[b] **Only where the appellant is in possession** does (1) the statute apply. *Cal.*—*Zappettini v. Buckles*, 167 Cal. 27, 138 Pac. 696. *Neb.*—*Penn Mut. Life Ins. Co. v. Creighton Theatre Bldg. Co.*, 51 Neb. 659, 71 N. W. 279. *N. Y.*—*Midwood Park Co. v. Baker*, 142 App. Div. 495, 127 N. Y. Supp. 48; *New York Sec. & Tr. Co. v. Saratoga Gas etc. Co.*, 5 App. Div. 535, 39 N. Y. Supp. 486, 25 Civ. Proc. 385. (2) The possession of a landlord is not within the contemplation of the statute. *Midwood Park Co. v. Baker*, 142 App. Div. 495, 127 N. Y. Supp. 48. (3) An appeal by a purchaser from an order setting aside a judicial sale and directing a resale is not within the statute. *Penn Mut. Life Ins. Co. v. Creighton Theatre Bldg. Co.*, 51 Neb. 659, 71 N. W. 279.

[c] **An order directing a sale of realty in the possession of the receiver**

property.<sup>95</sup> Some statutes in addition thereto provide for a stay in "other cases;"<sup>96</sup> but others have no such provision.<sup>97</sup>

Some statutes except from the operation of a stay of proceedings on an order or judgment appealed from, orders directing the sale of perishable property,<sup>98</sup> orders granting or refusing to grant a change of venue,<sup>99</sup> and judgments adjudging a person guilty of usurping or intruding into a public office.<sup>1</sup>

Judgments in a case of public right will not be superseded in some states.<sup>2</sup>

c. *Mandamus*.—Proceedings on a judgment granting or refusing a writ of mandamus may be stayed,<sup>3</sup> unless in some states, a public right is involved.<sup>4</sup> But it was otherwise at common law as to the

is not within the statute. *Zappettini v. Buckles*, 167 Cal. 27, 138 Pac. 696.

[d] **Judgment for foreclosure of mechanic's lien** (1) is embraced. *Central Lumb. & M. Co. v. Center*, 107 Cal. 193, 40 Pac. 334; *Naylor v. Lewiston & S. E. Elec. R. Co.*, 14 Idaho 722, 95 Pac. 827. (2) But the provision as to the bond's covering a deficiency in case of a mortgage foreclosure does not apply. *Naylor v. Lewiston & S. E. Elec. R. Co.*, 14 Idaho 722, 95 Pac. 827. But see *Root, Neilson & Co. v. Bryant*, 54 Cal. 182.

[e] **Judgments for sale of mortgaged premises** are embraced within statute. *Boob v. Hall*, 105 Cal. 413, 38 Pac. 977; *Pierce v. Kneeland*, 7 Wis. 224.

[f] **An order appointing a receiver** is not an order directing the delivery of possession of realty. *State v. Fawcett*, 58 Neb. 371, 78 N. W. 636; *Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755, 67 N. W. 766.

[g] **An order directing a receiver to sell assets other than realty** is not supersedeable as of right. *State v. Scott*, 60 Neb. 98, 82 N. W. 320.

[h] **An order granting a writ of assistance in a foreclosure suit** is not an order within the text. *Eseritt v. Michaleson*, 73 Neb. 634, 103 N. W. 300, 106 N. W. 1016, 10 Ann. Cas. 1039.

95. *Spence v. Scott*, 95 Cal. 152, 30 Pac. 202; *German Sav. & L. Soc. v. Kern*, 42 Ore. 532, 70 Pac. 509.

96. *Northwestern Mut. L. Ins. Co. v. Park Hotel Co.*, 37 Wis. 125; *Hudson v. Smith*, 9 Wis. 122.

97. See *supra*, V, A, 2, b, (I) and (II).

98. *Zappettini v. Buckles*, 167 Cal. 27, 138 Pac. 696; *Rogers v. Superior Court*, 158 Cal. 467, 111 Pac. 357; *Tolle*

*v. Heydenfeldt*, 138 Cal. 56, 70 Pac. 1013.

[a] **But to prevent a sale of property** which is not as a matter of law perishable or which as a matter of fact it is extremely doubtful if it is perishable, the appellate court will issue a writ of supersedeas. *Rogers v. Superior Court*, 158 Cal. 467, 111 Pac. 357.

[b] **The statute refers to cases** where the order directing the sale of certain property has been made because and upon the ground the property is perishable. *Zappettini v. Buckles*, 167 Cal. 27, 30, 138 Pac. 696. 99. *Howell v. Thompson*, 70 Cal. 635, 11 Pac. 789. See *Pierson v. McCahill*, 23 Cal. 249, under early practice.

1. *Day v. Gunning*, 125 Cal. 527, 58 Pac. 172; *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58; *Covarrubias v. Suprs. of Santa Barbara Co.*, 52 Cal. 622, and see *infra*, V, A, 6, e.

2. *State ex rel. Board of Comrs. v. Superior Court*, 72 Wash. 478, 130 Pac. 753; *Cooper v. Hindley*, 70 Wash. 331, 126 Pac. 916.

3. *Cal.—Palache v. Hunt*, 64 Cal. 473, 2 Pac. 245. *Minn.—State ex rel. Matthews v. Webber*, 31 Minn. 211, 17 N. W. 339. *Neb.—Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755, 67 S. W. 766; *Cooperrider v. State*, 46 Neb. 84, 64 N. W. 372, in the discretion of the court. *Okla.—Ex parte Epley*, 10 Okla. 631, 641, 64 Pac. 18.

[a] **Issuance of peremptory mandamus** is improper after appeal with stay from judgment awarding writ. *State ex rel. Laclede Bank v. Lewis*, 76 Mo. 370.

4. *Cooper v. Hindley*, 70 Wash. 331, 126 Pac. 916.



prerogative writ of mandamus.<sup>5</sup>

d. *Injunction*.<sup>6</sup> — Special statutes relative to stays pending appeals in injunction suits exist in a number of states,<sup>7</sup> and the matter is to some extent regulated in the federal courts by the equity rules.<sup>8</sup> The general rule is that a final decree granting a mandatory injunction which compels affirmative action by the defendant is stayed by a supersedeas bond,<sup>9</sup> even though couched in terms of prohibition.<sup>10</sup> But a final judgment or order granting or modifying a preventive injunction is not suspended or superseded by an appeal with stay bond,<sup>11</sup> unless the court order a suspension of the operation of the

5. *Tyler v. Hamersley*, 44 Conn. 393, 26 Am. Rep. 471; *Pinckney v. Henegan*, 2 Strobb. (S. C.) 250, 49 Am. Dec. 592. See *State ex rel. Laclede Bank v. Lewis*, 76 Mo. 370; *Ex parte Epley*, 10 Okla. 631, 643, 64 Pac. 18.

6. *Suit on injunction bond pending appeal*, see 13 STANDARD PROC. 327.

7. See generally the statutes and **Ky.**—*Borrone v. Moseley Bros.*, 143 Ky. 812, 137 S. W. 531. **Wash.**—*State ex rel. Ferguson v. Grady*, 71 Wash. 1, 127 Pac. 305. **Wis.**—*St. Hyacinth Congregation v. Borucki*, 141 Wis. 205, 124 N. W. 284; *Tenney v. Madison*, 99 Wis. 539, 75 N. W. 979.

8. See Equity Rule No. 74.

9. **U. S.**—*Green Bay & M. Canal Co. v. Norrie*, 118 Fed. 923. **Cal.** *People ex rel. Bradford v. Laine*, 177 Cal. 742, 171 Pac. 941; *Wolf v. Gall*, 174 Cal. 140, 162 Pac. 115; *Doudell v. Shoo*, 159 Cal. 448, 114 Pac. 579; *Clute v. Superior Court*, 155 Cal. 15, 99 Pac. 362, 132 Am. St. Rep. 54. **Del.**—*Tebo v. Hazel* (Del. Ch.), 74 Atl. 841. **Mont.** *Maloney v. King*, 26 Mont. 492, 63 Pac. 1014. **Tex.**—*Haley v. Walker* (Tex. Civ. App.), 141 S. W. 166; *Ft. Worth Driving Club v. Ft. Worth Fair Assn.*, 56 Tex. Civ. App. 162, 121 S. W. 213. **Utah.**—*Elliot v. Whitmore*, 10 Utah 238, 243, 37 Pac. 459. **Wash.** *State ex rel. Gibson v. Superior Court*, 39 Wash. 115, 80 Pac. 1108, 109 Am. St. Rep. 862, 1 L. R. A. (N. S.) 554 note, 4 Ann. Cas. 229.

10. *Clute v. Superior Court*, 155 Cal. 15, 99 Pac. 362, 132 Am. St. Rep. 54; *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58; *Stewart v. Superior Court*, 100 Cal. 543, 35 Pac. 156, 563.

11. **U. S.**—*In re Haberman Mfg. Co.*, 147 U. S. 525, 13 Sup. Ct. 527, 37 L. ed. 266; *Leonard v. Ozark Land Co.*, 115 U. S. 465, 6 Sup. Ct. 127, 29 L. ed. 445. **Ark.**—*Union Sawmill Co. v. Fel-*

*senthal Land etc. Co.*, 84 Ark. 494, 106 S. W. 676. **Cal.**—*Wolf v. Gall*, 174 Cal. 140, 162 Pac. 115; *Clute v. Superior Court*, 155 Cal. 15, 99 Pac. 362; *Rogers v. Superior Court*, 126 Cal. 183, 58 Pac. 452; *Tyler v. Presley*, 72 Cal. 290, 13 Pac. 856. **Fla.**—*Johnson v. Turner*, 44 Fla. 244, 33 So. 238. But see *Powell v. Florida Land etc. Co.*, 41 Fla. 494, 26 So. 700, the injunction may not be dissolved but the court cannot punish violations. **Ga.**—*Stokes v. Stokes*, 126 Ga. 804, 55 S. E. 1023. **Ill.**—*Barnes & Co. v. Chicago Typo. Union No. 16*, 232 Ill. 402, 83 N. E. 932, 122 Am. St. Rep. 129, 14 L. R. A. (N. S.) 1150. **Ia.**—*Lindsay v. Clayton Dist. Ct.*, 75 Iowa 509, 39 N. W. 817. **Ky.**—*Borrone v. Moseley Bros.*, 143 Ky. 812, 137 S. W. 531; *Jones v. Walter*, 24 Ky. L. Rep. 878, 70 S. W. 191. **Mo.**—*State ex rel. Busch v. Dillon*, 96 Mo. 56, 8 S. W. 781; *State ex rel. Gray v. Hennings*, 194 Mo. App. 545, 185 S. W. 1153. **Neb.**—*Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755, 67 N. W. 766. **N. J.**—*National Docks & N. J. Junction C. R. Co. v. Pennsylvania R. Co.*, 54 N. J. Eq. 167, 33 Atl. 936. **N. Y.** *Sixth Ave R. Co. v. Gilbert Elev. R. Co.*, 71 N. Y. 430. **S. D.**—*State v. Carlson*, 37 S. D. 231, 157 N. W. 657. **Tex.**—*Rogers v. Ivy* (Tex. Civ. App.), 191 S. W. 728; *Ft. Worth Driving Club v. Ft. Worth Fair Assn.*, 56 Tex. Civ. App. 162, 121 S. W. 213. But see *Aetna Club v. Jackson* (Tex. Civ. App.), 187 S. W. 971, holding even prohibitory judgments are suspended by supersedeas bond, as the statute so provides as to "all judgments." **Utah.** *Elliot v. Whitmore*, 10 Neb. 238, 243, 37 Pac. 459. **Wash.**—*State ex rel. Gibson v. Superior Court*, 39 Wash. 115, 80 Pac. 1108, 109 Am. St. Rep. 862, 1 L. R. A. (N. S.) 554, 4 Ann. Cas. 229; *State v. Superior Court*, 35 Wash. 200,

injunction pending the appeal.<sup>12</sup> Where an injunction is dissolved, an appeal with supersedeas bond does not revive it according to some authorities,<sup>13</sup> but the injunction is continued in force according to others.<sup>14</sup> A temporary restraining order, however, is not continued

77 Pac. 33. **W. Va.**—Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1225.

*Contra*, *Blondheim v. Moore*, 11 Md. 365.

[a] **An injunction which merely has the effect of preserving the subject of litigation *in statu quo* is not suspended by an appeal.** *Clute v. Superior Court*, 155 Cal. 15, 99 Pac. 362, 132 Am. St. Rep. 54.

[b] **An injunction restraining the continuance of an act is as prohibitory as one restraining the commission of an act within the rule.** *State ex rel. Gibson v. Superior Court*, 39 Wash. 115, 80 Pac. 1108, 109 Am. St. Rep. 862, 1 L. R. A. (N. S.) 554, 4 Ann. Cas. 229. *Compare State v. Carlson*, 37 S. D. 231, 157 N. W. 657.

[c] **The injunction continues in force, despite the stay bond.** *Ill. Barnes & Co. v. Chicago Typo. Union* No. 16, 232 Ill. 402, 83 N. E. 932, 122 Am. St. Rep. 129, 14 L. R. A. (N. S.) 1150. *Ind.*—*Miller v. Burket*, 132 Ind. 469, 32 N. E. 309. *Ia.*—*Lindsay v. Clayton Dist. Ct.*, 75 Iowa 509, 39 N. W. 817. *Mich.*—*Wilkinson v. Dunkley-Williams Co.*, 141 Mich. 409, 104 N. W. 772. *Va.*—*Bristow v. Home Bldg. Co.*, 91 Va. 18, 20 S. E. 946, 947.

[d] **The supersedeas does not permit the violation of the injunction pending the appeal, or protect the defendant in such violation.** *U. S. Green Bay & M. Canal Co. v. Norrie*, 118 Fed. 923. *Ind.*—*Hawkins v. State*, 126 Ind. 294, 26 N. E. 43. *Ia.*—*Lindsay v. Clayton Dist. Ct.*, 75 Iowa 509, 39 N. W. 817. *N. Y.*—*Genet v. President etc. of Canal Co.*, 113 N. Y. 472, 21 N. E. 390.

12. See 13 STANDARD PROC. 204.

[a] **Appellate courts may grant a special supersedeas to relieve the parties from the operation of an injunction.** *Miller v. Burket*, 132 Ind. 469, 32 N. E. 309.

13. *U. S.*—*Leonard v. Ozark Land Co.*, 115 U. S. 465, 6 Sup. Ct. 127, 29 L. ed. 445; *Hovey v. McDonald*, 109 U. S. 150, 159, 3 Sup. Ct. 136, 27 L.

ed. 888; *Staffords v. King*, 90 Fed. 136, 32 C. C. A. 536. *Alaska.*—*Elliott v. Kuzek*, 2 Alaska 587. *Ark.*—*Mewes v. Home Bank*, 133 Ark. 144, 201 S. W. 1106. *Fla.*—*Johnson v. Turner*, 44 Fla. 244, 33 So. 238. *Compare McMichael v. Eckman*, 26 Fla. 43, 7 So. 365. *Ky.* *United States Fid. & Guar. Co. v. Jones*, 133 Ky. 621, 111 S. W. 298, court may continue injunction however. But see *Elizabethtown, L. & B. S. R. Co. v. Ashland & C. Ry. Co.*, 94 Ky. 478, 22 S. W. 855, under earlier statute. *La.*—*State ex rel. Newman v. Burke*, 35 La. Ann. 185. *Mo.*—*Albers Com. Co. v. Spencer*, 236 Mo. 608, 139 S. W. 321, Ann. Cas. 1912D, 705. *N. Y.* *Hoyt v. Gelston*, 13 Johns. 139; *Wood v. Dwight*, 7 Johns. Ch. 295.

[a] **Chancellor may continue injunction pending appeal.** *Albers Com. Co. v. Spencer*, 236 Mo. 608, 139 S. W. 321, Ann. Cas. 1912D, 705. See 13 STANDARD PROC. 266.

14. *Ill.*—*Bressler v. McCune*, 56 Ill. 475. *La.*—*State v. De Baillon*, 113 La. 572, 37 So. 481; *State ex rel. Sentell v. Judge*, 38 La. Ann. 31. *Minn.*—*State ex rel. Leary v. District Court*, 78 Minn. 464, 81 N. W. 323; *State v. Duluth St. Ry. Co.*, 47 Minn. 369, 50 N. W. 332, as to appeal from order dissolving temporary injunction. *Miss.*—*Kimball, Raymond & Co. v. Aleorn*, 45 Miss. 145. *Neb.*—*State v. Baker*, 62 Neb. 840, 88 N. W. 124. *S. D.*—*Quarnberg v. Chamberlain*, 29 S. D. 377, 137 N. W. 405. *Tex.*—*Gulf, C. & S. F. Ry. Co. v. Fort Worth & N. O. Ry. Co.*, 68 Tex. 98, 2 S. W. 199, 3 S. W. 564; *Williams v. Pouns*, 48 Tex. 141; *Lee v. Broocks*, 51 Tex. Civ. App. 344, 111 S. W. 778. But *compare Rogers v. Ivy* (Tex. Civ. App.), 191 S. W. 728. *W. Va.*—*State ex rel. Woodcock v. Barrick*, 80 W. Va. 63, 92 S. E. 234.

[a] **Limitation on Rule.**—If the temporary injunction is continued to final hearing and then dissolved and the bill dismissed, a perfected appeal leaves it in force. But it is otherwise if the injunction is dissolved by an interlocutory order before final hearing. *Bressler v. McCune*, 56 Ill. 475.

by an appeal with stay bond from an order denying a permanent injunction.<sup>15</sup>

e. *A judgment of ouster from office* is a self-executing judgment and is not affected by a stay bond,<sup>16</sup> except under some statutes;<sup>17</sup> but a stay may be granted in the discretion of the court.<sup>18</sup>

f. *Account*.—Whether the taking of an account in equity is stayed by an appeal, in the absence of statute, depends upon whether the early or late English equity practice is followed.<sup>19</sup> But under statute the taking of the account is stayed by a perfected appeal.<sup>20</sup>

g. *Reference*.—Pending a perfected appeal from an order of reference the master cannot proceed under the order.<sup>21</sup>

**7. Commencement and Duration of Stay.**—A writ of error in some states operates as a stay only from the time of service upon the party or officer.<sup>22</sup> Where the execution of a bond operates as a supersedeas, the stay takes effect from the time of the acts requisite to call it into existence, or from the date of the filing of the bond.<sup>23</sup> In some states

15. *Hicks v. Michael*, 15 Cal. 107; *Sullivan v. Weibeler*, 37 Minn. 10, 32 N. W. 787.

16. **U. S.**—*Olmstead v. Distilling & Cattle-Feeding Co.*, 73 Fed. 44. But see *United States ex rel. Crawford v. Addison*, 22 How. (U. S.) 174, 16 L. ed. 304. **Cal.**—See *Day v. Gunning*, 125 Cal. 527, 58 Pac. 172. **Ia.**—*Jayne v. Drorbaugh*, 63 Iowa 711, 17 N. W. 433. **Mich.**—*People v. Stephenson*, 98 Mich. 218, 57 N. W. 115. **Neb.**—*State v. Kearney*, 28 Neb. 103, 44 N. W. 90.

17. *Grelle v. Pinney*, 62 Conn. 478, 26 Atl. 1106; *Sweeney v. Karsky*, 25 Nev. 197, 58 Pac. 813, on executing an undertaking in an amount to be fixed by the judge.

18. **Ark.**—*Williams v. Buchanan*, 84 Ark. 404, 106 S. W. 202. **Neb.**—*Gandy v. State*, 10 Neb. 243, 4 N. W. 1019. **Okla.**—*Palmer v. Harris*, 23 Okla. 500, 101 Pac. 852, 138 Am. St. Rep. 822.

[a] **But Not as a Matter of Right.** *Gandy v. State*, 10 Neb. 243, 4 N. W. 1019.

19. See *supra*, V, A, 1.

[a] **An appeal stays** the taking of the account. *Green v. Winter*, 1 Johns. Ch. (N. Y.) 77.

[b] **The taking of an account will not be suspended** by the court pending an appeal. *Morton v. Beach*, 56 N. J. Eq. 791, 41 Atl. 214; *Ratzer v. Ratzer*, 29 N. J. Eq. 162; *Nerot v. Burnard*, 2 Russ. 56, 38 Eng. Reprint 257.

20. *Petrie v. Dickerman*, 98 Mich. 130, 56 N. W. 1108.

21. *Heyman v. Heyman*, 117 Ill. App. 542, 547.

22. *Tyler v. Hamersley*, 44 Conn. 393, 400, 26 Am. Rep. 471.

[a] **At common law**, (1) a writ of error sued out before judgment takes effect from the time of signing the judgment if bail be put in within four days. If sued out afterwards, it operates as a supersedeas from the time of the allowance, that is, the delivery of the writ to the clerk of errors (*Hopkinson v. Sars*, 14 Vt. 494, 39 Am. Dec. 236; *Perkins v. Woolaston*, 1 Salk. 321, 91 Eng. Reprint 284) or (2) sooner if the defendant in error had notice of it. *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. 911, 27 L. ed. 609, (3) provided bail, when requisite be put in and perfected within four days. See *Jaques v. Cesar*, 2 Wm. Saund. 97, 101, 85 Eng. Reprint 773, 782.

23. **U. S.**—*Foster v. Kansas*, 112 U. S. 201, 5 Sup. Ct. 8, 97, 28 L. ed. 629, 696; *Hovey v. McDonald*, 109 U. S. 150, 159, 3 Sup. Ct. 136, 27 L. ed. 888; *Kitchen v. Randolph*, 93 U. S. 86, 23 L. ed. 810; *Boise v. Gorman*, 19 Wall. 661, 22 L. ed. 226. **Mich.**—*Ismond v. Scougale*, 119 Mich. 501, 78 N. W. 546, party is not entitled to stay until filing of bond and service of writ of error on clerk. **Minn.**—*Woolfolk v. Bruns*, 45 Minn. 96, 47 N. W. 460. **Mo.**—*Pickel v. Pickel*, 251 Mo. 197, 158 S. W. 8. **Neb.**—*Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755, 67 N. W. 766. **W. Va.**—*Sult v. A. Hockstetter Oil Co.*, 63 W. Va. 317, 339, 61 S. E. 307.



the proceedings are not stayed until the issuance of a writ of supersedeas,<sup>24</sup> or, if a review on error is sought, until the filing of a petition in error in the appellate court.<sup>25</sup> The stay operates until the final determination or remanding of the appeal,<sup>26</sup> or the dismissal of the writ of error,<sup>27</sup> unless the statute provides otherwise.<sup>28</sup>

**8. Vacation and Modification of Supersedeas.**—An order granting a stay of execution is subject to the control of the court in which the proceeding is pending,<sup>29</sup> and may be vacated<sup>30</sup> or modified.<sup>31</sup> After the case has been transferred to the appellate court, it has exclusive jurisdiction of proceedings to vacate the supersedeas.<sup>32</sup> The supersedeas may be vacated on motion,<sup>33</sup> in term as well as in vacation,<sup>34</sup> and even at a subsequent term.<sup>35</sup>

**Grounds.**—If after acceptance of the surety, the circumstances of the case, of the parties or of the sureties is changed so that the security becomes insufficient, on application, the appellate court may so order as

[a] **Does Not Relate Back to Date of Order.**—*Woolfolk v. Bruns*, 45 Minn. 96, 47 N. W. 460.

24. Trustees of Eddyville G. C. School Dist. v. Boards of Education, 138 Ky. 180, 127 S. W. 767; *Louisville & N. R. Co. v. Lucas' Admr.*, 120 Ky. 359, 86 S. W. 682. And see *supra*, V, A, 2, a.

25. *Stillings v. Porter*, 22 Kan. 17; *Von Dorn v. Mengedoht*, 41 Neb. 525, 537, 59 N. W. 800.

26. **U. S.**—*French v. Shoemaker*, 12 Wall. 86, 100, 20 L. ed. 270. **Ala.**—*Garratt v. Mayfield Woolen Mills*, 153 Ala. 602, 44 So. 1026. **Cal.**—*Granger v. Sheriff*, 140 Cal. 190, 73 Pac. 816, notwithstanding clerk's failure to make required entry on docket. **Ind.**—*Northern Ind. R. Co. v. Michigan Cent. R. Co.*, 3 Ind. 8. **Ore.**—*German Sav. & L. Soc. v. Kern*, 42 Ore. 532, 70 Pac. 509.

[a] **Until the cause is remanded back for further action of the trial court.** *Cralle v. Cralle*, 81 Va. 773.

[b] **When the mandate is filed, the stay terminates.** *Shelby Steel Tube Co. v. Delaware Seamless Tube Co.*, 161 Fed. 798; *Pickel v. Pickel*, 251 Mo. 197, 208, 158 S. W. 8.

**When jurisdiction is revested in trial court on remand, see 19 STANDARD PROC. 311.**

**Stay after remand, see *infra*, VI.**

27. *Galvin v. Palmer*, 134 Cal. 426, 66 Pac. 572.

28. See *Burns Ann. Ind. St.*, 1914, §686, unless the court order otherwise in certain cases.

[a] **Appeal from interlocutory order lasts thirty days unless otherwise ord-**

**ered.** *Northern Ind. R. Co. v. Michigan Cent. R. Co.*, 3 Ind. 8, thirty days.

29. *American Brew. Co. v. Talbot*, 135 Mo. 170, 36 S. W. 657, so that it shall not become an instrument of injustice.

30. See *infra*, this section.

31. *East Tennessee, V. & G. R. R. Co. v. Southern Tel. Co.*, 112 U. S. 306, 5 Sup. Ct. 168, 28 L. ed. 746.

32. **U. S.**—*Keyser v. Farr*, 105 U. S. 265, 26 L. ed. 1025; *Kendrick v. Roberts*, 214 Fed. 268. **Minn.**—*Boek v. Sauk Center Groc. Co.*, 100 Minn. 71, 110 N. W. 257, 9 L. R. A. (N. S.) 1054; *Briggs v. Shea*, 48 Minn. 218, 50 N. W. 1037. **Mo.**—*American Brew. Co. v. Talbot*, 125 Mo. 388, 28 S. W. 585.

[a] **But see *State ex rel. Chicago, St. P. M. & O. R. Co. v. District Court***, 136 Minn. 455, 161 N. W. 164, holding a district court ordering a stay can vacate it at any time after the appeal and while it is pending in the supreme court.

[b] **But where no appeal is taken, the supreme court has no jurisdiction to vacate an erroneous order granting a supersedeas.** *Ex parte Ralston*, 119 U. S. 613, 7 Sup. Ct. 317, 30 L. ed. 506.

33. *Farrelly v. Cross*, 10 Ark. 197.

[a] **Where writ of error is not filed in time, a motion to vacate the supersedeas is unnecessary.** *Western Air Line Const. Co. v. McGillis*, 127 U. S. 776, 8 Sup. Ct. 1390, 32 L. ed. 324.

34. *Radeliff v. Marine Ins. Co.*, 3 Caines (N. Y.) 106, *Colem. & C. Cas.* 461.

35. *Farrelly v. Cross*, 10 Ark. 197.

justice requires.<sup>36</sup> A supersedeas will be vacated when improvidently granted,<sup>37</sup> or where the bond,<sup>38</sup> or the sureties are insufficient,<sup>39</sup> or the approval of the bond was obtained by fraud and perjury,<sup>40</sup> or the writ is defective,<sup>41</sup> and where there are defects in the appeal.<sup>42</sup> But the mere absence of a justification of the sureties,<sup>43</sup> or the frivolousness of the appeal<sup>44</sup> does not justify a vacation.

**Determination.** — When the bond or security is insufficient, the court may order a vacation unless a proper bond is filed,<sup>45</sup> or it may order a vacation without prejudice to apply for a supersedeas.<sup>46</sup>

**9. Effect of the Stay or Supersedeas.**<sup>47</sup> — *Generally.* — The relief afforded by a supersedeas pending appeal is of a negative rather than of an affirmative character.<sup>48</sup> Its effect is to leave the parties to the judgment in the same position as they were prior to the supersedeas, or at the time of perfecting the appeal,<sup>49</sup> and to prevent the

36. *Williams v. Clafin*, 103 U. S. 753, 26 L. ed. 606 (modifying the supersedeas); *Jerome v. McCarter*, 21 Wall. 17, 22 L. ed. 515.

37. **U. S.**—Title Guar. & Sur. Co. v. United States, 222 U. S. 401, 32 Sup. Ct. 168, 56 L. ed. 248, where bond is approved when writ of error was allowed after sixty days. **Fla.**—*Warner v. Watson*, 27 Fla. 518, 8 So. 842. **Ill.**—*Thompson v. Rock Island Co.*, 4 Ill. 66. **Ky.**—*Greene v. Buckler*, 19 Ky. L. Rep. 286, 40 S. W. 382, when there is no appeal. **N. D.**—*Burger v. Sinclair*, 24 N. D. 326, 140 N. W. 235. **W. Va.**—*State v. Harper's Ferry Bridge Co.*, 16 W. Va. 864. **Wyo.**—*Laughlin v. King*, 22 Wyo. 8, 18, 133 Pac. 1073.

38. *Tampa St. Ry. & P. Co. v. Tampa Sub. R. Co.*, 30 Fla. 400, 418, 11 So. 908; *Jackson v. Relf*, 24 Fla. 198, 4 So. 534; *Ex parte Epley*, 10 Okla. 631, 641, 64 Pac. 18.

[a] **Where Amount Is Sufficient.** *Edgerton v. West*, 38 Fla. 338, 21 So. 278.

39. *Hays v. Todd*, 26 Fla. 214, 7 So. 851.

[a] **Where sureties become insufficient after approval of the bond.** *Florida Orange Hedge Fence Co. v. Branham*, 32 Fla. 289, 13 So. 281; *American Brew. Co. v. Talbot*, 135 Mo. 170, 36 S. W. 657.

40. *Florida Cent. R. Co. v. Schulte*, 100 U. S. 644, 25 L. ed. 605.

41. *Ex parte Woods*, 3 Ark. 532, 540, where the writ varies from the order.

42. *Ex parte Epley*, 10 Okla. 631, 645, 64 Pac. 18.

43. *Edgerton v. West*, 38 Fla. 338, 21 So. 278.

44. *Johnson v. Turner*, 44 Fla. 244, 33 So. 238, statutory supersedeas by perfecting appeal within thirty days.

45. *American Brew. Co. v. Talbot*, 125 Mo. 388, 28 S. W. 585. See *McClintock v. Laing*, 19 Mich. 300.

46. *Warner v. Watson*, 27 Fla. 518, 8 So. 842; *Jackson v. Relf*, 24 Fla. 198, 4 So. 534.

[a] **A request, on hearing of the motion to vacate, for time to file an additional bond is not proper practice.** *Hays v. Todd*, 26 Fla. 214, 7 So. 851.

47. **Effect on Injunction**, see *supra*, V, A, 6, d.

**Effect on lien of attachment**, see 3 STANDARD PROC. 844. In justices court, see 18 STANDARD PROC. 267.

**Effect upon the time during which an execution must issue**, see 15 STANDARD PROC. 756.

**Effect as a discharge of a debtor held by execution against the person**, see 16 STANDARD PROC. 320.

**Amendment of judgment pending appeal**, see 15 STANDARD PROC. 110.

**Vacation of judgment pending appeal**, see 15 STANDARD PROC. 194.

48. *Willis v. Willis*, 165 Ind. 332, 75 N. E. 655, 2 L. R. A. (N. S.) 244, 6 Ann. Cas. 772; *Lindsay v. Clayton Dist. Ct.*, 75 Iowa 509, 39 N. W. 817.

49. **Ark.**—*Love v. Cahn*, 93 Ark. 215, 124 S. W. 259. **Cal.**—*Vosburg v. Vosburg*, 137 Cal. 493, 70 Pac. 473; *State Inv. & Ins. Co. v. Superior Court*, 101 Cal. 135, 35 Pac. 549; *Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 33 Pac. 123. **Ind.**—*Willis v. Willis*,

appellant from being prejudiced by its enforcement.<sup>50</sup> A party is not thereby authorized to do what the decree prohibits however.<sup>51</sup>

All further proceedings in the court below upon the judgment appealed from or the matter embraced therein are stayed,<sup>52</sup> and all proceedings for the enforcement of the judgment or order appealed from are suspended,<sup>53</sup> although some statutes merely provide that the supersedeas shall operate to stay execution.<sup>54</sup>

Pending the supersedeas the court has no power to enforce the judgment or order appealed, either by execution,<sup>55</sup> by proceedings for con-

165 Ind. 332, 75 N. E. 655, 2 L. R. A. (N. S.) 244, 6 Ann. Cas. 772. **Ia.**—Lindsay v. Clayton Dist. Ct., 75 Iowa 509, 39 N. W. 817. **Ky.**—May v. Com., 160 Ky. 785, 170 S. W. 493. **Minn.**—Woolfolk v. Bruns, 45 Minn. 96, 47 N. W. 460. **N. Y.**—Graves v. Maguire, 6 Paige 379. **Va.**—Bristow v. Home Bldg. Co., 91 Va. 18, 20 S. E. 946, 947.

[a] But not in the same situation they were before the entry of the order or decree appealed from. Graves v. Maguire, 6 Paige (N. Y.) 379.

50. Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 33 Pac. 123.

51. Willis v. Willis, 165 Ind. 332, 75 N. E. 655, 2 L. R. A. (N. S.) 244, 6 Ann. Cas. 772; Central U. Tel. Co. v. State, 110 Ind. 203, 10 N. E. 922, 12 N. E. 136; Matter of Meyer, 209 N. Y. 59, 102 N. E. 606. See *supra*, III, A, 5, d.

52. Farmers' Nat. Bank v. Backus, 63 Minn. 115, 65 N. W. 255; Starbuck v. Dunklee, 12 Minn. 161, this is the language of the statute.

[a] But only in so far as it affects the appellant, requires him to do something to be done to him. Halsted v. First Sav. Bank, 173 Cal. 605, 160 Pac. 1075.

[b] It operates only on the process of the court. Cohn v. Lehman, 93 Mo. 574, 6 S. W. 267. See Lindsay v. Clayton Dist. Ct., 75 Iowa 509, 39 N. W. 817.

[c] It is proceedings in the court below on the judgment that are stayed. Rose v. Mesmer, 131 Cal. 631, 63 Pac. 1010.

[d] Collection of alimony by execution is a "proceeding on the judgment" within the rule. Anderson v. Anderson, 123 Cal. 445, 56 Pac. 61.

[e] Extrajudicial enforcement is not suspended. Rose v. Mesmer, 131 Cal. 631, 63 Pac. 1010.

[f] Summary proceedings to enforce a stay bond given on appeal

from a judgment cannot be taken pending a stay on appeal from an order on motion for new trial, even though the first appeal is dismissed. Starr v. Kreuzberger, 131 Cal. 41, 63 Pac. 134.

[g] Pending appeal from an order striking out portions of an answer, with stay bond, the cause cannot be noticed for trial. Starbuck v. Dunklee, 12 Minn. 161.

53. **Ark.**—Love v. Cahn, 93 Ark. 215, 124 S. W. 259; Miller v. Nuckolls, 76 Ark. 485, 89 S. W. 88, 113 Am. St. Rep. 101. **Cal.**—McAneny v. Superior Court, 150 Cal. 6, 87 Pac. 1020; Stalter v. Superior Court, 107 Cal. 536, 40 Pac. 949. **Fla.**—Henry v. Whitehurst, 66 Fla. 567, 64 So. 233. **Ill.**—Anderson v. Anderson, 124 Ill. App. 613. **Ind.**—Central U. Tel. Co. v. State, 110 Ind. 203, 10 N. E. 922, 12 N. E. 136; Walls v. Palmer, 64 Ind. 493. **Ky.**—Louisville & N. R. Co. v. Lucas' Admr., 120 Ky. 359, 86 S. W. 682; Gardner v. Continental Ins. Co., 31 Ky. L. Rep. 69, 101 S. W. 911; Yarborough v. Fitzpatrick, 21 Ky. L. Rep. 208, 51 S. W. 172. **Va.**—Bristow v. Home Bldg. Co., 91 Va. 18, 20 S. E. 946, 947. **Wis.**—Sexton v. Pickett, 24 Wis. 346.

54. Grelle v. Pinney, 62 Conn. 478, 26 Atl. 1106; Central Branch Union Pac. R. Co. v. Andrews, 34 Kan. 563, 9 Pac. 213.

[a] The words "stay of execution" in the statute is not confined to stay of execution in a technical sense, but includes the stay of all appropriate process or proceedings to enforce or compel the performance of judgments. State *ex rel.* Heckel v. Klein, 137 Mo. 673, 679, 39 S. W. 272; State *ex rel.* Gray v. Hennings, 194 Mo. App. 545, 185 S. W. 1153. But see Central Branch Union Pac. R. Co. v. Andrews, 34 Kan. 563, 9 Pac. 213.

55. **U. S.**—Draper v. Davis, 102 U. S. 370, 26 L. ed. 121; Board of Comrs.



tempt,<sup>56</sup> or by the appointment of a receiver.<sup>57</sup> And where a decree requires security within a limited time as a condition to its enforcement, a stay suspends the running of the time.<sup>58</sup> On appeal from an order denying a new trial, the right to enter judgment is suspended.<sup>59</sup>

But the effect of a supersedeas or stay is not to divest the court of its jurisdiction but merely to suspend the exercise of it;<sup>60</sup> hence acts in violation of the stay are not void, but voidable only.<sup>61</sup>

It is only in the case in which the appeal is taken that the stay operates.<sup>62</sup>

*v. Gorman*, 19 Wall. 661, 22 L. ed. 226. **Cal.**—*McAneny v. Superior Court*, 150 Cal. 6, 87 Pac. 1020. **Ind.**—*Salem-Bedford Stone Co. v. Hobbs*, 28 Ind. App. 520, 63 N. E. 314. **Ky.**—*Louisville & N. R. Co. v. Lucas' Admr.*, 120 Ky. 359, 86 S. W. 682. **N. J.**—*National Docks & N. J. J. C. R. Co. v. Pennsylvania R. Co.*, 54 N. J. Eq. 167, 33 Atl. 936.

See 15 STANDARD PROC. 743.

**Appeal as stay of execution for costs**, see 5 STANDARD PROC. 977.

**Where execution already issued**, see *infra*, V, A, 11, e.

[a] **A writ of mandamus to enforce a judgment is simply a writ of execution and is within the statute.** *Grelle v. Pinney*, 62 Conn. 478, 26 Atl. 1106.

[b] **Amendment of execution cannot be permitted.** *Merrifield v. Western Cottage Piano etc. Co.*, 238 Ill. 526, 87 N. E. 379, 128 Am. St. Rep. 148.

56. **U. S.**—*Smith v. Government of Canal Zone*, 249 Fed. 273, 161 C. C. A. 281. **Cal.**—*Clute v. Superior Court*, 155 Cal. 15, 99 Pac. 362, 132 Am. St. Rep. 54; *McAneny v. Superior Court*, 150 Cal. 6, 87 Pac. 1020; *Foster v. Superior Court*, 115 Cal. 279, 284, 47 Pac. 58. **Ill.**—*Anderson v. Anderson*, 124 Ill. App. 613.

[a] **But contempt proceedings for violation of an injunction are not stayed, by a supersedeas.** **U. S.**—*Green Bay & M. Canal Co. v. Norrie*, 118 Fed. 923. **Cal.**—*Wolf v. Gall*, 174 Cal. 140, 162 Pac. 115; *Rogers v. Superior Court*, 126 Cal. 183, 58 Pac. 452; *Heinlen v. Cross*, 63 Cal. 44. **Ore.**—*Treadgold v. Willard*, 81 Ore. 658, 160 Pac. 803. *Contra*, *Powell v. Florida Land & Imp. Co.*, 41 Fla. 494, 26 So. 700. The appellate court, however, may stay such proceedings. *Lindsay v. Clayton Dist. Ct.*, 75 Iowa 509, 39 N. W. 817. See *supra*, III, A, 6, c. (III).

57. *McAneny v. Superior Court*, 150 Cal. 6, 87 Pac. 1020; *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627. 58. *Ruzicka v. Hotovy*, 72 Neb. 589, 101 N. W. 328, so the party has a like time for compliance after the decree again becomes enforceable.

59. *St. Paul & D. R. Co. v. Hinckley*, 53 Minn. 102, 54 N. W. 940.

60. *Ex parte Caldwell*, 5 Ark. 390; *Briggs v. Shea*, 48 Minn. 218, 50 N. W. 1037. *Contra*, *State ex rel. Parish Board School Directors v. Monroe*, 133 La. 1045, 63 So. 513.

61. *St. Paul & D. R. Co. v. Hinckley*, 53 Minn. 102, 54 N. W. 940; *Briggs v. Shea*, 48 Minn. 218, 50 N. W. 1037.

[a] **It affects the regularity of the proceedings rather than the jurisdiction of the court.** *St. Paul & D. R. Co. v. Hinckley*, 53 Minn. 102, 54 N. W. 940.

**Will be set aside**, see *infra*, V, A, 10, e.

62. **U. S.**—*Spraul v. Louisiana*, 123 U. S. 516, 518, 8 Sup. Ct. 253, 31 L. ed. 233. **Ala.**—*Espy v. Balkum*, 45 Ala. 256. **Cal.**—See *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58. **Mo.** *State ex rel. Brainerd v. Thayer*, 80 Mo. 436, 439. **Neb.**—*State v. Ramsey*, 50 Neb. 166, 69 N. W. 758. **N. Y.** See *Welch v. Cook*, 7 How. Pr. 282.

See *infra*, V, A, 9, b.

[a] **Judgments in other actions which are regarded as auxiliary or dependent actions are not stayed.** *Knox v. Harshman*, 132 U. S. 14, 10 Sup. Ct. 8, 33 L. ed. 249.

[b] **Thus a supersedeas of a decree dismissing a bill to impeach a judgment or order which are stayed, not judgment.** *Knox v. Harshman*, 132 U. S. 14, 10 Sup. Ct. 8, 33 L. ed. 249.

[c] **Appeal in a mandamus proceeding against the judge in an action, does not stay proceedings in the ac-**

b. *Effect on Proceedings Not Embraced in Order or Judgment.* The court below may proceed upon any other matter embraced in the action and not affected by the order appealed from.<sup>63</sup> It may perform acts necessary to the appeal and incidental to its duty to certify the record,<sup>64</sup> and may make such orders as are needful for the preservation of the res and rights of the parties pending the appeal.<sup>65</sup> But a stay bond given on appeal from an order denying a new trial stays proceedings on the judgment, although no appeal is taken from the judgment itself.<sup>66</sup>

tion between the parties. *State ex rel. Brainerd v. Thayer*, 80 Mo. 436.

63. **Ia.**—*Allen v. Church*, 101 Iowa 116, 124, 70 N. W. 127. **N. J.**—*National Union Bank v. Dodge*, 42 N. J. L. 316. **N. C.**—*Hinson v. Adrian*, 91 N. C. 372.

See *McArdle v. McArdle*, 12 Minn. 122, holding it doubtful whether this statute applies to legal as distinguished from equitable proceedings.

[a] It is proceedings on the judgment or order which are staged, not proceedings after the judgment or order. *Allen v. Church*, 101 Iowa 116, 124, 70 N. W. 127.

[b] An appeal with stay bond from a part of a judgment does not stay execution as to the remainder. *Allen v. Church*, 101 Iowa 116, 124, 70 N. W. 127. See *Gaines v. Merryman*, 95 Va. 660, 29 S. E. 738.

[c] An appeal from an intermediate order before judgment does not (1) stay proceedings in the action unless the court so orders. *Noonan v. Orton*, 30 Wis. 356. (2) But an appeal from an order sustaining a demurrer stays proceedings in the cause. *Liles v. Harris-Grimes Co. (S. C.)*, 76 S. E. 115.

[d] An appeal from an order striking out parts of a pleading, with stay bond, does not stay proceedings as to the subject-matter remaining. *Allen v. Church*, 101 Iowa 116, 124, 70 N. W. 127.

[e] Despite appeal from an order refusing to open a default, with stay bond, the court may enter judgment on the default. *Exley v. Berryhill*, 37 Minn. 182, 33 N. W. 567.

[f] Proceedings on motion for new trial are not stayed by appeal from a judgment. *Knowles v. Thompson*, 133 Cal. 245, 65 Pac. 468.

[g] A stay bond on an appeal from an order after judgment does not stay

proceedings on the judgment. *Carit v. Williams*, 67 Cal. 580, 8 Pac. 93.

[h] A stay bond on appeal from an order refusing to vacate a former order does not stay proceedings on the former order. *Credits Com. Co. v. Superior Court*, 140 Cal. 82, 73 Pac. 1009, order refusing to vacate an order settling receiver's account.

[i] Where judgment is for several kinds of relief, the judgment is stayed only as to those branches as to which the proper undertaking is given. *Englund v. Lewis*, 25 Cal. 337.

[j] On Removal of Cause.—A writ of error to the United States supreme court to review an order remanding a cause removed from the state court to the circuit court, does not stay proceedings in the state court, although a proper bond is filed. *National Union Bank v. Dodge*, 42 N. J. L. 316.

[k] Commission to take testimony of witnesses may be issued. *San Francisco G. & E. Co. v. Superior Court*, 155 Cal. 30, 99 Pac. 359.

[l] Notice of judgment may be given. *Sexton v. Pickett*, 24 Wis. 346. Amending judgment pending appeal, see 15 STANDARD PROC. 110.

64. *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. 911, 27 L. ed. 609.

[a] May Settle and Certify Statement of Facts.—*William Mercantile Co. v. Fussy*, 13 Mont. 401, 34 Pac. 189.

65. *Hinson v. Adrian*, 91 N. C. 372; *Cralle v. Cralle*, 81 Va. 773.

66. *People v. Bank of San Luis Obispo*, 159 Cal. 65, 83, 112 Pac. 866, Ann. Cas. 1912B, 1148, 37 L. R. A. (N. S.) 934; *Credits Com. Co. v. Superior Court*, 140 Cal. 82, 73 Pac. 1009; *Baldwin v. Superior Court*, 125 Cal. 584, 58 Pac. 185; *Owen v. Pomona Land & Water Co.*, 124 Cal. 331, 57 Pac. 71.

[a] The reason is that the relief is

c. *Retroactive Operation*.—The supersedeas has no retroactive operation.<sup>67</sup> It merely operates to prevent any future change in the condition of the parties,<sup>68</sup> and it does not undo what has already been done.<sup>69</sup>

d. *Effect on Judgment and Lien*.—The judgment or order appealed from is not reversed, vacated or annulled by the supersedeas,<sup>70</sup> nor is its character destroyed or impaired.<sup>71</sup>

*Judgment Lien*.—The judgment is still a lien on real estate,<sup>72</sup> despite

the same in form and substance in both appeals. *Fulton v. Hanna*, 40 Cal. 278.

67. *Colo.*—*Houston v. Walton*, 23 *Colo. App.* 282, 129 *Pac.* 263. *Ky.* *Barker v. Illinois Sur. Co.*, 169 *Ky.* 441, 184 *S. W.* 377; *Gardner v. Continental Ins. Co.*, 31 *Ky. L. Rep.* 69, 101 *S. W.* 911; *Runyon v. Bennett*, 4 *Dana* 598, 29 *Am. Dec.* 431. *Minn.*—*Althen v. Tarbox*, 48 *Minn.* 18, 50 *N. W.* 1018, 31 *Am. St. Rep.* 616. *Miss.*—*Grayson v. Harris*, 102 *Miss.* 57, 58 *So.* 775, 59 *So.* 1, *Ann. Cas.* 1914C, 1219. *Nev.* *Green v. Hooper*, 41 *Nev.* 12, 167 *Pac.* 23.

[a] *Satisfaction of judgment* before it is superseded is valid. *Hey v. Harding*, 25 *Ky. L. Rep.* 1454, 78 *S. W.* 136.

But as to release of levy, see *infra*, V, A, 9, e.

[b] *A purchaser in possession under execution sale*, is not ousted by subsequent filing of a stay bond. *German Sav. & L. Soc. v. Kern*, 42 *Ore.* 532, 70 *Pac.* 509.

68. *Merced Min. Co. v. Fremont*, 7 *Cal.* 130; *State ex rel. Gibson v. Superior Court*, 39 *Wash.* 115, 80 *Pac.* 1108, 109 *Am. St. Rep.* 862, 1 *L. R. A.* (N. S.) 554, 4 *Ann. Cas.* 229. But compare dictum in *Dulin v. Pacific Wood & Coal Co.*, 98 *Cal.* 304, 33 *Pac.* 123.

69. *United States Fid. & Guar. Co. v. Jones*, 133 *Ky.* 621, 111 *S. W.* 298.

70. *U. S.*—*Green Bay & M. Canal Co. v. Norrie*, 118 *Fed.* 923. *Ark.* *Miller v. Nuckolls*, 76 *Ark.* 485, 89 *S. W.* 88, 113 *Am. St. Rep.* 101; *Farrelly v. Cross*, 10 *Ark.* 197, 404. *Fla.* *Reese v. Damato*, 44 *Fla.* 692, 699, 33 *So.* 462. *Ill.*—*Barnes & Co. v. Chicago Typo. Union* No. 16, 232 *Ill.* 402, 83 *N. E.* 932, 122 *Am. St. Rep.* 129, 14 *L. R. A.* (N. S.) 1150. *Ind.*—*Dinwiddie v. Shipman*, 183 *Ind.* 82, 108 *N. E.* 228; *Waring v. Fletcher*, 152 *Ind.* 620, 52 *N. E.* 203; *Central U. Tel. Co. v. State*, 110 *Ind.* 203, 10 *N. E.* 922, 12

*N. E.* 136. *Ia.*—*Allen v. Church*, 101 *Iowa* 116, 124, 70 *N. W.* 127. *Ky.* *United States Fid. & Guar. Co. v. Jones*, 133 *Ky.* 621, 111 *S. W.* 298; *Runyon v. Bennett*, 4 *Dana* 598, 29 *Am. Dec.* 431; *Gardner v. Continental Ins. Co.*, 31 *Ky. L. Rep.* 69, 101 *S. W.* 911. *Minn.* *Hershey v. Meeker Co. Bank*, 71 *Minn.* 255, 268, 73 *N. W.* 967; *Farmers' Nat. Bank v. Baekus*, 63 *Minn.* 115, 65 *N. W.* 255. *N. Y.*—*Sixth Ave. R. Co. v. Gilbert Elev. R. Co.*, 71 *N. Y.* 430. *Tenn.*—*Dodd & Son v. Nashville, C. & St. L. R. Co.*, 120 *Tenn.* 440, 110 *S. W.* 588. *Va.*—*Martin v. South Salem Land Co.*, 94 *Va.* 28, 26 *S. E.* 591. *Wash.* *State ex rel. Gibson v. Superior Court*, 39 *Wash.* 115, 80 *Pac.* 1108, 109 *Am. St. Rep.* 862, 1 *L. R. A.* (N. S.) 554, 4 *Ann. Cas.* 229.

[a] *A vacated judgment is not reinstated* so as to operate as an estoppel on appeal with stay bond from order vacating it. *Hershey v. Meeker Co. Bank*, 71 *Minn.* 255, 268, 73 *N. W.* 967.

71. *Cal.*—*Dulin v. Pacific Wood & Coal Co.*, 98 *Cal.* 304, 33 *Pac.* 123. *Ia.* *Lindsay v. Clayton Dist. Ct.*, 75 *Iowa* 509, 39 *N. W.* 817. *Ky.*—*Runyon v. Bennett*, 4 *Dana* 598, 29 *Am. Dec.* 431. *Minn.*—*Allen v. Robinson*, 17 *Minn.* 113. *Tex.*—*Semple v. Eubanks*, 13 *Tex. Civ. App.* 418, 35 *S. W.* 509, *affirmed*, 93 *Tex.* 720.

*Effect of judgment as an estoppel and bar* to another action pending stay, see 15 *STANDARD PROC.* 598, and the title "*Res Judicata*."

[a] It is not correct to say that the judgment is stayed. It is proceedings on the judgment, that is the execution, the enforcement, that are stayed. *Havemeyer v. Superior Court*, 84 *Cal.* 327, 381, 24 *Pac.* 121, 18 *Am. St. Rep.* 192, 10 *L. R. A.* 627.

72. *Cal.*—*Low v. Adams*, 6 *Cal.* 277. See *Dewey v. Latson*, 6 *Cal.* 130, but compare present statute. *Minn.*—*Allen v. Robinson*, 17 *Minn.* 113. *Tex.*—*Sem-*



the supersedeas, unless otherwise provided by law.<sup>73</sup> But the running of the time during which the judgment is a lien is suspended.<sup>74</sup>

e. *Effect on Execution Already Issued.* — At common law an execution already issued is not recalled, by a supersedeas;<sup>75</sup> the levy is not released ipso facto;<sup>76</sup> and the sheriff may proceed to sell the property.<sup>77</sup> But under modern statutes, the supersedeas suspends further proceedings on the execution,<sup>78</sup> generally letting things already done remain in statu quo,<sup>79</sup> although some statutes require the clerk to countermand the execution,<sup>80</sup> and even provide that property levied on is released.<sup>81</sup> A distinction between levies on personal and real property is sometimes made.<sup>82</sup>

ple v. Eubanks, 13 Tex. Civ. App. 418, 35 S. W. 509.

[a] **Taking steps to secure a judgment lien** are not prevented. *Semple v. Eubanks*, 13 Tex. Civ. App. 418, 35 S. W. 509.

73. See generally the statutes and *Austin v. Union Pav. & Contract Co.*, 4 Cal. App. 610, 88 Pac. 731.

74. *Barroilhet v. Hathaway*, 31 Cal. 395, 89 Am. Dec. 193; *Ebel v. Stringer*, 4 Neb. (Unof.) 43, 93 N. W. 142. *Contra*, *Christy v. Flanagan*, 87 Mo. 670.

75. *Boyle v. Zacharie*, 6 Pet. (U. S.) 648, 8 L. ed. 532; *Tilley v. Washburn*, 91 Wis. 105, 64 N. W. 312.

[a] **The supreme court has inherent power to recall the execution and release the levy on proper terms.** *Tilley v. Washburn*, 91 Wis. 105, 64 N. W. 312.

76. *Tilley v. Washburn*, 91 Wis. 105, 64 N. W. 312.

77. *Boyle v. Zacharie*, 6 Pet. (U. S.) 648, 8 L. ed. 532.

[a] **The proceeds are brought into court to abide the writ of error.** *Hopkinson v. Sears*, 14 Vt. 494, 39 Am. Dec. 236.

78. **U. S.**—Board of Comrs. v. Gorman, 19 Wall. 661, 22 L. ed. 226; *Staffords v. King*, 90 Fed. 136, 32 C. C. A. 536. **Fla.**—*Thalheim v. Camp Phosphate Co.*, 48 Fla. 190, 37 So. 523, 5 Ann. Cas. 784; *Bacon v. Green*, 36 Fla. 313, 18 So. 866; *Archer v. Hart*, 5 Fla. 234. **Mich.**—*Ismond v. Seougale*, 119 Mich. 501, 78 N. W. 546, on serving the sheriff with a certificate further proceedings are stayed. **Minn.**—*First Nat. Bank v. Rogers*, 13 Minn. 407, 97 Am. Dec. 239. **Miss.**—*Grayson v. Harris*, 102 Miss. 57, 58 So. 775, 59 So. 1, Ann. Cas. 1914C, 1219.

79. **U. S.**—Board of Comrs. v. Gor-

man, 19 Wall. (U. S.) 661, 22 L. ed. 226. **Fla.**—*Thalheim v. Camp Phosphate Co.*, 48 Fla. 190, 37 So. 523, 5 Ann. Cas. 784. **Ill.**—*Snyder v. Powell*, 133 Ill. App. 393. **Minn.**—*First Nat. Bank v. Rogers*, 13 Minn. 407, 97 Am. Dec. 239; *Northwestern Express Co. v. Landes*, 6 Minn. 564.

[a] **The lien created by the levy is not impaired.** **Conn.**—*Hobbs v. Simmonds*, 61 Conn. 235, 23 Atl. 962. **Fla.**—*Thalheim v. Camp Phosphate Co.*, 48 Fla. 190, 37 So. 523, 5 Ann. Cas. 784. **Miss.**—*Grayson v. Harris*, 102 Miss. 57, 58 So. 775, 59 So. 1, Ann. Cas. 1914C, 1219, where a levy on real estate was made. Whether rule would be otherwise if levy was made on personalty, query.

[b] **Personal property levied on need not be restored** (1) to the possession of the defendant in execution. *Thalheim v. Camp Phosphate Co.*, 48 Fla. 190, 37 So. 523, 5 Ann. Cas. 784. (2) The sheriff may retain the property, until decision of the appellate court or order of the court. *Northwestern Express Co. v. Landes*, 6 Minn. 564.

[c] **If the purchaser at the execution sale has not gone into possession, he cannot do so after supersedeas.** *German Sav. & L. Soc. v. Kern*, 42 Ore. 532, 70 Pac. 709.

80. *Loomis v. McKenzie*, 57 Iowa 77, 8 N. W. 779, 10 N. W. 298; *Swift v. Comboy*, 12 Iowa 444.

[a] **And property levied on but not sold shall be delivered to the debtor.** *Swift v. Comboy*, 12 Iowa 444.

81. *Sam Yuen v. McMann*, 99 Cal. 497, 34 Pac. 80. But see *Ewing v. Jacobs*, 49 Cal. 72 (under previous statute); *State ex rel. St. Louis & K. R. Co. v. Hirzel*, 137 Mo. 435, 37 S. W. 921, 38 S. W. 961.

82. See *infra*, VII, E.

f. *Judgment as Set-Off and Basis of Action.*—It has been held that a superseded judgment cannot be pleaded as a set-off in another action.<sup>83</sup> And some courts hold that an action on a superseded judgment cannot be brought,<sup>84</sup> but other courts hold to the contrary.<sup>85</sup>

g. *Costs and Fees.*—A supersedeas does not prevent an officer or witness from enforcing by fee bills the payment of the fees due them.<sup>86</sup>

10. *Remedies on Violation of Stay.*—a. *Generally.*—The trial court has power, by order, to compel the sheriff to observe the stay.<sup>87</sup> Hence an independent suit in equity for an injunction is not proper.<sup>88</sup>

b. *Writ of Supersedeas.*—If, after an appeal, where the execution of the prescribed bond operates as a stay,<sup>89</sup> the court below seeks to enforce its judgment, the appellate court<sup>90</sup> will grant a special order

83. *Yarborough & Co. v. Fitzpatrick*, 21 Ky. L. Rep. 208, 51 S. W. 172. See generally 16 STANDARD PROC. 562.

84. See 16 STANDARD PROC. 364, and *Cal.*—*Taylor v. Shew*, 39 Cal. 536, 2 Am. Rep. 478, query. *Ky.*—*Johnson v. Williams*, 82 Ky. 45. *Mo.*—*Sublette v. St. Louis, I. M. & S. Ry. Co.*, 66 Mo. App. 331. *N. Y.*—*Nazro v. McCalmont Oil Co.*, 36 Hun 296.

As to actions on foreign judgments, see 16 STANDARD PROC. 390.

85. *Ind.*—*Salem-Bedford Stone Co. v. Hobbs*, 28 Ind. App. 520, 63 N. E. 314. *Kan.*—*Poll v. Hicks*, 67 Kan. 191, 72 Pac. 847. *Minn.*—*Allen v. Robinson*, 17 Minn. 113. *N. J.*—*National Union Bank v. Dodge*, 42 N. J. L. 316. *Eng.*—*Entwistle v. Shepherd*, 2 Durn. & East. 78.

See 16 STANDARD PROC. 364.

[a] But the court may stay proceedings on the judgment in the second action pending the writ of error. *Taswell v. Stone*, 4 Burr. 2454, 98 Eng. Reprint 287.

86. *Mackison v. Clegg*, 83 Ind. 135.

87. *Cal.*—*Mannix v. Superior Court*, 157 Cal. 730, 109 Pac. 264. *Kan.*—*Jaedicke v. Patrie*, 15 Kan. 287. *Okla.*—*Deming Inv. Co. v. Fariss*, 50 Pac. 130.

*Mandamus*, see *infra*, XII.

88. See 16 STANDARD PROC. 479.

[a] But an injunctive order may issue from the trial court. *Deming Inv. Co. v. Fariss* (Okla.), 50 Pac. 130, even where the bond as approved fails to comply with the statute.

89. See *supra*, III, A, 6, c, (III).

90. *Goddard v. Ordway*, 94 U. S. 672, 24 L. ed. 237; *Slaughter House Cases*, 10 Wall. (U. S.) 273, 19 L. ed.

915; *Green v. Van Buskirk*, 3 Wall. (U. S.) 448, 18 L. ed. 245; *Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69; *McAneny v. Superior Court*, 150 Cal. 6, 87 Pac. 1020; *Brown v. Rouse*, 115 Cal. 619, 47 Pac. 601; *Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 33 Pac. 123.

[a] If the property is sold on execution before the hearing of the application for a supersedeas, the motion must be denied. *Hoppe v. Hoppe*, 99 Cal. 536, 34 Pac. 222. See *Craig v. Stansbury* (Cal. App.), 174 Pac. 404.

[b] By virtue of its incidental power to preserve the status quo as to rights involved in the appeal. *Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69; *Craig v. Stansbury* (Cal. App.), 174 Pac. 404; *Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 128 Pac. 9, 18. And see *supra*, V, A, 3, b.

[c] A motion in the appellate court to obtain the writ is (1) a proper remedy. *Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69; *McAneny v. Superior Court*, 150 Cal. 6, 87 Pac. 1020. (2) The motion should be entitled, filed and registered as a motion in the appeal, not as an independent proceeding. *Flores v. Superior Court*, 167 Cal. 794, 139 Pac. 73; *Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 139 Pac. 69.

[d] Notice is essential where the avoidance of the effect of an improper execution is sought. *Boise v. Gorman*, 131 U. S. exxv, 22 L. ed. 148.

[e] The affidavit in support of the motion should state facts, not conclusions. *McMillan v. Hayward*, 84 Cal. 85, 24 Pac. 151.

[f] An attempt to enforce the judg-

or writ restraining its action. The writ is directed to the court,<sup>91</sup> or to some one of its officers,<sup>92</sup> not against the parties<sup>93</sup> or strangers to the action,<sup>94</sup> and it is limited to restraining any action upon the judgment appealed from.<sup>95</sup>

c. *Prohibition*.—The writ of prohibition is sometimes regarded as a proper remedy to prevent a violation of a supersedeas,<sup>96</sup> though some courts hold otherwise.<sup>97</sup>

d. *Contempt proceedings* may be resorted to on disobedience of an order or writ of supersedeas.<sup>98</sup>

e. *Vacation of Proceedings*.—What is done after the supersedeas has taken effect should be set aside as irregularly done.<sup>99</sup>

f. *Habeas corpus* is a proper remedy on the part of one who is imprisoned for contempt in refusing to perform a judgment or decree which has been stayed or superseded.<sup>1</sup>

ment must be shown. *Lanier v. Nash*, 122 U. S. 630, 30 L. ed. 1244.

91. *Madera v. Raymond Granite Co.*, 138 Cal. 244, 71 Pac. 112; *Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 33 Pac. 123.

92. *Madera v. Raymond Granite Co.*, 138 Cal. 244, 71 Pac. 112; *Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 33 Pac. 123.

93. *Rose v. Mesmer*, 131 Cal. 631, 63 Pac. 1010; *Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 33 Pac. 123, the writ cannot be used to perform the functions of an injunction against the parties restraining them from any act in the assertion of their rights other than to prevent them from using the process of the court below to enforce the judgment.

94. *Madera v. Raymond Granite Co.*, 138 Cal. 244, 71 Pac. 112; *Dulin v. Pacific Wood & Coal Co.*, 98 Cal. 304, 33 Pac. 123.

95. *Dulin v. Pacific Wood & C. Co.*, 98 Cal. 304, 33 Pac. 123.

96. *State ex rel. St. Louis & K. R. Co. v. Hirzel*, 137 Mo. 435, 37 S. W. 921; *State ex rel. Gray v. Hennings*, 194 Mo. App. 545, 185 S. W. 1153. See *Bronson v. La Crosse & M. R. Co.*, 1 Wall. (U. S.) 405, 17 L. ed. 616, and California cases in following note.

97. *State v. Young*, 44 Minn. 76, 46 N. W. 204, as the jurisdiction of the trial court is not divested.

[a] In California, it has been held that the existence of a remedy by motion in the appellate court for a writ of supersedeas precludes the remedy by writ of prohibition (*McAneny v. Superior Court*, 150 Cal. 6, 87 Pac.

1020), except (2) when the person applying for a writ of prohibition is one who cannot move for writ of supersedeas. *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 18 Am. St. Rep. 192, 10 L. R. A. 627, distinguished in *McAneny v. Superior Court*, 150 Cal. 6, 87 Pac. 1020. But compare *Covarrubias v. Board of Suprs. of Santa Barbara Co.*, 52 Cal. 622; *Mulvey v. Superior Court*, 22 Cal. App. 514, 135 Pac. 53, granting a writ of prohibition without referring to the remedy by supersedeas.

98. Fla.—*Banning v. Brown*, 74 So. 23; *State v. Johnson*, 13 Fla. 33. Va.—*Cralle v. Cralle*, 81 Va. 773. Wash.—*State ex rel. Union Mach. & Sup. Co. v. Thompson*, 99 Wash. 478, 169 Pac. 980. W. Va.—*State ex rel. Woodcock v. Barrick*, 80 W. Va. 63, 92 S. E. 234.

99. Ky.—*Runyon v. Bennett*, 4 Dana 598, 29 Am. Dec. 431; *Gardner v. Continental Ins. Co.*, 31 Ky. L. Rep. 69, 101 S. W. 911. N. C.—*Pruett v. Charlotte Power Co.*, 167 N. C. 598, 83 S. E. 830. N. D.—*Beyer v. Robinson*, 32 N. D. 560, 156 N. W. 203. Ore.—*Anderson v. Phegley*, 54 Ore. 102, 102 Pac. 603. Wis.—*Baasen v. Eilers*, 11 Wis. 277.

[a] **Execution May Be Quashed.** (1) See 16 STANDARD PROC. 422, note 37. (2) By appellate court. *Owen v. Pomona Land & Water Co.*, 124 Cal. 331, 57 Pac. 71.

[b] **Execution sale** may be set aside. *Baasen v. Eilers*, 11 Wis. 277.

1. *Ex parte Queirolo*, 119 Cal. 635, 51 Pac. 956; *Ex parte Oxford*, 102 Cal. 656, 36 Pac. 928.



g. *A writ of certiorari* will lie to annul orders made in violation of a stay.<sup>2</sup>

**11. Enforcing Judgment Notwithstanding Stay on Giving Restitution Bond.**—Statutes sometimes authorize the enforcement of judgments notwithstanding a stay of proceedings, upon appellant's giving a restitution bond.<sup>3</sup> The right is sometimes limited to actions on contract for payment of money only,<sup>4</sup> though some statutes allow it in forcible entry and detainer cases.<sup>5</sup>

**12. Effect of Failure To Obtain Supersedeas.**—Generally the filing of a supersedeas bond is not a condition precedent to a review of a judgment or final order, either upon appeal or upon error.<sup>6</sup> A failure to procure a stay in no way affects the proceedings in the appellate court,<sup>7</sup> but in the absence thereof the judgment may be enforced pending the appeal, subject to a possible reversal,<sup>8</sup> unless the appeal va-

2. *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58.

3. See the statutes and *American Cent. Ins. Co. v. Cox*, 54 Kan. 502, 38 Pac. 558; *Hansen v. Robbins*, 80 Ore. 659, 157 Pac. 1112, 158 Pac. 403; *Holbrook v. Investment Co.*, 32 Ore. 104, 51 Pac. 451; *Ah Lep v. Gong Choy*, 13 Ore. 205, 9 Pac. 483.

[a] If filed before expiration of the time within which to except to sureties on the stay bond, restitution bond is premature. *Hume v. Rice*, 86 Ore. 93, 167 Pac. 578.

[b] **Discretionary With Court.** *Water Power Co. v. Brown*, 23 Kan. 695.

[c] **Application** should be made to the trial court. *Magic City Realty Co. v. Scheneckenberger*, 82 Neb. 648, 118 N. W. 567.

4. *American Cent. Ins. Co. v. Cox*, 54 Kan. 502, 38 Pac. 558; *Bentley v. Brown*, 37 Kan. 17, 14 Pac. 435; *Kollock & Co. v. Leyde*, 77 Ore. 569, 143 Pac. 621, 151 Pac. 733.

[a] Both express and implied contracts are contemplated. *St. Louis & S. F. Ry. Co. v. Kirkpatrick*, 52 Kan. 201, 34 Pac. 804; *Bentley v. Brown*, 37 Kan. 17, 14 Pac. 435.

[b] A mortgage is a contract within the statute. *Gearin v. Fleckenstein*, 89 Ore. 146, 173 Pac. 569.

[c] **Suits to enforce liens** are not within the statute. *Gill v. Buckingham*, 7 Kan. App. 237, 52 Pac. 903 (landlord's lien); *Kollock & Co. v. Leyde*, 77 Ore. 569, 143 Pac. 621, 151 Pac. 733, mechanic's lien.

5. *Magic City Realty Co. v. Schen-*

*eckenberger*, 82 Neb. 648, 118 N. W. 567.

6. **U. S.**—*Ex parte French*, 100 U. S. 1, 25 L. ed. 529. **Ala.**—*Ex parte Floyd*, 40 Ala. 116. **Ark.**—*Hand v. Haugland*, 87 Ark. 105, 112 S. W. 184; *Hughes v. Wheat*, 32 Ark. 292. **Minn.** *Briggs v. Shea*, 48 Minn. 218, 50 N. W. 1037. **Neb.**—*Creighton v. Keith*, 50 Neb. 810, 70 N. W. 406; *State v. Ramsey*, 50 Neb. 166, 69 N. W. 758; *Welton v. Baltezoire*, 17 Neb. 399, 23 N. W. 1. **Okla.**—*State ex rel. Mose v. District Court*, 46 Okla. 654, 149 Pac. 240.

In justice's courts, see 18 STANDARD PROC. 269.

[a] **Not Essential in Perfecting Appeal.**—*Loomis v. McKenzie*, 57 Iowa 77, 8 N. W. 779, 10 N. W. 298.

[b] **Except in cases of collateral or auxiliary proceedings**, where it is a necessary condition for procuring a review that some property or thing should be held by the process of the court to make its judgment effective, a supersedeas is not essential. *Welton v. Baltezoire*, 17 Neb. 399, 23 N. W. 1.

7. **Mo.**—*Cohn v. Lehman*, 93 Mo. 574, 6 S. W. 267. **Neb.**—*Welton v. Baltezoire*, 17 Neb. 399, 23 N. W. 1. **Wis.**—*Bird v. Morrison*, 9 Wis. 551.

8. **Ga.**—*Parker-Hensel Engineering Co. v. Schuler*, 133 Ga. 696, 66 S. E. 800; *Johnston v. Pinkston*, 12 Ga. App. 585, 77 S. E. 1075. **N. Y.**—*Matter of Meyer*, 209 N. Y. 59, 102 N. E. 606. **Wis.**—*Hudson v. Smith*, 9 Wis. 122.

**Execution May Be Issued.**—See 15 STANDARD PROC. 757, 743.

[a] If a third party purchases property at the judicial sale or in re-

cates the judgment.<sup>9</sup>

**B. IN CRIMINAL CASES.**—The question of supersedeas in criminal cases, and that of bail are independent matters.<sup>10</sup>

In the absence of statute, a writ of error upon a judgment in a criminal case does not operate as a supersedeas,<sup>11</sup> unless it is so ordered or indorsed on the writ.<sup>12</sup> But the appellate court has power to grant a stay independent of statute.<sup>13</sup>

In the modern practice, however, statutes generally, if not universally, regulate stay or supersedeas pending appeal and writ of error in criminal cases.<sup>14</sup> These statutes differ considerably. It is sometimes provided that an appeal by the state does not stay the operation of a judgment in favor of the defendant.<sup>15</sup> As to stay or supersedeas pending proceedings for review taken by the defendant, some statutes variously provide that an appeal by the defendant or the issuance of a writ of error stays execution of the judgment,<sup>16</sup> or that an appeal or

liance upon the decree then in force, no supersedeas bond having been filed, his rights cannot be divested by a subsequent reversal of the decree. *Creighton v. Keith*, 50 Neb. 810, 70 N. W. 406; *State v. Ramsey*, 50 Neb. 166, 69 N. W. 758.

[b] The court cannot order the appellee to furnish a refunding bond, where the appellant is unable to give a stay bond. *Watson v. Niles*, 112 Iowa 655, 84 N. W. 702.

9. See 2 STANDARD PROC. 325.

10. *Ritchey v. People*, 22 Colo. 251, 43 Pac. 1026.

[a] On ordering a stay, a further order for the custody of the defendant or release on bail may be made. *People v. West*, 143 Mich. 586, 107 N. W. 283.

As to bail, see the title "Recognizances and Bail."

11. **U. S.**—*United States v. Whittier*, 13 Fed. 534, 11 Biss. 356. **Mich.** *People v. Frith*, 166 Mich. 576, 131 N. W. 1112. **Va.**—*Conner v. Com.*, 2 Va. Cas. (4 Va.) 30.

12. *Conner v. Com.*, 2 Va. Cas. (4 Va.) 30.

13. *Parker v. State*, 135 Ind. 534, 35 N. E. 179, 23 L. R. A. 859; *Reinex v. State*, 51 Wis. 152, 8 N. W. 155.

[a] Unless for cogent reasons the appellate court will not grant a stay. *Reinex v. State*, 51 Wis. 152, 8 N. W. 155.

[b] Until application is made to and refused by the court below, the appellate court will not supersede a criminal judgment. *Hofler v. State*, 16 Ark. 214.

[c] Where there is abundant evidence to support the finding of the circuit judge and no errors of law are shown in the record, a motion for stay of sentence will be refused. *State v. Bates*, 89 S. C. 131, 71 S. E. 654.

14. See the statutes.

[a] The circuit judge on application should stay execution to enable defendant to apply to supreme court for allowance of appeal. *Youngblood v. State*, 35 Ark. 35; *Ex parte Bixley*, 13 Ark. 286.

[b] Statute held to be mandatory, although it uses the word "may." *Ex parte Doyle*, 62 W. Va. 280, 57 S. E. 824.

15. See the statutes and *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333.

16. **Ark.**—*Morphis v. State*, 113 Ark. 438, 170 S. W. 1165. **Cal.**—See *Spears v. Modoc Co.*, 101 Cal. 303, 35 Pac. 869, on appeal to superior court. **Conn.** *Sorden v. Hugo*, 84 Conn. 566, 80 Atl. 713. **Fla.**—*State v. Mitchell*, 29 Fla. 302, 10 So. 746. **Kan.**—See *In re Ready*, 44 Kan. 702, 25 Pac. 234 (when the judgment is for a fine only); *In re Chambers*, 30 Kan. 450, 2 Pac. 646, appeal does not stay execution until transcript is filed. **Mo.**—*Ex parte Dimpley*, 233 Mo. 235, 135 S. W. 56; *Ex parte Vickers*, 201 Mo. 643, 100 S. W. 585, in capital cases. **N. M.** *Parks v. Hughes*, 24 N. M. 421, 174 Pac. 425. **Pa.**—See *Com. v. Hill*, 185 Pa. 385, 39 Atl. 1055. **P. R.**—*Ex parte Toro*, 7 Porto Rico 440. **S. C.**—*State v. Johnson*, 52 S. C. 505, 30 S. E. 592, the service of notice of appeal in accordance with law operates as a stay

writ of error shall not operate as a stay unless an order to that effect is made,<sup>17</sup> or that the court shall grant a stay if desired by the defendant,<sup>18</sup> or that judgment shall be stayed by order of court on giving a stay bond,<sup>19</sup> or that on allowance of a writ of error, the clerk shall issue a writ of supersedeas,<sup>20</sup> or that the filing of the clerk's certificate that an appeal has been taken, suspends execution.<sup>21</sup> Some statutes provide that an appeal shall stay execution in capital cases, but in

of sentence, until the appeal is finally disposed of. **Tex.**—*Tores v. State*, 74 Tex. Crim. 37, 166 S. W. 523. See *Ex parte Barr*, 62 Tex. Crim. 62, 136 S. W. 456. **Wash.**—*In re Norris*, 26 Wash. 323, 67 Pac. 72; *Ex parte Jones*, 2 Wash. 551, 27 Pac. 172.

[a] **An order for a writ of error** does not operate as a supersedeas. *State v. Mitchell*, 29 Fla. 302, 10 So. 746.

[b] **On allowance of exceptions,** execution is stayed. *Reinex v. State*, 51 Wis. 152, 8 N. W. 155.

17. **U. S.**—*In re Claasen*, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. ed. 409 (as no security is required in a criminal case, a supersedeas may be obtained by serving the writ of error in the time prescribed without giving any security, provided the justice signing the citation directs the writ shall so operate); *United States v. Whittier*, 13 Fed. 534, 11 Biss. 356. **Mich.** *People v. Fritch*, 166 Mich. 576, 131 N. W. 1112; *People v. West*, 143 Mich. 586, 107 N. W. 283. **Minn.**—*State v. Hayward*, 62 Minn. 114, 64 N. W. 90. **N. Y.**—*People v. Tweed*, 67 Barb. 496; *Stout v. People*, 4 Park. Crim. 132. Compare present New York statute abolishing writ of error in criminal cases.

[a] **Stay is not a matter of right** (1) coincident with right of appeal (*State v. Hayward*, 62 Minn. 114, 64 N. W. 90), even (2) in capital cases. *State v. Chounard*, 93 Minn. 176, 100 N. W. 1125.

[b] **This order is in the discretion** of court. *United States v. Whittier*, 13 Fed. 534, 11 Biss. 356; *People v. Tweed*, 67 Barb. (N. Y.) 496.

[c] **Where it is probable error has been committed** or (1) real doubt exists as to the correctness of the decision, the order of stay should be made. *Stout v. People*, 4 Park. Crim. (N. Y.) 132. See the title "Certificate of Probable Cause and of Reasonable Doubt." (2) If there is any fair doubt

as to the merit of the appeal in capital cases, a stay should be granted. *State v. Chounard*, 93 Minn. 176, 100 N. W. 1125; *State v. Hayward*, 62 Minn. 114, 64 N. W. 90.

[d] **May be allowed before a bill of exceptions is settled.** *People v. Rogers*, 13 Abb. Pr. N. S. (N. Y.) 370. 18. *White v. State*, 134 Ala. 197, 32 So. 320.

[a] **In Kentucky**, (1) when an appeal is prayed in a felony case, the court, if the defendant desires it, shall make an order suspending execution until the period within which the defendant is required to lodge a transcript in the office of the clerk of the appellate court. Ky. Crim. Code, §336, sub. 2. *Com. v. Crouch*, 170 Ky. 772, 186 S. W. 674; *Balce v. Com.*, 153 Ky. 558, 156 S. W. 147. (2) When the transcript is filed, the filing of the clerk's certificate that an appeal has been taken suspends execution of the judgment pending the appeal (Ky. Crim. Code, §336, sub. 3), even though the court refuses to make an order of stay when the appeal is prayed. *Slaughter v. Com.*, 148 Ky. 315, 146 S. W. 422.

[b] **Mandamus lies to enforce right.** *Com. v. Crouch*, 170 Ky. 772, 186 S. W. 674.

19. *State v. Coletti*, 102 Kan. 523, 170 Pac. 995; *Youngberg v. Smart*, 70 Kan. 299, 78 Pac. 422 (construing statute); *Hazelrigg v. Douglass*, 126 Ky. 738, 104 S. W. 755, in misdemeanor cases.

[a] **In Kentucky.**—In misdemeanor cases the execution of the statutory bond suspends execution, provided the record is lodged with the clerk of the appellate court within sixty days after judgment. *Hazelrigg v. Douglass*, 126 Ky. 738, 104 S. W. 755.

20. *Ritchey v. People*, 22 Colo. 251, 43 Pac. 1026.

21. *Slaughter v. Com.*, 148 Ky. 315, 146 S. W. 422. See *supra*, this section, note.



all other cases only on filing a certificate that there is probable cause for appeal.<sup>22</sup>

To procure a stay, no security is required,<sup>23</sup> except where the statute requires it.<sup>24</sup> Some statutes provide for both a stay on bond and a stay without bond, requiring the defendant to be confined in the county jail in the latter case until disposition of the appeal.<sup>25</sup>

The supersedeas suspends the sentence of imprisonment until the determination and remand of the appeal.<sup>26</sup> Pending the stay, the sheriff, on being served with proper notice, must keep the defendant in custody without executing the judgment and detain him to abide the judgment on appeal,<sup>27</sup> unless he is admitted to bail.<sup>28</sup> If the execution of the judgment has commenced before the supersedeas became effectual, further execution is suspended, and upon service of a proper certificate or notice, the defendant must be restored to his original custody.<sup>29</sup>

**VI. SUPERSEDEAS AFTER REMAND.**—Inasmuch as the remission or remand of a cause pending on appeal retransfers jurisdiction of the cause to the trial court,<sup>30</sup> the appellate court, although it has power thereafter to stay its own mandate, until a rehearing can

22. See the title "**Certificate of Probable Cause and of Reasonable Doubt.**"

23. *In re Claasen*, 140 U. S. 200, 11 Sup. Ct. 735, 35 L. ed. 409.

24. **Ga.**—*Williams v. Tipton*, 3 Ga. App. 445, 60 S. E. 113. **Ind.**—See *Doren v. State*, 181 Ind. 314, 104 N. E. 500. **Kan.**—*State v. Coletti*, 102 Kan. 523, 170 Pac. 995; *Youngberg v. Smart*, 70 Kan. 299, 78 Pac. 422; *In re Ready*, 44 Kan. 702, 25 Pac. 234. **Ky.**—*Hazlerigg v. Douglass*, 126 Ky. 738, 104 S. W. 755, in misdemeanor cases. **Miss.** Board of Suprs. *v. Worrell*, 67 Miss. 154, 6 So. 628. **Okla.**—*Ex parte Burton*, 13 Okla. Crim. 280, 164 Pac. 135; *Killough v. State*, 6 Okla. Crim. 311, 118 Pac. 620; *Ex parte Tyler*, 2 Okla. Crim. 455, 102 Pac. 716, bond is necessary except in capital cases. See *Bryce v. State*, 14 Okla. Crim. 456, 172 Pac. 976.

[a] On failure to take proceedings for review within the statutory time, any bail bond given ceases to be effective as a supersedeas. *Killough v. State*, 6 Okla. Crim. 311, 118 Pac. 620.

25. *Ex parte Tyler*, 2 Okla. Crim. 455, 102 Pac. 716, construing statute.

26. *Ex parte Rodley*, 132 Cal. 40, 64 Pac. 91. See *Green v. Com.*, 181 Ky. 253, 204 S. W. 82.

27. **Cal.**—*Ex parte Rodley*, 132 Cal.

40, 64 Pac. 91. **N. M.**—*Parks v. Hughes*, 24 N. M. 421, 174 Pac. 425. **N. Y.** *People v. Connolly*, 88 App. Div. 302, 84 N. Y. Supp. 617. *Compare People ex rel. Trezza v. Brush*, 60 Hun 399, 15 N. Y. Supp. 512, 39 N. Y. St. 877, it is the "execution" only, not the imprisonment which is suspended. **Tex.** *Ex parte Barr*, 62 Tex. Crim. 62, 136 S. W. 456. **Wash.**—*Ex parte Jones*, 2 Wash. 551, 27 Pac. 172.

And see 4 STANDARD PROC. 875, note 56, 873, note 43, and 872, note 34.

[a] Defendant is entitled to remain in the county jail, although sentenced to imprisonment in the penitentiary. *In re Adams*, 81 Cal. 163, 22 Pac. 547; *Ex parte Jones*, 2 Wash. 551, 27 Pac. 172.

[b] A person convicted of a capital offense may be confined in the state prison. *Ex parte Fredericks*, 104 Cal. 400, 38 Pac. 51. See *People ex rel. Treeza v. Brush*, 60 Hun 399, 15 N. Y. Supp. 512, 39 N. Y. St. 877.

28. See the title "**Recognizances and Bail.**"

29. *McKane v. Durston*, 153 U. S. 684, 14 Sup. Ct. 913, 38 L. ed. 867. See *Ex parte Lawrence*, 71 Ark. 54, 70 S. W. 470; *Youngblood v. State*, 35 Ark. 35. See also the title "**Certificate of Probable Cause and of Reasonable Doubt.**"

30. See 19 STANDARD PROC. 311.

be had,<sup>31</sup> has no power to grant a supersedeas to stay the enforcement of a judgment,<sup>32</sup> the power to do which is reposed in the trial court.<sup>33</sup>

**VII. STAY PENDING CERTIORARI.** — A. **GENERALLY.** — At common law and in the absence of statute, a writ of certiorari operates by its own inherent force as a supersedeas and stays execution of the judgment to be reviewed,<sup>34</sup> without any special order to that effect.<sup>35</sup> It is nevertheless proper to insert a special clause in the writ, directing it to so operate,<sup>36</sup> and directing a special writ of supersedeas to the sheriff, if necessary.<sup>37</sup> And under some statutes a certiorari does not operate as a stay in the absence of this clause, or a separate order to that effect.<sup>38</sup>

Pending an application for a writ of certiorari, the court may, under proper circumstances, stay proceedings,<sup>39</sup> and the statute sometimes provides for a stay.<sup>40</sup>

31. See 19 STANDARD PROC. 349.

32. *Bond v. United Railroads*, 169 Cal. 618, 147 Pac. 465.

33. *Ex parte Burrill*, 24 Cal. 350; *Blackburn v. Reilly*, 48 N. J. L. 82, 2 Atl. 817. But see *Marysville v. Buchanan*, 3 Cal. 212.

[a] **Jurisdiction and Proceedings in Lower Court After Remission.**—See 19 STANDARD PROC. 313. Stay of enforcement where new rights have intervened pending appeal, see 19 STANDARD PROC. 318, note 1.

34. *Ala.*—*John v. State*, 1 Ala. 95. *Ga.*—*Dixon v. Sable*, 147 Ga. 623, 95 S. E. 240; *Loeb v. Mangum*, 134 Ga. 335, 67 S. E. 882. *Md.*—*Riggs v. Green*, 118 Md. 218, 84 Atl. 343. *Miss.*—*Grayson v. Harris*, 102 Miss. 57, 58 So. 775, 59 So. 1, Ann. Cas. 1914C, 1219. *Mo.* *State ex rel. Wolff v. Vogel*, 6 Mo. App. 526. *N. J.*—*National Union Bank v. Dodge*, 42 N. J. L. 316; *McWilliams v. King*, 32 N. J. L. 21. *N. Y.* *Patchin v. Brooklyn*, 13 Wend. 664; *Launitz v. Dixon*, 5 Sandf. 249; *Conover's Case*, 5 Abb. Pr. 182. Compare present statute. *Pa.*—*Com. v. Kistler*, 149 Pa. 345, 24 Atl. 216; *Ewing v. Thompson*, 43 Pa. 372, 377; *Connelly v. Arundell*, 6 Phila. 38.

And see 4 STANDARD PROC. 932; and 11 STANDARD PROC. 61.

[a] **But a statutory writ of certiorari** will not operate as a supersedeas unless statute so provides. *Thomas v. Glasgow*, 13 Pa. Co. Ct. 167, 2 Pa. Dist. 711.

[b] **The certiorari is not in itself a writ of supersedeas**; it operates as one by implication. *Com. v. Kistler*,

149 Pa. 345, 24 Atl. 216; *Ewing v. Thompson*, 43 Pa. 372.

[c] **The reason** is the writ removes the record from the inferior tribunal and thus renders all proceedings on it there impossible. *People ex rel. Croker v. Sturgis*, 39 Misc. 448, 80 N. Y. Supp. 194; *Com. v. Kistler*, 149 Pa. 345, 24 Atl. 216.

[d] **Mere notice of petition for certiorari** does not operate as a stay. *Inhabitants of Adams*, 10 Pick. (Mass.) 273.

[e] **A subsequent order that the writ shall not operate as a stay** is without effect. *Conover's Case*, 5 Abb. Pr. (N. Y.) 182.

35. *National Union Bank v. Dodge*, 42 N. J. L. 316. See also cases in preceding note.

36. *John v. State*, 1 Ala. 95.

37. *Ex parte Grant*, 53 Ala. 16; *John v. State*, 1 Ala. 95.

[a] **In vacation**, power may be exercised. *Ex parte Grant*, 53 Ala. 16.

38. *People ex rel. Loevin v. Griffig*, 164 App. Div. 529, 150 N. Y. Supp. 209; *People ex rel. Croker v. Sturgis*, 39 Misc. 448, 80 N. Y. Supp. 194.

[a] **Stay May Be Vacated.**—*People ex rel. Croker v. Sturgis*, 39 Misc. 448, 80 N. Y. Supp. 194.

39. *Boston & M. R. Co. v. Gokey*, 150 Fed. 686.

40. See *infra*, this note.

[a] **In Louisiana**, the filing of notice of intention to make application for writ of certiorari suspends execution of the judgment during the thirty

B. A WRIT OF SUPERSEDEAS is not necessary to stay proceedings of the inferior tribunal as the delivery of the writ of certiorari is formal notice to it of the issuance and stay.<sup>41</sup> But when execution is issued, a supersedeas to the sheriff is required.<sup>42</sup>

C. A BOND or recognizance for certiorari as a supersedeas was not required at common law;<sup>43</sup> but statutes sometimes require a bond,<sup>44</sup> or authorize issuance of the writ in forma pauperis.<sup>45</sup>

D. DURATION OF STAY.—The stay continues until remission of the cause.<sup>46</sup>

E. EFFECT OF STAY.—The effect of the supersedeas on certiorari is to stay proceedings under the judgment or decree while the cause is pending in the appellate court.<sup>47</sup> It is not retroactive,<sup>48</sup> and does

days allowed for filing the petition. *Salittes v. Southern Pub. Co.*, 140 La. 739, 73 So. 847.

41. *Del.*—*Biggs v. Rickards*, 3 Harr. 283. *N. J.*—*McWilliams v. King*, 32 N. J. L. 21. *N. Y.*—*Conover's Case*, 5 Abb. Pr. 182.

[a] Until served on the justice, the certiorari is no supersedeas. *Biggs v. Rickards*, 3 Harr. (Del.) 283.

42. *Ala.*—*Payne v. Governor*, 18 Ala. 320. *Del.*—*Biggs v. Rickards*, 3 Harr. 283. *N. J.*—*McWilliams v. King*, 32 N. J. L. 21. *Pa.*—*Com. v. Kistler*, 149 Pa. 345, 24 Atl. 216; *Ewing v. Thompson*, 43 Pa. 372. *Tenn.*—See *Woods v. Batey*, 15 Lea 733.

[a] Oral notice on the sheriff is not sufficient to bind him. *Payne v. Governor*, 18 Ala. 320.

[b] The court to which the certiorari is directed issues (1) the writ of supersedeas. *Biggs v. Rickards*, 3 Harr. (Del.) 283; *Fitz-Williams' Case*, Cro. Eliz. 915, 78 Eng. Reprint 1136. (2) Otherwise in New Jersey, where the writ of supersedeas accompanies the certiorari out of the superior court. The correct course is to apply to the judge at chambers for the allowance of the writ. *McWilliams v. King*, 32 N. J. L. 21.

[c] The writ is directed to the officer holding the execution, instead of to a sheriff to be served on the officer holding the process. *Welch v. Jones*, 11 Ala. 660.

43. *Webb v. McPherson & Co.*, 142 Ala. 540, 38 So. 1009.

44. *Ia.*—*Muscatine Co. v. Oliver*, 159 Iowa 417, 139 N. W. 1105. *Miss.*—*Grayson v. Harris*, 102 Miss. 57, 58 So. 775, 59 So. 1, Ann. Cas. 1914C, 1219. *Pa.*—*Thomas v. Glasgow*, 13 Pa. Co. Ct. 167, 2 Pa. Dist. 711, a bond is in-

sufficient under statute requiring recognizance. *Tenn.*—*Fry v. Manlove*, 1 Baxt. 256, 25 Am. Rep. 775. See *Campbell v. Boulton*, 3 Baxt. 354.

45. *Gardner v. Barger*, 4 Heisk. (Tenn.) 668. See *Campbell v. Boulton*, 3 Baxt. (Tenn.) 354.

[a] Express order of judge made on notice (1) is essential. *Mowry v. Davenport*, 6 Lea (Tenn.) 80; *Campbell v. Boulton*, 3 Baxt. (Tenn.) 354. (2) But an appearance is a waiver of notice. *Mowry v. Davenport*, 6 Lea (Tenn.) 80.

46. *John v. State*, 1 Ala. 95.

[a] Until Final Disposition of Writ. *Launitz v. Dixon*, 5 Sandf. (N. Y.) 249.

[b] Until final hearing in the superior court. *Loeb v. Mangum*, 134 Ga. 335, 67 S. E. 882.

[c] No order or mandate need be filed in the court below after overruling or dismissal of the certiorari to authorize the lower court to proceed. *Loeb v. Mangum*, 134 Ga. 335, 67 S. E. 882. *Contra*, *State v. Adams*, 54 N. J. L. 506, 24 Atl. 482.

47. *N. J.*—*Hunt v. Lambertville*, 46 N. J. L. 59. *Pa.*—*Ewing v. Thompson*, 43 Pa. 372. *Tenn.*—*McMinnville & M. R. Co. v. Huggins*, 7 Coldw. 217.

[a] The status of affairs under the judgment complained of cannot be altered by the trial court after certiorari. *Loeb v. Mangum*, 134 Ga. 335, 67 S. E. 882.

[b] Exception as to summary proceedings to recover possession of land is made by statute. *Launitz v. Dixon*, 5 Sandf. (N. Y.) 249.

48. *Taylor v. Boynton*, 7 Ga. App. 233, 66 S. E. 550; *Grayson v. Harris*, 102 Miss. 57, 58 So. 775, 59 So. 1, Ann. Cas. 1914C, 1219.



not annul the proceedings or the process in the hands of the officer.<sup>49</sup> Any proceedings not inconsistent with the dormant status of the judgment may be taken.<sup>50</sup> The writ of certiorari does not prevent action on an execution already begun to be executed,<sup>51</sup> unless a writ of supersedeas be directed to the officer.<sup>52</sup> In some states, however, the supersedeas releases levies made on personalty,<sup>53</sup> but not those on realty.<sup>54</sup> And where a bond has been given to secure plaintiff's judgment it had been held that the lien of a previous attachment is thereby dissolved.<sup>55</sup>

**Who Is Bound.** — It binds not only the court and the parties to whom it is directed,<sup>56</sup> but also, it has been held, all concerned in the matter who have notice of its issuance.<sup>57</sup>

Proceedings after notice of the issuance of certiorari are irregular,<sup>58</sup> and even void it has been held.<sup>59</sup>

**VIII. SUPERSEDEAS OF INTERLOCUTORY ORDERS.** — Supersedeas or stay of interlocutory orders which are appealed from is treated elsewhere in this article.<sup>60</sup> In the case of non-appealable interlocutory orders or decrees, it is sometimes provided by statute that the supreme court in term or the judges thereof in vacation may grant

49. La.—State *ex rel.* Rivoire *v.* St. Paul, 104 La. 203, 28 So. 973. Me. State *v.* Madison, 63 Me. 546. Miss. Grayson *v.* Harris, 102 Miss. 57, 58 So. 775, 59 So. 1, Ann. Cas. 1914C, 1219. N. J.—McWilliams *v.* King, 32 N. J. L. 21. Wis.—State *ex rel.* Chicago & N. W. R. Co. *v.* Burnell, 102 Wis. 232, 78 N. W. 425.

[a] The lien of a levy previously made is not destroyed. *In re Freeny*, 2 Marv. (Del.) 114.

50. State *ex rel.* Chicago & N. W. R. Co. *v.* Burnell, 102 Wis. 232, 78 N. W. 425.

[a] Illustrations.—Notwithstanding the stay, the judgment may be given in evidence in bar or as an estoppel, or the judgment debtor may be garnished. State *ex rel.* Chicago & N. W. R. Co. *v.* Burnell, 102 Wis. 232, 78 N. W. 425.

[b] Notice of entry of judgment may be given. State *ex rel.* Chicago & N. W. R. Co. *v.* Burnell, 102 Wis. 232, 78 N. W. 425.

51. *Domina Regina v. Nash*, 1 Salk. 147, 91 Eng. Reprint 136.

52. See *supra*, VII, B.

53. *Fry v. Manlove*, 1 Baxt. (Tenn.) 256, 25 Am. Rep. 775; *McCamy v. Lawson*, 3 Head (Tenn.) 256. See Grayson *v.* Harris, 102 Miss. 57, 58 So. 775, 59 So. 1, Ann. Cas. 1914C, 1219, query.

54. Grayson *v.* Harris, 102 Miss. 57,

58 So. 775, 59 So. 1, Ann. Cas. 1914C, 1219; *Littleton v. Yost*, 3 Lea (Tenn.) 267.

55. *Vanderhoof v. Prendergast*, 94 Mich. 18, 53 N. W. 792, in analogy with the rule in case of appeal. See 3 STANDARD PROC. 844, 846.

56. *Hunt v. Lambertville*, 46 N. J. L. 59.

57. *Hunt v. Lambertville*, 46 N. J. L. 59.

[a] Compare *Com. v. Kistler*, 149 Pa. 345, 24 Atl. 216, and *Ewing v. Thompson*, 43 Pa. 372, holding the writ operates only on the court and parties directly connected with the proceedings. "Action by other parties and upon collateral matters is not interfered with."

Necessity of writ of supersedeas to officer, see *supra*, VII, B.

58. N. J.—McWilliams *v.* King, 32 N. J. L. 21. N. Y.—*Launitz v. Dixon*, 5 Sandf. 249. Eng.—*Fitz-Williams' Case*, Cro. Eliz. 915, 78 Eng. Reprint 1136.

[a] Every judicial act is erroneous and every ministerial act is void. *Fitz-Williams' Case*, Cro. Eliz. 915, 78 Eng. Reprint 1136. Compare *McWilliams v. King*, 32 N. J. L. 21, where no such distinction is made.

59. *McWilliams v. King*, 32 N. J. L. 21.

60. See *supra*, V, A, 6, b.

writs of supersedeas to such orders or decrees or executions issued thereon.<sup>61</sup> But it is only orders requiring affirmative action which can be superseded.<sup>62</sup>

**IX. AUDITA QUERELA.**—Audita querela is no supersedeas<sup>63</sup> unless so allowed.<sup>64</sup>

**X. INJUNCTION AS SUPERSEDEAS.**—An injunction against an execution operates as a supersedeas so long as it remains in force.<sup>65</sup>

**XI. HABEAS CORPUS AS SUPERSEDEAS.**—The writ of habeas corpus suspends other writs and proceedings pending the final determination of the lawfulness of the detention.<sup>66</sup>

61. *Troughber v. Akin*, 109 Tenn. 451, 73 S. W. 118; *McMinnville & M. R. Co. v. Huggins*, 7 Coldw. (Tenn.) 217, but such orders are not appealable.

[a] The object of the statute is to enable the supreme court or its judges to stay execution of orders which in advance of final hearing undertake to deprive a litigant of money or property. *Gwynne v. Memphis Appeal-Avalanche Co.*, 93 Tenn. 603, 30 S. W. 23; *Woods v. Batey*, 15 Lea (Tenn.) 733.

[b] Writ does not operate as an appeal or writ of error, and (1) the orders cannot be reversed. *Gwynne v. Memphis Appeal-Avalanche Co.*, 93 Tenn. 603, 30 S. W. 23; *McMinnville & M. R. Co. v. Huggins*, 7 Coldw. (Tenn.) 217; *Redmond v. Redmond*, 9 Baxt. (Tenn.) 561. (2) The cause remains in the inferior court, and the supersedeas merely suspends its operation until final hearing. *McMinnville & M. R. Co. v. Huggins*, 7 Coldw. (Tenn.) 217.

[c] The effect of a writ of restitution cannot be given writs of supersedeas. *McMinnville & M. R. Co. v. Huggins*, 7 Coldw. (Tenn.) 217, 227.

[d] Bond with good security may be required. *Mabry v. Ross*, 1 Heisk. (Tenn.) 769.

[e] A fiat of a judge granting writs of certiorari and supersedeas cannot be superseded under this statute. *Woods v. Batey*, 15 Lea (Tenn.) 733.

[f] The supersedeas may be discharged (1) on motion. *Blake v. Dodge*, 8 Lea (Tenn.) 465; *Redmond v. Redmond*, 9 Baxt. (Tenn.) 561; *Richmond v. Yates*, 3 Baxt. (Tenn.) 204. (2) Whether the order is within the statute is the only issue. *Blake v. Dodge*, 8 Lea (Tenn.) 465.

62. *Mabry v. Ross*, 1 Heisk. (Tenn.) 769; *Allen v. Nelson*, 7 Baxt. (Tenn.) 343.

[a] Orders which in fieri may be actively and affirmatively enforced against a party. *Redmond v. Redmond*, 9 Baxt. (Tenn.) 561.

[b] Negative or prohibitory orders cannot be superseded. *Redmond v. Redmond*, 9 Baxt. (Tenn.) 561; *McMinnville & M. R. Co. v. Huggins*, 7 Coldw. (Tenn.) 217.

[c] Therefore orders granting and dissolving injunctions cannot be superseded. *McMinnville & M. R. Co. v. Huggins*, 7 Coldw. (Tenn.) 217; *Mabry v. Ross*, 1 Heisk. (Tenn.) 769.

[d] An order appointing a receiver merely to take hold and dispose of property for benefit of parties cannot be superseded. But such an order when the receiver could not have been appointed at all or until settlement of the issues may be. *Downing v. Dunlap Coal, etc. Co.*, 93 Tenn. 221, 235, 24 S. W. 122.

[e] A fiat of a chancellor awarding extraordinary process cannot be superseded. *Redmond v. Redmond*, 9 Baxt. (Tenn.) 561.

63. **N. Y.**—See *Hunt v. Brooks*, 18 Johns. 5. **Pa.**—*Emery v. Patton*, 9 Phila. 125. **Eng.**—*Langston v. Grant*, 1 Salk. 92, 91 Eng. Reprint 85; *Nuby v. Jenkins*, 1 Sid. 351, 82 Eng. Reprint 1151.

64. *Emery v. Patton*, 9 Phila. (Pa.) 125; *Perry v. Ward*, 20 Vt. 92.

[a] Order Is Not as of Course. *Hunt v. Brooks*, 18 Johns. (N. Y.) 5; *Emery v. Patton*, 9 Phila. (Pa.) 125.

[b] Recognizance Required.—*State Treasurer v. Wells*, 27 Vt. 276.

65. See 16 STANDARD PROC. 499; 15 STANDARD PROC. 355.

66. See 10 STANDARD PROC. 928, 936.

**XII. MANDAMUS TO ENFORCE DUTIES RELATING TO SUPERSEDEAS.**—Mandamus lies to control ministerial duties connected with the granting of stays and supersedeas,<sup>67</sup> but not to control any discretion in this respect unless abused.<sup>68</sup> If the sheriff refuses to obey the supersedeas, a writ of mandamus may be issued,<sup>69</sup> except, perhaps, where there is another remedy by motion or order in the proceedings superseded or stayed.<sup>70</sup>

**XIII. CONTROL OF SUPERSEDEAS BY INJUNCTION.**—A supersedeas cannot be controlled by injunction.<sup>71</sup>

In election contests, see 8 STANDARD PROC. 112.

67. See *supra*, V, A, 2, b, (III), (C).

68. See 19 STANDARD PROC. 203.

69. *Ex parte* Grant, 53 Ala. 16.

70. See *supra*, V, A, 10, and 19 STANDARD PROC. 164.

71. *Burns v. Sanderson*, 13 Fla. 381.



# SUPPLEMENTAL PLEADING

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For forms, see 9 STANDARD PROC. 1183.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. NATURE, PURPOSE, AND NECESSITY.** — A. **GENERALLY.** Supplemental pleadings had their rise and development chiefly in the practice of the equity courts.<sup>1</sup> They are pleadings<sup>2</sup> introduced after the original pleadings have been filed to bring before the court new and material facts relevant to the case, which it was not within the power of the parties to take advantage of in their original pleadings or by amendment, either because, the new facts thus sought to be interposed in the case were not discovered in time, or because of their subsequent occurrence.<sup>3</sup> Such supplemental pleadings are not independent

1. See *infra*, I, B.
2. *Divine v. Duncan*, 52 How. Pr. (N. Y.), 446, 2 Abb. N. C. 328.
3. **Ala.**—*Walker v. Hallett*, 1 Ala. 379 (supplemental bill); *Bowie v. Minter*, 2 Ala. 406, supplemental bill. **Fla.**—*Ledwith v. Jacksonville*, 32 Fla. 1, 13 So. 454, supplemental bill. **Ind.**

pleadings,<sup>4</sup> neither are they original pleadings,<sup>5</sup> nor are they substitutes for such pleadings,<sup>6</sup> but they are only additional,<sup>7</sup> ancillary,<sup>8</sup> or secondary<sup>9</sup> thereto,<sup>10</sup> and are so far considered as a continuation or part of the original pleadings as to make them constitute therewith one pleading and one record.<sup>11</sup>

*Dillman v. Dillman*, 90 Ind. 585, supplemental complaint. **Ia.**—*Leach v. Germania Bldg. Assn.*, 102 Iowa 125, 70 N. W. 1090; *Seever v. Hamilton*, 11 Iowa 66 (supplemental petition); *Wright v. Meek*, 3 G. Gr. 472, original bill in nature of supplemental bill. **Md.**—*Schwab v. Schwab*, 93 Md. 382, 49 Atl. 331, 52 L. R. A. 414, supplemental bill. **Mass.**—*Graef v. Bernard*, 162 Mass. 300, 38 N. E. 503, case of a supplemental reply. **N. Y.**—*Beach v. Reynolds*, 64 Barb. 506, supplemental bill. **Ohio.**—*Gibson v. Dougherty*, 10 Ohio St. 365, supplemental petition. **Tex.**—*Blewitt v. Greene*, 57 Tex. Civ. App. 588, 122 S. W. 914, supplemental answer. **Wash.**—*Lawrence v. Pederson*, 34 Wash. 1, 74 Pac. 1011, supplemental complaint. **Eng.**—*Jones v. Jones*, 3 Atk. 217, 26 Eng. Reprint, 927, supplemental bill.

For definition of supplemental bill in the nature of bill of review, see, 4 STANDARD PROC. 456.

As to bills of revivor and supplement, see the title "Revivor."

4. *Lewis v. Rowland*, 131 Ind. 37, 30 N. E. 796.

[a] The original pleading must be on file at the time the supplemental pleading is filed, because the latter cannot of itself be the foundation of an action. *Ellis v. Indianapolis*, 148 Ind. 70, 47 N. E. 218, original complaint out on demurrer.

5. *Dann v. Baker*, 12 How. Pr. (N. Y.) 521; 4 STANDARD PROC. 107.

[a] "A supplemental bill was the continuation, not the commencement of a suit." *Attorney-General v. Corporation of Avon*, 3 De G. J. & S. 637, 33 Beav. 67, 33 L. J. Ch. 172, 2 New Rep. 564, 11 Wilk. Rep. 1050, 46 Eng. Reprint 783, 55 Eng. Reprint 291.

6. **Cal.**—*Giddings v. Seventy-Six Land & Water Co.*, 109 Cal. 116, 41 Pac. 788. **Ind.**—*Musselman v. Manly*, 42 Ind. 462. **N. Y.**—*Dann v. Baker*, 12 How. Pr. 521.

[a] An amendment to a pleading makes a substituted pleading, but a supplemental pleading leaves the form-

er pleading intact. *Giddings v. Seventy-Six Land & Water Co.*, 109 Cal. 116, 41 Pac. 788.

[b] **Withdrawal of Original Allegations.**—By filing a supplemental petition "the plaintiff does not thereby withdraw any allegation in his original petition not inconsistent with the averments in the supplemental petition." *Gibbon v. Dougherty*, 10 Ohio St. 365.

[c] **A supplemental answer does not waive or become a substitute for the previous answer.** *Hamlin v. Kinney*, 2 Ore. 91. See also *Thatcher v. Rockwell*, 4 Colo. 375; *Medbury v. Swan*, 46 N. Y. 200; *Brown v. Richardson*, 4 Robt. (N. Y.) 603. *Contra*, *Kortzen-dorfer v. St. Louis*, 52 Mo. 204; *Rubelman v. McNichol*, 13 Mo. App. 584.

7. **Conn.**—*Gillett v. Hall*, 13 Conn. 426. **Fla.**—*Neubert v. Massman*, 37 Fla. 91, 19 So. 625. **Me.**—*Mason v. York & C. R. Co.*, 52 Me. 82, 107. **Md.**—*Schwab v. Schwab*, 93 Md. 382, 49 Atl. 331, 52 L. R. A. 414. **N. Y.**—*Slauson v. Englehart*, 34 Barb. 198. **Vt.**—*Blondin v. McArthur*, 84 Vt. 516, 80 Atl. 663.

8. **U. S.**—*Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. ed. 1123. **Md.**—*Chappel Chemical & F. Co. v. Sulphur Mines Co.*, 85 Md. 681, 36 Atl. 121. **Ohio.**—*Gibbon v. Dougherty*, 10 Ohio St. 365.

9. *Hope v. Brinekerhoff*, 4 Edw. Ch. (N. Y.) 348.

10. See the following cases for statement of the office or function of supplemental pleadings: **Cal.**—*Young v. Matthew Turner Co.*, 168 Cal. 671, 143 Pac. 1029. **Ia.**—*Kean v. Rogers*, 118 N. W. 515. **Mass.**—*Bartlett v. New York, N. H. & H. R. Co.*, 226 Mass. 467, 115 N. E. 976. **N. Y.**—*Casassa v. Savarese*, 149 App. Div. 243, 133 N. Y. Supp. 657. **Okla.**—*Wade v. Gould*, 8 Okla. 690, 59 Pac. 11. **Tex.**—*Mellville v. Wickham* (Tex. Civ. App.), 169 S. W. 1123.

11. **U. S.**—*Berliner Gramophone Co. v. Seaman*, 113 Fed. 750, 51 C. C. A. 440. **Ind.**—*Muncie & Portland Traction Co.*



In modern practice the amendment has usurped some of the former functions of the supplemental pleading, and, in some jurisdictions, has entirely supplanted it;<sup>12</sup> the office of the supplemental pleading is now frequently restricted to introducing only such matters as have occurred since the institution of the suit, and not, as formerly, of also bringing in facts occurring before but not known till after the original pleadings were filed.<sup>13</sup> But even where supplemental pleadings have been abolished the general rules regarding them are applied to amendments which perform the same function.<sup>14</sup> The purpose of supplemental pleadings ordinarily is not to supply defects in the original pleadings,<sup>15</sup> which should, where possible, be done by amendment,<sup>16</sup> but is to

*v. Citizens' Gas, etc., Co.*, 179 Ind. 322, 100 N. E. 65; *Lewis v. Rowland*, 131 Ind. 37, 30 N. E. 796. **Md.** *Schwab v. Schwab*, 93 Md. 382, 49 Atl. 331, 52 L. R. A. 414.

Right to demur to supplemental pleading separately, see *infra*, VIII, B, 1.

[a] **Statute of Limitations.**—Since supplemental pleadings are not regarded as the commencement of a new suit, if the period of the statute of limitations is run before the supplemental pleadings are filed it will not constitute a bar and end the case if the suit of which the supplemental pleadings are a mere continuance is not barred. *Bryce v. Massey*, 35 S. C. 127, 14 S. E. 768.

12. See the statutes and rules of court and 1 STANDARD PROC. 850, 851. See also *Henry v. Travelers' Ins. Co.*, 45 Fed. 299; *Crumlish's Admr. v. Shenandoah Val. R. Co.*, 28 W. Va. 623.

[a] **Reason for Change.**—"The right to introduce into the record, by way of amendment, matters which have accrued subsequently to the filing of an original bill is, . . . a right which is given merely for the purpose of saving the expense of proceeding by supplemental bill." *Attorney-General v. Corporation of Avan*, 3 De G. J. & S. 637, 33 Beav. 67, 33 L. J. Ch. 172, 2 New Rep. 564, 11 Wlky. Rep. 1050, 46 Eng. Reprint 783, 55 Eng. Reprint 291.

[b] **The Terms Amendment and Supplement Used Synonymously.**—*Bannon v. Comegys*, 69 Md. 411, 16 Atl. 129.

13. See the statutes and rules and **Cal.**—*California Farm & Trust Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593. **Ind.**—*Musselman v. Manly*, 42

Ind. 462. **Mich.**—*Fisher v. Holden*, 84 Mich. 494, 47 N. W. 1063. *Wood v. Truax*, 39 Mich. 628. **Minn.**—*Guptill v. Red Wing*, 76 Minn. 129, 78 N. W. 970.

See also *infra*, this section. But see Federal Eq. Rule 34.

[a] **Amended and Supplemental Pleadings Distinguished.**—*SeEVERS v. Hamilton*, 11 Iowa 66. See also 1 STANDARD PROC. 850. A supplemental pleading is not a substitute for the original pleading by which the former pleading is superseded, but it is a further pleading and assumes that the original is to stand. *Musselman v. Manly*, 42 Ind. 462.

[b] **Notwithstanding the code provision** that "plaintiff and defendant respectively may be allowed, on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the case, occurring after the former complaint, answer, or reply, or of which the party was ignorant when his former pleading was made," facts occurring before the pleading was filed should be added by amendment and those subsequent should be added by supplemental pleading and not by amendment. *Murphy v. Plankinton Bank*, 18 S. D. 317, 100 N. W. 614.

14. *Bartlett v. New York, N. H. & H. R. Co.*, 226 Mass. 467, 115 N. E. 976; *Attorney-General v. Corporation of Avon*, 3 De G. J. & S. 637, 33 Beav. 67, 33 L. J. Ch. 172, 2 New Rep. 564, 11 Wlky. Rep. 1050, 46 Eng. Reprint 783, 55 Eng. Reprint 291. See *Becker v. Donaldson*, 133 Ga. 864, 67 S. E. 92.

15. See *infra*, IV, C and D and *Burks v. Burks* (Tex. Civ. App.), 141 S. W. 337.

16. See the titles "Amendments

strengthen or reinforce the original cause of action or defense or enlarge or change the relief sought by setting up facts that have occurred, or, in some jurisdictions, have been discovered since the commencement of the suit.<sup>17</sup>

**Necessity for.**—If a party wishes to avail himself of matters which are not provable without being pleaded and which have occurred subsequent to the filing of his original pleading and are therefore not proper subjects for amendment he must ordinarily set them up by way of supplemental pleading.<sup>18</sup> The court may, however, disregard the

and Joefails;” “Bills and Answers;” “New Cause of Action or Defense.”

17. **Cal.**—Imperial Land Co. v. Imperial Irr. Dist., 173 Cal. 668, 161 Pac. 116. **Ind.**—Dillman v. Dillman, 90 Ind. 585. **Ia.**—Kean v. Rogers, 118 N. W. 515; Leach v. Germania Bldg. Assn., 102 Iowa 125, 70 N. W. 1090. **Md.**—Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375. **Mo.**—Nave v. Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421. **N. Y.**—Wattson v. Thibou, 17 Abb. Pr. 184.

See *supra*, this section and *infra*, VI, C.

[a] **Reasons.**—(1) “Facts which occur subsequent to the filing of the original complaint, and which change the liabilities of the defendants, and, in consequence, the character of the judgment which is sought, cannot be incorporated into the original complaint by an amendment without presenting averments inconsistent with the date of the commencement of the action.” Van Maren v. Johnson, 15 Cal. 308; (2) The court will not permit a party to file two original bills and carry on two suits at the same time against the defendant to satisfy the same cause of action. Eager v. Price, 2 Paige (N. Y.) 333; (3) “The expense of an original bill is much greater than of a supplemental bill, and the latter should be used whenever it can equally subserve the purposes of justice.” Allen v. Taylor, 3 N. J. Eq. 435, 29 Am. Dec. 721.

[b] **They constitute an exception to the rule** that the rights of the parties to an action must be determined as they were at its commencement. **Cal.**—Metropolis Trust & Sav. Bank v. Barnet, 165 Cal. 449, 132 Pac. 833. **Mass.**—Graef v. Bernard, 162 Mass. 300, 38 N. E. 503; Bernard v. Toplitz, 160 Mass. 162, 35 N. E. 673, 39 Am. St. Rep. 465. **N. Y.**—Styles v.

Fuller, 101 N. Y. 622, 4 N. E. 348, 3 How. Pr. (N. S.) 464.

[c] **Subsequent events pleaded supplementally relate to the date of their happening** rather than to the beginning of the suit. Von Bernuth v. Von Bernuth, 76 N. J. Eq. 177, 73 Atl. 1049, 139 Am. St. Rep. 752. See also Duessel v. Proch, 78 Conn. 343, 62 Atl. 152, 3 L. R. A. (N. S.) 854.

18. **U. S.**—Hardy v. Johnson, 1 Wall. 371, 17 L. ed. 502 (applying California code); Kryptok Co. v. Haussmann & Co., 216 Fed. 267. **Ark.**—Brooks v. Moody, 25 Ark. 452, supplemental answer. **Cal.**—Moss v. Shear, 30 Cal. 467, plaintiff’s loss of title pendente lite. **Colo.**—Sayre v. Sage, 47 Colo. 559, 108 Pac. 160; Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760. **Kan.**—Porter v. Wells, 6 Kan. 448. **Ky.**—Butler v. Butler, 4 Litt. 201. **Minn.**—Guptill v. Red Wing, 76 Minn. 129, 78 N. W. 970. **N. Y.**—Lawrence v. Church, 128 N. Y. 324, 28 N. E. 499; Styles v. Fuller, 101 N. Y. 622, 4 N. E. 348, 3 How. Pr. (N. S.) 464. **N. C.**—See Williams v. Hutton, 164 N. C. 216, 80 S. E. 257. **S. C.**—McCaslan v. Latimer, 17 S. C. 123. **S. D.**—Murphy v. Plankinton Bank, 18 S. D. 317, 100 N. W. 614. **Utah**—Kahn v. Old Telegraph Min. Co., 2 Utah 174, subsequently acquired title. **Vt.**—Downer v. Wilson, 33 Vt. 1. **Wis.**—Pike v. Miles, 23 Wis. 164, 99 Am. Dec. 148.

See *infra*, IV.

**Compare** Delaware, L. & W. R. Co. v. Breckenridge, 56 N. J. Eq. 595, 40 Atl. 23; Crumlish’s Admr. v. Shenendoah Val. R. Co., 28 W. Va. 623.

**Subsequently accruing damages** where recoverable, may be, but apparently need not be, pleaded. See *infra*, VI, C, note 30 [a].

**In an action of foreclosure** subsequently accruing items of the secured indebtedness may be but need not, in

name given the pleading by the pleader and treat it as an amendment or a supplemental pleading as the circumstances and its contents may warrant.<sup>19</sup>

B. STATUTES AND RULES. — Although they had their rise and development in the equity courts, in many states where by statute legal and equitable procedure has been combined into one system, supplemental pleadings have received express statutory authorization or have been embodied in court rules.<sup>20</sup> Such statutes, with varying limitations, not only embody the principles long observed in chancery practice with respect to supplemental pleadings, making them applicable to procedure at law as well as in equity,<sup>21</sup> but they also compound the

some jurisdictions, be set up in supplemental pleadings. See *infra*, VI, C, note 30 [e].

Waiver of objection, see *infra*, VIII, C.

19. See *infra*, VII, C.

20. See the statutes and rules and the following cases: **Alaska.**—*Bush v. Pioneer Mining Co.*, 179 Fed. 78, 102 C. C. A. 372. **Colo.**—*Sylvester v. Jerome*, 19 Colo. 128, 34 Pac. 760. **Conn.**—*Goodrich v. Stanton*, 71 Conn. 418, 42 Atl. 74. **Ind.**—*Cleveland, C. C. & St. L. R. Co. v. Hadley*, 179 Ind. 429, 101 N. E. 473, 45 L. R. A. (N. S.) 796; *Barker v. Prizer*, 150 Ind. 4, 48 N. E. 4. **Ind. Ter.**—*Rutherford v. McDonald*, 3 Ind. Ter. 512, 61 S. W. 989, wherein the court cites the Arkansas statute. **Ia.**—*Allen v. Davenport*, 115 Iowa 20, 87 N. W. 743. **Kan.**—*Austin v. Jones*, 47 Kan. 565, 28 Pac. 621; *King v. Hyatt*, 31 Kan. 504, 31 Am. St. Rep. 304. **Ky.**—*Petry v. Petry*, 142 Ky. 564, 134 S. W. 922; *Dant v. Head*, 90 Ky. 255, 13 S. W. 1073, 29 Am. St. Rep. 369. **Minn.**—*State ex rel. Broderick v. Dist. Court*, 91 Minn. 161, 97 N. W. 581. **Mo.**—*Nave v. Adams*, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; *Childs v. Kansas City etc. R. Co.*, 117 Mo. 414, 17 S. W. 954, 23 S. W. 373. **Neb.**—*Flagg v. Flagg*, 39 Neb. 229, 58 N. W. 109. **N. M.**—*United States v. Rio Grande Dam & Irrigation Co.*, 13 N. M. 386, 85 Pac. 393 (*affirmed*, 215 U. S. 266, 30 Sup. Ct. 97, 54 L. ed. 190); *Albright v. Albright*, 21 N. M. 606, 157 Pac. 662, Ann. Cas. 1918 E. 542. **N. Y.**—*Halfmoon Bridge Co. v. Canal Board*, 213 N. Y. 160, 107 N. E. 344. **N. C.**—*Williams v. Hutton*, 164 N. C. 216, 80 S. E. 257. **N. D.**—*Swedish American Nat. Bank v. Dickinson Co.*, 6 N. D. 222, 69 N. W. 455, 49 L. R. A. 285. **Ohio.**—*Cincinnati v.*

*Cameron*, 33 Ohio St. 336. **Okla.**—*Wynnewood Cotton Oil Co. v. Moore*, 54 Okla. 163, 153 Pac. 633; *Reader v. Farriss*, 49 Okla. 459, 153 Pac. 678, L. R. A. 1916D, 672. **Ore.**—*Wagenaar v. Beeman-Woodward Co.*, 65 Ore. 109, 131 Pac. 1023. **S. C.**—*Copeland v. Copeland*, 60 S. C. 135, 38 S. E. 269; *Moon v. Johnson*, 14 S. C. 434. **S. D.**—*Ponca State Bank v. Adebar*, 35 S. D. 480, 152 N. W. 703; *Murphy v. Plankinton Bank*, 18 S. D. 317, 100 N. W. 614. **Tenn.**—*Peoples v. Carroll*, 11 Heisk. 417. **Utah.**—*Kahn v. Old Telegraph Min. Co.*, 2 Utah 174. **Wash.**—*Keeler v. Parks*, 72 Wash. 255, 130 Pac. 111. **Wis.**—*Moehlenpah v. Mayhew*, 138 Wis. 561, 119 N. W. 826; *Orton v. Noonan*, 29 Wis. 541. **Wyo.**—*Bank of Chadron v. Anderson*, 6 Wyo. 518, 48 Pac. 197.

[a] The purpose of statutes allowing supplemental pleadings "is to permit parties to avail themselves of any fact or matter that would have a bearing upon the litigation, so that the entire controversy may be settled in one lawsuit, and thereby obviate the necessity of trying a case by piecemeal." *Prince v. Gosnell*, 47 Okla. 570, 149 Pac. 1162.

21. See the statutes and the following: **U. S.**—*Bush v. Pioneer Mining Co.*, 179 Fed. 78, 102 C. C. A. 372. **Ind.**—*Johnson v. Briscoe*, 92 Ind. 367. **Ia.**—*Allen v. Davenport*, 115 Iowa 20, 87 N. W. 743. **Mo.**—*Childs v. Kansas City, etc. R. Co.*, 117 Mo. 414, 17 S. W. 954, 23 S. W. 373. **N. Y.**—*Holyoke v. Adams*, 59 N. Y. 233. **N. D.**—*Swedish American Nat. Bank v. Dickinson Co.*, 6 N. D. 222, 69 N. W. 455, 49 L. R. A. 285. **S. D.**—*Murphy v. Plankinton Bank*, 18 S. D. 317, 100 N. W. 614. **Wis.**—*Moehlenpah v. Mayhew*, 138 Wis. 561, 119 N. W. 826.



practice governing the common law pleading of *puis darrein continuance*.<sup>22</sup>

In construing statutes allowing supplemental pleadings to be filed, the courts, in order to arrive at a correct interpretation thereof, rely upon the practice established and followed by the equity courts prior to the passage of such legislation.<sup>23</sup>

In Texas supplemental pleadings seem to be different from the equity or code supplemental pleadings and may be filed only in response to the adversary's pleading, by way of exception, denial, or allegation of new matter in reply.<sup>24</sup>

22. Cal.—Harding *v. Minear*, 54 Cal. 502. Ind.—Kimble *v. Seal*, 92 Ind. 276. Mass.—Graef *v. Bernard*, 162 Mass. 300, 38 N. E. 503. Mo.—Childs *v. Kansas City*, etc. R. Co., 117 Mo. 414, 17 S. W. 954, 23 S. W. 373. N. Y.—Holyoke *v. Adams*, 59 N. Y. 233; Drought *v. Curtis*, 8 How. Pr. 56. N. C.—Williams *v. Hutton*, 164 N. C. 216, 80 S. E. 257. Ore.—Wagenaar *v. Beeman-Woodward Co.*, 65 Ore. 109, 131 Pac. 1023. S. D.—Murphy *v. Plankinton Bank*, 18 S. D. 317, 100 N. W. 614.

See the title "*Puis Darrein Continuance*."

[a] A Supplemental Answer Is a Substitute for the Plea *Puis Darrein Continuance*.—Harding *v. Minear*, 54 Cal. 502; Holyoke *v. Adams*, 59 N. Y. 233; Drought *v. Curtis*, 8 How. Pr. (N. Y.) 56; Bate *v. Fellowes*, 4 Bosw. (N. Y.) 638.

[b] Leave to serve a supplemental answer in actions at law will be granted in all cases in which a plea *puis darrein continuance* could be put in as a matter of right. Holyoke *v. Adams*, 59 N. Y. 233.

[c] Distinction Between a Supplemental Answer and a Plea *Puis Darrein Continuance*.—(1) The general rule in actions at law was that the plea *puis darrein* was a waiver of all former pleas, and made the only issue to be tried in the action. This was not so, however, when the latter plea was not inconsistent with former pleas. In suits in chancery, on the contrary, a supplemental answer was never regarded as a waiver of the first answer. It was, as its name implied, an addition to the first answer. Slauson *v. Englehart*, 34 Barb. (N. Y.) 198. See also Thatcher *v. Rockwell*, 4 Colo. 375, and *supra*, I, A, note 6. (2) A supplemental answer under the code differs from the plea *puis dar-*

rein continuance in that the supplemental answer may be allowed on motion whenever the facts forming the ground of the answer have occurred since the answer was put in, or where the defendant was ignorant of them at the time of pleading the first answer, whereas the plea *puis darrein continuance* could strictly be pleaded only before or at the next continuance after the facts transpired. Drought *v. Curtis*, 8 How. Pr. (N. Y.) 56.

23. Ind.—Barker *v. Prizer*, 150 Ind. 4, 48 N. E. 4. Mo.—Childs *v. Kansas City*, etc. R. Co., 117 Mo. 414, 17 S. W. 954, 23 S. W. 373. Neb.—Null *v. Jones*, 5 Neb. 500. N. Y.—Dann *v. Baker*, 12 How. Pr. 521; Greene *v. Bates*, 7 How. Pr. 296. See Roach *v. La Farge*, 43 Barb. 616, 19 Abb. Pr. 67. N. D.—Swedish American Nat. Bank *v. Dickinson Co.*, 6 N. D. 222, 69 N. W. 455, 49 L. R. A. 285. S. D.—Murphy *v. Plankinton Bank*, 18 S. D. 317, 100 N. W. 614. Wis.—Moehlenpah *v. Mayhew*, 138 Wis. 561, 119 N. W. 826.

[a] "The principles that obtained prior to the passage of the code . . . still continue, except when either expressly abrogated by, or manifestly inconsistent with, the provisions of the code." Wattson *v. Thibou*, 17 Abb. Pr. (N. Y.) 184.

24. See Rules in 84 Tex. 708, 709, 20 S. W. xii, and the following: Chicago, R. I. & T. R. Co. *v. Halsell*, 98 Tex. 244, 83 S. W. 14; Crescent Ins. Co. *v. Camp*, 64 Tex. 521; Hicks *v. Stewart*, 53 Tex. Civ. App. 401, 118 S. W. 206; San Antonio *v. Wildenstein*, 49 Tex. Civ. App. 514, 109 S. W. 231; Foley *v. Northrup*, 47 Tex. Civ. App. 277, 105 S. W. 229 (*affirmed* without opinion in 102 Tex. 582); Standifer *v. Bond Hdw. Co.* (Tex. Civ. App.), 94 S. W. 144; Hatch *v. Rodgers* (Tex.

## II. JURISDICTION AND LEAVE OF COURT TO ENTERTAIN SUPPLEMENTAL PLEADINGS.—A. JURISDICTION.—

Under the reformed practice the jurisdiction of courts of equity to entertain supplemental pleadings has been by statute extended to the law courts.<sup>25</sup> As supplemental pleadings are a continuation of the original pleadings, no objection can be made to the jurisdiction of the court in which they are filed when that court is the one that assumed and properly had jurisdiction of the original pleadings.<sup>26</sup> And while it might seem that application could not be made in the appellate court, the contrary has been held.<sup>27</sup>

**B. LEAVE OF COURT.—1. Necessity.**—Leave of court is required before any supplemental pleading may be filed, either in an action at

Civ. App.), 40 S. W. 819; *Tomson v. Heidenheimer*, 16 Tex. Civ. App. 114, 40 S. W. 425.

[a] **Effect of amendment of original pleading**, see *Chicago, R. I. & T. R. Co. v. Halsell*, 98 Tex. 244, 83 S. W. 15; *Hicks v. Stewart*, 53 Tex. Civ. App. 401, 118 S. W. 206.

25. See the statutes, and *supra*, I, B.

26. *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. (U. S.) 609, 17 L. ed. 886.

[a] **Diversity of Citizenship.**—(1) It is no objection to a supplemental pleading filed in a federal court that such pleading brings in parties who are all citizens of the same state if the court had jurisdiction of the first pleadings. *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. (U. S.) 609, 17 L. ed. 886. (2) And if the original suit is between citizens of the same state, a citizen of another state seeking to become a party to such suit by means of a supplemental pleading cannot have the suit removed from the state to the federal court. *Hospes v. Northwestern Mfg. & Car Co.*, 22 Fed. 565.

[b] **Where an original bill in the nature of a supplemental bill sought to affect the title to land in another county from that in which the original pleadings were on file and all the parties to the new pleading were residents of the county in which the land was located, it was held that as the pleading was not a purely supplemental one and in continuance of the original pleadings it should be filed in the county where the subject matter and parties were located.** *McDonald v. Asay*, 139 Ill. 123, 27 N. E. 929.

[c] **Plea to the Jurisdiction.**—"It is probable, I think, that, although it is now too late to raise the question as to the validity of the original proceedings and decree, the question of jurisdiction might be raised upon a supplemental bill, seeking to enlarge and extend the relief prayed, so as to include other property." *Mosgrove v. Kountze*, 14 Fed. 315. See *Standley v. Currey* (Tex. Civ. App.), 161 S. W. 416.

[d] **Service on New Parties Necessary To Give Court Jurisdiction.**—*McMinn v. Whelan*, 27 Cal. 300. See *infra*, IV, A, 2.

[e] **State court cannot oust the federal courts of jurisdiction by entertaining a suit with respect to a matter that is properly supplemental to a controversy already before the federal courts when a motion for leave to file supplemental pleadings with respect to the new matter is pending in the federal courts.** *Knott v. Chicago, B. & Q. Ry. Co.*, 230 U. S. 474, 33 Sup. Ct. 975, 57 L. ed. 1571.

[f] **Only courts of record may permit the filing of supplemental pleadings.** *Myers v. Rosenback*, 7 Misc. 560, 28 N. Y. Supp. 9, 23 Civ. Proc. 363.

[g] **Referee has no authority to allow supplemental pleadings.** *Lyon v. Isett*, 2 Jones & S. (N. Y.) 41, 11 Abb. Pr. (N. S.) 353, 42 How. Pr. 155.

**After appeal from justice court, see *infra*, III, A.**

**As to filing supplemental bill alleging jurisdictional facts in a creditor's suit, see 6 STANDARD PROC. 185.**

27. See *Ponca State Bank v. Adabar*, 35 S. D. 480, 152 N. W. 703, and *infra*, III, A.

law or in a suit in equity.<sup>28</sup> A supplemental pleading filed without leave of court will be stricken from the files upon motion,<sup>29</sup> but under special circumstances the court may order such pleading to stand,<sup>30</sup> and it has been held that when the court declines to strike out a supplemental pleading filed without leave, such refusal is tantamount to leave.<sup>31</sup> The objection that service of a supplemental pleading was made without leave may be waived.<sup>32</sup>

**2. Discretion.**—*a. Generally.*—It rests in the sound discretion of the court to grant or refuse leave to file supplemental pleadings,<sup>33</sup>

**28. U. S.**—Rio Grande D. & Irr. Co. v. United States, 215 U. S. 266, 30 Sup. Ct. 97, 54 L. ed. 190; Kennedy v. Georgia State Bank, 8 How. 586, 12 L. ed. 1209; Henry v. Travelers Ins. Co., 45 Fed. 299. See Equity Rule 34. **Ala.**—Bowie v. Minter, 2 Ala. 406. **Cal.**—Seehorn v. Big Meadows & B. W. Road Co., 60 Cal. 240; Harding v. Minear, 54 Cal. 502. **Colo.**—Rogers v. Rogers, 57 Colo. 132, 140 Pac. 193; Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760. **Ill.**—Davis v. Lanz, 153 Ill. 175, 38 N. E. 635; Millikin v. Jones, 77 Ill. 372. **Kan.**—Clark v. Spencer, 14 Kan. 398, 19 Am. Rep. 96. **Ky.**—Petry v. Petry, 142 Ky. 564, 134 S. W. 922; Asher v. Uhl, 122 Ky. 114, 87 S. W. 307, 93 S. W. 29. **La.**—Koeber v. New Orleans Levee Bd., 51 La. Ann. 523, 25 So. 415; State v. Pilsbury, 31 La. Ann. 1. **Md.**—Winn v. Albert, 2 Md. Ch. 42. **Mass.**—Graef v. Bernard, 162 Mass. 300, 38 N. E. 503 (supplemental reply); Pedrick v. White, 1 Mete. 76. **Minn.**—Guptill v. Red Wing, 76 Minn. 129, 78 N. W. 970. **Neb.**—Flagg v. Flagg, 39 Neb. 229, 58 N. W. 109. **N. H.**—Tappan v. Evans, 12 N. H. 330. **N. J.**—Allen v. Taylor, 3 N. J. Eq. 435, 29 Am. Dec. 721. **N. M.**—United States v. Rio Grande Dam & Irr. Co., 13 N. M. 386, 85 Pac. 393, *affirmed*, 215 U. S. 266, 30 Sup. Ct. 97, 54 L. ed. 190. **N. Y.**—Holyoke v. Adams, 59 N. Y. 233; Fisk v. Albany & S. R. Co., 8 Abb. Pr. (N. S.) 309. **N. C.**—Williams v. Hutton, 164 N. C. 216, 80 S. E. 257. **S. C.**—Pickett v. Fidelity & Cas. Co., 60 S. C. 477, 38 S. E. 160, 629; Moon v. Johnson, 14 S. C. 434. But not for supplemental complaint to revive. Arthur v. Allen, 22 S. C. 432. **S. D.**—Ernst v. Christianson, 24 S. D. 103, 123 N. W. 711; Murphy v. Plankinton Bank, 18 S. D. 317, 100 N. W. 614. **Tex.**—Tomson v. Heidenheimer, 16 Tex. Civ. App. 114, 40 S. W. 425. **Wis.**—Matteson v. Curtis, 14 Wis. 436. **Wyo.**

Bank of Chadron v. Anderson, 6 Wyo. 518, 48 Pac. 197.

[a] **Reason.**—This control has been deemed necessary to prevent delay and vexation. Buckingham v. Corning, 29 N. J. Eq. 238.

[b] **Supplemental reply** must be on leave. Graef v. Bernard, 162 Mass. 300, 38 N. E. 503.

**29.** Braxton v. Liddon, 49 Fla. 280, 38 So. 717; Millikin v. Jones, 77 Ill. 372.

**Filing before application**, see *infra*, III, A.

**As ground of demurrer**, see *infra*, VIII, B, 2.

**30.** Mackintosh v. Flint & P. M. R. Co., 34 Fed. 582; Pedrick v. White, 1 Mete. (Mass.) 76, "if sufficient cause is shown."

**31.** Ward v. Whitfield, 64 Miss. 754, 2 So. 493.

**32.** Greenblatt v. Mendelsohn, 46 Misc. 554, 92 N. Y. Supp. 963, proper service acknowledged.

**33. U. S.**—Brookfield v. Novelty Glass Mfg. Co., 170 Fed. 960, 96 C. C. A. 127; Berliner Gramophone Co. v. Seaman, 113 Fed. 750, 51 C. C. A. 440. **Ala.**—Cahaba Southern Min. Co. v. Pratt, 146 Ala. 245, 40 So. 943. **Cal.**—Jensen v. Dorr, 159 Cal. 742, 116 Pac. 553; Harding v. Minear, 54 Cal. 502; Kirstein v. Madden, 38 Cal. 158. **Colo.**—Rogers v. Rogers, 57 Colo. 132, 140 Pac. 193. **Ill.**—Davis v. Lang, 153 Ill. 175, 38 N. E. 635; Haas v. Stenger, 75 Ill. 597. **Ind.**—Cleveland, C. C. & St. L. R. Co. v. Hadley, 179 Ind. 429, 101 N. E. 473, 45 L. R. A. (N. S.) 796; Muncie & Portland Tract. Co. v. Citizens', etc. Co., 179 Ind. 322, 100 N. E. 65. **Kan.**—Alexander v. Clarkson, 96 Kan. 174, 150 Pac. 576; Central Branch U. P. R. Co. v. Andrews, 41 Kan. 370, 21 Pac. 276. **Ky.**—Petry v. Petry, 142 Ky. 564, 134 S. W. 922; Asher v. Uhl, 122 Ky. 114, 87 S. W. 307, 93 S. W. 29. **Md.**—Wilmer v. Placide, 128 Md.



though this discretion must be exercised reasonably and without caprice.<sup>34</sup> It is generally true that the granting of leave is not a mere matter-of-course,<sup>35</sup> and the action of the court will depend somewhat upon the stage of the proceedings at which the application for leave is presented,<sup>36</sup> and whether the party knew or should have known the facts when he filed his original pleading,<sup>37</sup> or in time to have supplied them by amendment, where an amendment is permissible.<sup>38</sup> But doubt-

168, 97 Atl. 363; *Frisby v. Parkhurst*, 29 Md. 58, 96 Am. Dec. 503. **Mass.** *Graef v. Bernard*, 162 Mass. 300, 38 N. E. 503. **Minn.**—*Guptill v. Red Wing*, 76 Minn. 129, 78 N. W. 970; *Voak v. Nat. Investment Co.*, 51 Minn. 450, 53 N. W. 708. **Neb.**—*Fitzgerald's Estate v. Union Sav. Bank*, 65 Neb. 97, 90 N. W. 994; *Flagg v. Flagg*, 39 Neb. 229, 58 N. W. 109. **N. M.** *United States v. Rio Grande Dam & Irr. Co.*, 13 N. M. 386, 85 Pac. 393, *affirmed*, 215 U. S. 266, 30 Sup. Ct. 97, 54 L. ed. 190. **N. Y.**—*Halfmoon Bridge Co. v. Canal Board*, 213 N. Y. 160, 107 N. E. 344; *Park & Sons Co. v. Hubbard*, 198 N. Y. 136, 91 N. E. 261. **Ohio.**—*Carter v. Jennings*, 24 Ohio St. 182. **Okla.**—*Prince v. Gosnell*, 47 Okla. 570, 149 Pac. 1162; *Lewis v. Allen*, 42 Okla. 584, 142 Pac. 384. **S. C.**—*Bernard v. Bernard*, 79 S. C. 364, 60 S. E. 700, 128 Am. St. Rep. 852; *Copeland v. Copeland*, 60 S. C. 135, 38 S. E. 269. **S. D.**—*Ernst v. Christiansen*, 24 S. D. 103, 123 N. W. 711. **Wash.** *Burnett v. Ewing*, 39 Wash. 45, 80 Pac. 855; *McDaniels v. Gowey*, 30 Wash. 412, 71 Pac. 12; *Davis v. Erickson*, 3 Wash. 654, 29 Pac. 86. **W. Va.**—*Dudley v. Niswander & Co.*, 65 W. Va. 461, 64 S. E. 745.

[a] "There are cases . . . in which a party not guilty of laches has a substantial right to serve a supplemental pleading. In other cases it is a matter in the discretion of the court." *Park & Sons Co. v. Hubbard*, 198 N. Y. 136, 91 N. E. 261.

[b] **Reasons for the Rule.**—"Neither party has the right, after pleadings have once been filed, issue joined, and the case ready for trial, to change the issues by filing either an amended or supplemental pleading. This can be done only by leave of the court, and the granting of leave is within the discretion of the court. Error will lie only when an abuse of that discretion is shown. . . . It may be that, as supplemental pleadings embrace only subsequent facts, there can be fewer

reasons for refusing to permit them to be filed; but still, like amended pleadings, they are within the control, and subject to the discretion, of the court." *Brewer, J., in Clark v. Spencer*, 14 Kan. 398, 19 Am. Rep. 96.

**34. Cal.**—*Jensen v. Dorr*, 159 Cal. 742, 116 Pac. 553; *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. 119. **Kan.**—*Alexander v. Clarkson*, 96 Kan. 174, 150 Pac. 576. **Mass.**—*Pedrick v. White*, 1 Mete. 76. **N. Y.**—*Halfmoon Bridge Co. v. Canal Board*, 213 N. Y. 160, 107 N. E. 344; *Spears v. New York*, 72 N. Y. 442. **S. C.**—*Pickett v. Fidelity & Cas. Co.*, 60 S. C. 477, 38 S. E. 160, 629.

[a] **Counterclaim.**—Where facts proposed to be set out in a supplemental answer could have been interposed as a defense to the action, and as a counterclaim therein, there is no abuse of discretion in denying the motion for leave to file such answer. *Ernst v. Christianson*, 24 S. D. 103, 123 N. W. 711.

[b] **Defective statement of defense in a supplemental answer** not a sufficient reason for refusing to permit such answer to be filed if it contains the substance of a good defense, as it can be moved against after filing if it does not conform to rules of pleading. *Burnett v. Kirk*, 39 Wash. 45, 80 Pac. 855.

**35. Md.**—*Winn v. Albert*, 2 Md. Ch. 42. **Mass.**—*Pedrick v. White*, 1 Mete. 76. **S. C.**—*Moon v. Johnson*, 14 S. C. 434.

See also cases in preceding notes.

**36.** See *infra*, III, B, and the cases in following note.

**37. U. S.**—*Suydam v. Truesdale*, 6 McLean 459, 23 Fed. Cas. No. 13,656; *Healey Ice Machine Co. v. Green*, 184 Fed. 515; *Mosgrove v. Kountze*, 4 McCrary 561, 14 Fed. 315. **Colo.**—*Park v. McKee*, 24 Colo. App. 11, 131 Pac. 279. **Fla.**—*Owens v. Love*, 9 Fla. 325. **Miss.** See *Walker v. Gilbert*, 7 Smed. & M. 456. **Mo.**—*Henderson v. Henderson*, 55 Mo. 534.

**38.** *Henry v. Travelers' Ins. Co.*, 45 Fed. 299.

less, as held by some courts and strongly intimated by others, there are circumstances, as in case of material matters occurring after filing the original pleading and as to which he would be concluded by the judgment, where a party may have a substantial, affirmative right to file supplemental pleadings, provided that right has not been by any means forfeited;<sup>39</sup> and it is almost a matter of course to allow proper supplemental pleadings to be filed if application is promptly made and their allowance does not injure the other party.<sup>40</sup> In any event, if there is an abuse of discretion in granting or refusing leave the action of the court may, in most jurisdictions, be assigned as error and reviewed upon appeal.<sup>41</sup>

b. *Conditions.*—The court may in its discretion attach conditions to the granting of leave to file supplemental pleadings,<sup>42</sup> as, for example, the payment of costs.<sup>43</sup> Provision is usually made for such

[a] If an amendment is permissible a supplemental pleading will not be allowed. See *Clark v. First Cong. Soc.*, 46 N. H. 272; *Hope v. Brinckerhoff*, 4 Edw. (N. Y.) 348; *McMahon v. Allen*, 3 Abb. Pr. (N. Y.) 89, 1 Hilt. 103.

39. *Ark.*—*Brooks v. Moody*, 25 Ark. 452. *Minn.*—*Guptill v. Red Wing*, 76 Minn. 129, 78 N. W. 970; *Voak v. National Investment Co.*, 51 Minn. 450, 53 N. W. 708. *N. Y.*—*Park & Sons Co. v. Hubbard*, 198 N. Y. 136, 91 N. E. 261; *Sand v. Borman*, 134 App. Div. 651, 119 N. Y. Supp. 454. *S. D.* *Schouweiler v. Hough*, 7 S. D. 163, 63 N. W. 776. *Tenn.*—*Peoples v. Carrol*, 11 Heisk. 417. *Wash.*—*Burnett v. Ewing*, 29 Wash. 45, 80 Pac. 855.

[a] "Any defense which a party could have pleaded *puis darrein continuance* (1) as a matter of strict right, he should be allowed to set up by supplemental answer. . . . If the defendant be guilty of laches, it is in the discretion of the court to receive the plea or not." *Morel v. Garely*, 16 Abb. Pr. (N. Y.) 269. (2) When a plea *puis would* on motion have been ordered off the files on the ground of fraud or gross injustice the court may now refuse to receive it as a supplemental answer, but the code provision was not designed to alter the rules so as to leave the reception of the plea open to a larger discretion than the courts previously exercised on the same subject. *Bate v. Fellowes*, 4 Bosw. (N. Y.) 638.

[b] Where the supplemental facts would extinguish the plaintiff's cause of action they may be pleaded as a

matter of right. *Drought v. Curtis*, 8 How. Pr. (N. Y.) 56. "It is an abuse of discretion for a trial court to refuse leave to a defendant to set up by supplemental answer a bankruptcy discharge obtained subsequent to the commencement of the action, as a bar to any personal judgment, where proper application is made thereof within a reasonable time after obtaining such discharge." *Jensen v. Dorr*, 159 Cal. 742, 116 Pac. 553.

40. *Milliken v. McGarrah*, 164 App. Div. 110, 149 N. Y. Supp. 484; *Sage v. Mosher*, 17 How. Pr. (N. Y.) 367; *Schouweiler v. Hough*, 7 S. D. 163, 63 N. W. 776; *Eager v. Price*, 2 Paige (N. Y.) 333.

41. See *infra*, XII.

42. *Cal.*—*Greenwood v. Adams*, 80 Cal. 74, 21 Pac. 1134; *Seehorn v. Big Meadows & B. W. Road Co.*, 60 Cal. 240. *Ia.*—*Gribben v. Clement*, 141 Iowa 144, 119 N. W. 596, 133 Am. St. Rep. 157. *La.*—*Koerber v. New Orleans Levee Board*, 51 La. Ann. 523, 25 So. 415. *N. Y.*—*Sage v. Mosher*, 17 How. Pr. 367; *Staunton v. Swann*, 10 Civ. Proc. 12. *Wis.*—*Damp v. Dane*, 33 Wis. 430; *Boorman v. Sunnuchs*, 42 Wis. 233.

[a] A failure to impose terms will not be considered ordinarily as an abuse of discretion, especially where the other party does not demand their imposition or take an exception to the order of the court permitting the filing of a supplemental pleading without terms. *Boorman v. Sunnuchs*, 42 Wis. 233.

43. *Cal.*—*Greenwood v. Adams*, 80 Cal. 74, 21 Pac. 1134. *Ia.*—*Gribben*

conditions by statute<sup>44</sup> or rule of court.<sup>45</sup> It is optional with a party to accept the terms and take the benefit of the order, or to refuse to do so and forego such benefit.<sup>46</sup> Notice of election to repudiate the terms should be given to the opposing party.<sup>47</sup>

**3. Application.**—In general, application for leave to file supplemental pleadings is requisite,<sup>48</sup> but the court under some circumstances may of its own motion direct a party to file a supplemental pleading if justice demands.<sup>49</sup> The application may be made orally,<sup>50</sup> though usually it is made in writing on motion and affidavit;<sup>51</sup> but, in either case, the applicant must fully apprise the court of the essential facts relied upon as the ground for asking leave to file the supplemental pleading.<sup>52</sup> The practice of the courts touching applications for leave

*v. Clement*, 141 Iowa 144, 119 N. W. 596, 133 Am. St. Rep. 157. **N. Y.** *Sage v. Mosher*, 17 How. Pr. 367; *Barnett v. Holbrook, etc. Corp.*, 175 App. Div. 881, 160 N. Y. Supp. 1052. **Wis.** *Damp v. Dane*, 33 Wis. 430.

[a] **Waiver of Costs.**—A party does not waive his right to the costs required by the court to be paid by the person asking leave to file a supplemental pleading by demurring to such pleading before the costs are paid. *Damp v. Dane*, 33 Wis. 430. See also *Marshall v. Merritt*, 13 Allen (Mass.) 274.

[b] **In Iowa** where an action prematurely brought may be aided by supplemental pleading, the usual terms imposed are that the plaintiff be required to pay all costs incurred prior to the maturity of his cause of action. *Gribben v. Clement*, 141 Iowa 144, 119 N. W. 596, 133 Am. St. Rep. 157.

44. *Jackson v. Matthews*, 128 N. Y. Supp. 1042; *Reader v. Farriss*, 49 Okla. 459, 153 Pac. 678, L. R. A. 1916D, 672.

45. Federal Equity Rule 34, effective Feb. 1, 1913.

46. *Damp v. Dane*, 33 Wis. 430. See *Pickrell v. Mendel*, 87 App. Div. 163, 84 N. Y. Supp. 70.

[a] **Repudiation of Terms.**—Where a party files a supplemental pleading, treats it as being regularly interposed in the case, and gives no notice to the opposing party that the terms upon which the order of allowance were given are not accepted, such party cannot be heard to say after demurrer to the supplemental pleading that he repudiated the terms. *Damp v. Dane*, 33 Wis. 430.

47. *Damp v. Dane*, 33 Wis. 430.

48. **Ill.**—*Tierney v. Sampsell*, 172

**Ill. App. 119. Minn.**—*Stacy v. Stephen*, 78 Minn. 480, 81 N. W. 391. **S. C.** *Pickett v. Fidelity & Cas. Co.*, 60 S. C. 477, 38 S. E. 160, 629.

[a] **Abandonment of Application.**

A court may well conclude that an application for leave to file a supplemental answer has been abandoned when the defendant after procuring an order on plaintiff to show cause and having set it for hearing failed to appear at such hearing. *Wood v. Brush*, 72 Cal. 224, 13 Pac. 627.

**In what court**, see *supra*, II, A.

[b] **Abandonment of Application or Motion.**—If a party fails to appear at the hearing of his application or motion for leave to file a supplemental pleading the court is justified in concluding that he has abandoned his application or motion. *Wood v. Brush*, 72 Cal. 224, 13 Pac. 627.

49. *Moehlenpah v. Mayhew*, 138 Wis. 561, 119 N. W. 826.

50. *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 179 Ind. 429, 101 N. E. 473, 45 L. R. A. (N. S.) 796.

51. See the following cases: **Colo.** *Pollard v. Lathrop*, 12 Colo. 171, 20 Pac. 251, holding facts stated in affidavit not sufficient. **La.**—*Maillet v. Martin*, 15 La. Ann. 40. **N. Y.**—*Garner v. Hannah*, 6 Duer 262; *Hendricks v. Decker*, 35 Barb. 298; *Rosenbaum v. Breslau*, 54 Misc. 76, 104 N. Y. Supp. 506.

**For forms**, see 9 STANDARD PROC. 1186.

52. **U. S.**—*Parkhurst v. Kinsman*, 2 Blatchf. 72, 18 Fed. Cas. No. 10,758. **Kan.**—Central Branch U. P. R. Co. *v. Andrews*, 41 Kan. 370, 21 Pac. 276. **N. Y.**—*Reynolds v. Aetna Life Ins. Co.*, 11 App. Div. 99, 42 N. Y. Supp. 1058.



to file supplemental pleadings generally has been liberal to the applicant,<sup>53</sup> and ordinarily the court will not proceed to try the cause on such application,<sup>54</sup> but will examine the question only so far as to determine whether or not the pleading is sought to be injected into the proceedings for purposes of vexation and delay,<sup>55</sup> leaving the other party to his remedy by plea, answer, or demurrer if the supplemental pleading is filed without sufficient grounds,<sup>56</sup> though the latter may, it seems, oppose the application on the ground that the matter proposed to be pleaded is not proper subject matter for a supplemental pleading.<sup>57</sup> The mere leave to file a supplemental complaint decides nothing as to the plaintiff's rights,<sup>58</sup> and the order granting leave, even though made

**[a] The Supplemental Pleading Sought To Be Introduced Must Be Filed With the Motion for Leave.**

*Diehl v. Beck*, 61 App. Div. 570, 70 N. Y. Supp. 818; *Fitzgerald's Estate v. Union Sav. Bank*, 65 Neb. 97, 90 N. W. 994. Although this may not be required in all jurisdictions, yet it is the safest course to pursue. *Schmidt v. Braley*, 112 Ill. 48, 1 N. E. 267, wherein it is said, "It does not appear from the record what was the character of the new answer which appellants proposed to file, nor, indeed, does it appear that an answer had been prepared at all. How can this court say there was error in refusing to permit an answer to be filed which is not embodied in the record? Even if we assume one was prepared by counsel, which we have no right to do, still we cannot judicially know what it contained, and must presume it was of such a character as warranted the court below in refusing to permit it to be filed." See also *Newell v. Newell*, 27 Misc. 117, 57 N. Y. Supp. 403; *Diehl v. Lambart*, 9 Civ. Proc. (N. Y.) 347.

**[b] A prima facie showing of facts material to the case or defense must be made by the motion for leave to file.** *Pickett v. Fidelity & Cas. Co.*, 60 S. C. 477, 38 S. E. 160, 629.

**[c] If the defense existed at the time the former pleadings were filed the reasons why the new defense offered in the supplemental answer was not used before must be affirmatively shown.** *Asher v. Uhl*, 122 Ky. 114, 87 S. W. 307, 93 S. W. 29.

**[d] Application Must Be Made, Under the Code, on Motion, or Order To Show Cause.**—*Harding v. Minear*, 54 Cal. 502. See also *Jones v. Gould*, 56 Misc. 328, 107 N. Y. Supp. 661.

**[e] Unsatisfactory Showing.**—"In view of the indefiniteness of the proposed answer, and the meagre and unsatisfactory showing upon which the application was based, we cannot hold that the court abused the discretion with which it was vested." *Central Branch Union P. R. Co. v. Andrews*, 41 Kan. 370, 21 Pac. 276.

**[f] If there is probable cause for filing a supplemental pleading leave will be granted.** *Eager v. Price*, 2 Paige (N. Y.) 333.

**[g] "Must make out such a case that it shall appear due to general justice to permit the issue to be altered."** *Wells v. Wood*, 10 Ves. Jr. 401, 32 Eng. Reprint 900 (Lord Eldon).

53. *Oregon & Transcontinental Co. v. Northern Pac. R. Co.*, 32 Fed. 428 (wherein the court granted a motion for leave to file a supplemental bill although "upon the facts set forth in the supplemental bill, there may be grave doubts as to the complainant's right to the relief prayed for in such bill"); *Cornwall v. Cornwall*, 30 Hun (N. Y.) 573.

54. *Oregon & T. Co. v. Northern Pac. R. Co.*, 32 Fed. 428; *Barnett v. Holbrook, Cabot & Rollins Corp.*, 175 App. Div. 881, 160 N. Y. Supp. 1052; *Bate v. Fellowes*, 4 Bosw. (N. Y.) 638.

55. *Eager v. Price*, 2 Paige (N. Y.) 333.

56. **Ga.**—*Dulin v. Caldwell & Co.*, 29 Ga. 362. **N. Y.**—*Fisk v. Albany & S. R. Co.*, 8 Abb. Pr. (N. S.) 309. **Wis.**—*Turner v. Pierce*, 31 Wis. 342.

57. See **U. S.**—*Maynard v. Green*, 30 Fed. 643. **Fla.**—*Crump v. Perkins*, 18 Fla. 353. **Mass.**—*Pinch v. Anthony*, 10 Allen 470.

58. *Robbins v. Wells*, 26 How. Pr. (N. Y.) 15, 18 Abb. Pr. 191, 1 Robt.

by consent, should not be treated as an adjudication binding upon the parties, as to the sufficiency of the pleading.<sup>59</sup> Where it does not appear whether a supplemental pleading was filed by consent of parties or leave of court, the proceedings will be considered to have been regular.<sup>60</sup>

Where both plaintiff and defendant may file a supplemental bill preference will be given to the plaintiff's application.<sup>61</sup>

**4. Notice of Motion or Application To File.**—In the absence of a statute or rule requiring notice to the opposing party, it has been held that notice is not necessary, though the court may, with propriety, require notice to be given.<sup>62</sup> Notice is necessary, however, if some immediate, special relief, such as a preliminary or interlocutory injunction, is asked for;<sup>63</sup> and, under strict practice, a supplemental bill by which it is sought to add to the terms of a decree cannot be filed without notice—at least to the parties adversely affected.<sup>64</sup> Notice to the opposing party is quite generally required either by statute or rule of court,<sup>65</sup> but in any case, the opposing party may waive notice by his voluntary appearance,<sup>66</sup> by his failure to object to want of notice when leave to file supplemental pleadings is asked in open court,<sup>67</sup> by demurring to the supplemental pleading without taking objection on the

666; *Central Trust Co. v. West India Imp. Co.*, 109 App. Div. 517, 96 N. Y. Supp. 519.

59. *Turner v. Pierce*, 31 Wis. 342.

60. *Gillett v. Hall*, 13 Conn. 426. As to consent of parties, see *Callaway v. Webster*, 1 Rob. (La.) 553; *Turner v. Pierce*, 31 Wis. 342.

61. See *infra*, IV.

62. **U. S.**—*Thompson v. Schenectady Ry. Co.*, 119 Fed. 634. **La.**—*Fluker v. De Grange*, 117 La. 331, 41 So. 591. **N. J.**—*Barrielo v. Trenton Mut. Life & F. Ins. Co.*, 13 N. J. Eq. 154; *Allen v. Taylor*, 3 N. J. Eq. 435, 29 Am. Dec. 721. **N. Y.**—*Fisk v. Albany & S. R. Co.*, 8 Abb. Pr. (N. S.) 309; *Lawrence v. Bolton*, 3 Paige 294. In *Fleischmann v. Bennett*, 79 N. Y. 579, it was said, "Both parties should be heard, and to that end the application should be upon notice."

63. *Fisk v. Albany & S. R. Co.*, 8 Abb. Pr. N. S. (N. Y.) 309. See also *Great Western Tel. Co. v. Purdy*, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. ed. 986; *Smith v. Woolfolk*, 115 U. S. 143, 5 Sup. Ct. 1177, 29 L. ed. 357; and 13 STANDARD PROC. 151.

[a] If the case be a doubtful one, notice should be given. *Winn v. Albert*, 2 Md. Ch. 42.

64. *Atwood v. Carmer*, 75 N. J. Eq.

319, 73 Atl. 114, citing 2 Dan. Ch. Pr. \*1523.

65. See the following cases: **Colo.** *Rogers v. Rogers*, 57 Colo. 132, 140 Pac. 193. **Kan.**—*Goodacre v. Skinner*, 47 Kan. 575, 28 Pac. 705. **Neb.**—*Fitzgerald's Estate v. Union Sav. Bank*, 65 Neb. 97, 90 N. W. 994; *Flagg v. Flagg*, 39 Neb. 229, 58 N. W. 109. **N. M.** *United States v. Rio Grande Dam & Irr. Co.*, 13 N. M. 386, 85 Pac. 393. **Okl.** *Prince v. Gosnell*, 47 Okla. 570, 149 Pac. 1162. **Pa.**—*Vincent v. Jenkins*, 60 Pa. Super. 448. **S. C.**—*Avery v. Wilson*, 47 S. C. 78, 25 S. E. 286.

[a] Failure to comply with a rule requiring four days' notice of intention to move to file is of itself sufficient ground for refusal to grant leave. *Avery v. Wilson*, 47 S. C. 78, 25 S. E. 286.

66. *Insurance Co. of North America v. Svendsen*, 74 Fed. 346; *Allen v. Taylor*, 3 N. J. Eq. 435, 29 Am. Dec. 721.

67. *Flagg v. Flagg*, 39 Neb. 229, 58 N. W. 109.

[a] A party is chargeable with notice of an application and granting of leave to file a supplemental pleading when such pleading is tendered when the court is open, the leave to file is given in open court, and his attorney is served with a copy of the pleading on the very day it was tendered and

ground of want of notice,<sup>68</sup> or by going to trial.<sup>69</sup>

**III. TIME FOR FILING.** — **A. GENERALLY.** — As long as a case continues undisposed of<sup>70</sup> application may be made in a proper case for leave to file supplemental pleadings and they will be allowed if the court believes this would promote justice.<sup>71</sup> A supplemental complaint or petition may be filed before the defendant has appeared,<sup>72</sup> or after he has answered,<sup>73</sup> and a supplemental answer, as well as a supplemental petition or complaint, may be filed after the jury has been impaneled,<sup>74</sup> or at any time during the progress of the cause,<sup>75</sup> even after verdict,<sup>76</sup> but not after the case has been finally adjudicated,<sup>77</sup> as long as such judgment stands.<sup>78</sup> In equity, however, a supplemental bill may be filed at any time, even after hearing or decree,<sup>79</sup> for

filed. *Rio Grande Dam & Irr. Co. v. United States*, 215 U. S. 266, 30 Sup. Ct. 97, 54 L. ed. 190.

68. *Allen v. Taylor*, 3 N. J. Eq. 435, 29 Am. Dec. 721. See *infra*, VIII, C.

69. *King v. Hyatt*, 51 Kan. 504, 32 Pac. 1105, 37 Am. St. Rep. 304, "Defendant objected at the time, but made no point of the want of notice. . . . No application for a delay of the trial was made by the defendant, nor was there any showing of surprise, or undue advantage, being taken."

70. *Austin v. Jones*, 47 Kan. 565, 28 Pac. 621.

71. *Henry v. Montezuma Water & Land Co.*, 55 Colo. 182, 133 Pac. 747.

72. *Lehman Dry Goods Co. v. Le-moine*, 129 La. 382, 56 So. 324.

73. *Musselman v. Manly*, 42 Ind. 462.

74. *Seehorn v. Big Meadows & B. Wagon Rd. Co.*, 60 Cal. 240. See also *Lincoln v. McLaughlin*, 74 Ill. 11; *St. Louis S. W. Ry. Co. v. Shumate* (Tex. Civ. App.), 178 S. W. 1050.

75. *Ind.*—*Kimble v. Seal*, 92 Ind. 276. *N. Y.*—*Central Trust Co. v. West India Imp. Co.*, 109 App. Div. 517, 96 N. Y. Supp. 519. *Wis.*—*Moehlenpah v. Mayhew*, 138 Wis. 561, 119 N. W. 826.

76. *Bandler v. Bradley*, 110 Minn. 66, 124 N. W. 644.

But see *Marshall v. Merritt*, 13 Allen (Mass.) 274, wherein it was said, "The court deem it proper to say that they know of no practice which would authorize the court, after a proper issue has once been tried to a jury, and a verdict has been rendered upon it, to authorize a supplemental answer to be filed, for the purpose of trying a new issue to a new jury." See also *United States v. United States Bank*, 11 Rob. (La.) 418.

**New trial of issues**, see *infra*, XI.

77. *Cal.*—*Gleason v. Gleason*, 54 Cal. 135. *Kan.*—*Martindale v. Battey*, 73 Kan. 92, 84 Pac. 527. *N. Y.*—*Apgar v. Connell*, 150 App. Div. 914, 135 N. Y. Supp. 77; *Cheeseman v. Sturges*, 19 Abb. Pr. 293. *Okla.*—*Nat. Bank of Anadarko v. First Nat. Bank*, 39 Okla. 225, 134 Pac. 866.

But see *Ia.*—*Christie v. Iowa Life Ins. Co.*, 111 Iowa 177, 82 N. W. 499. *Minn.*—*State ex rel. Broderick v. Dist. Court*, 91 Minn. 161, 97 N. W. 581. *S. D.*—*Poncea State Bank v. Adebar*, 35 S. D. 480, 152 N. W. 703.

[a] **Vacation of Judgment for Purpose of Filing Supplemental Pleading.** Neither a purchaser at a sheriff's sale, as such, nor a redemptioner, nor an assignee of the sheriff's certificate of sale, upon his own ex parte motion, made in his own name, is entitled to have the judgment upon which the execution or order of sale issued, vacated and himself substituted as plaintiff, in order that he may file a supplemental complaint to bring in other parties. *Abadie v. Lobero*, 36 Cal. 390.

78. *Martindale v. Battey*, 73 Kan. 92, 84 Pac. 527.

[a] **Refusal to Open Judgment.**—It is no abuse of discretion to refuse to open a judgment for the purpose of permitting a supplemental pleading to be filed. *Voak v. National Inv. Co.*, 51 Minn. 450, 53 N. W. 708.

79. *U. S.*—*Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. ed. 1123; *Secor v. Singleton*, 41 Fed. 725; *Hazleton Tripod-Boiler Co. v. Citizens' St. R. Co.*, 72 Fed. 325. *Equity Rule* 19. *Md.*—*O'Hara v. Shepherd*, 3 Md. Ch. 306. *Tenn.*—*Herd v. Bewley*, 1 Heisk. 524.



the purpose of aiding or revising the decree,<sup>80</sup> but not after the final and unqualified dismissal of the original pleadings as there are then no pleadings that can be supplemented.<sup>81</sup> Supplemental pleadings embodying matters occurring pendent lite, may be filed after appeal and the remanding of the case for further proceedings;<sup>82</sup> and, according to some authorities, the application may be made in and determined by the appellate court,<sup>83</sup> and this is, of course, true where there is a trial de novo, as in case of an appeal from a justice's court.<sup>84</sup>

The pleading should not be filed until leave is granted,<sup>85</sup> but its pre-

See also *Ashuelot Ry. Co. v. Cheshire Ry. Co.*, 59 N. H. 409.

[a] If a party proceeds to a decree after the discovery of the facts on which the new claim is founded, he will not be permitted afterwards to file a supplemental bill founded on such facts. *Boynton v. Ingalls*, 70 Me. 461.

[b] Where a decree has been rendered and partly executed, it is too late to file a supplemental pleading. *Sulek v. McWilliams*, 72 Ark. 67, 78 S. W. 769.

[c] **Difference in Time of Filing Amended and Supplemental Bills.** "Amended bills can only be filed during the progress of the litigation before decree and generally before answer, except with leave, while supplemental bills in proper cases, may be filed after decree." *Mitchell v. Big Six Development Co.*, 186 Fed. 552.

[d] "The question is one of convenient procedure, and the trial of the issues on the supplemental answers in the case would be so inconvenient that the answers ought to be rejected." *Pearson v. Northern R. Co.*, 63 N. H. 534, 4 Atl. 388.

80. *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. ed. 1123 (citing *Story's Eq. Pl.*, §388); *Mitchell v. Big Six Development Co.*, 186 Fed. 552. See also *Christie v. Iowa Life Ins. Co.*, 111 Iowa 177, 82 N. W. 499; *Ponca State Bank v. Adebar*, 35 S. D. 480, 152 N. W. 703.

[a] **To Carry Decree Into Effect.** A court of equity has jurisdiction to entertain a supplemental pleading to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject matter and the parties are the same in both proceedings. *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. ed. 1123.

**Supplemental bill of review**, see 4 STANDARD PROC. 456.

**Bills to enforce decrees**, see 4 STANDARD PROC. 460.

**Bills to impeach judgments**, see 4 STANDARD PROC. 472.

81. *Emory v. Keighan*, 88 Ill. 516; *Burke v. Smith*, 15 Ill. 158; *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.*, 85 Md. 681, 36 Atl. 121. See also *Chesterman v. Seeley*, 6 Pa. Dist. 159, a case of qualified dismissal of original pleading. But see *Murchison v. Atlantic Coast Line R. Co.*, 91 S. C. 325, 74 S. E. 749.

82. **U. S.**—*Rio Grande Dam & Irr. Co. v. United States*, 215 U. S. 266, 30 Sup. Ct. 97, 54 L. ed. 190 (remanded to take further evidence); *Williams v. Gibbes*, 20 How. 535, 15 L. ed. 1013, in which case a supplemental answer was properly allowed to bring to notice of court matters relied on in adjustment of account. **Ark.**—*Greer v. Turner*, 36 Ark. 17. **Ia.**—*Leach v. Germania Bldg. Assn.*, 102 Iowa 125, 70 N. W. 1090, wherein it was said, "In such case, however, greater care should be exercised in granting it." **Minn.** *State ex rel. Broderick v. Dist. Court*, 91 Minn. 161, 97 N. W. 581. **N. Y.** *Lawrence v. Church*, 128 N. Y. 324, 28 N. E. 499. **Wash.**—*Long v. Eisenbeis*, 23 Wash. 556, 63 Pac. 249.

**As to effect of mandate**, see the title "Mandate and Proceedings Thereafter."

83. *Ponca State Bank v. Adebar*, 35 S. D. 480, 152 N. W. 703.

84. *Erickson v. Elliott*, 17 N. D. 389, 117 N. W. 361. See 18 STANDARD PROC. 316, 328, note 24, and *Standley v. Currey* (Tex. Civ. App.), 161 S. W. 416.

85. *Wood v. Brush*, 72 Cal. 224, 13 Pac. 627, does not become a pleading until leave is granted.

mature filing is not ground for denying leave to file.<sup>86</sup> The time of filing a supplemental pleading after leave granted, may be prescribed by the court.<sup>87</sup>

**B. LACHES.**—If the application for leave to file is not made promptly, or, at least, within a reasonable time after the supplemental matter occurs and comes to the knowledge of the applicant, his laches may in the discretion of the court justify a denial of leave.<sup>88</sup> As to what constitutes a reasonable time, no definite rule can be laid down, because the term "reasonable," as here used, is an intensely relative one depending upon the facts in the particular case.<sup>89</sup> If it appears that no party will be substantially injured, a mere delay in making a motion for leave to file a supplemental pleading will not in itself defeat the application,<sup>90</sup> but if laches apparently exists at the time of application a satisfactory showing must be made to the contrary.<sup>91</sup>

86. *Eager v. Price*, 2 Paige (N. Y.) 333.

87. *Murchison v. Atlantic Coast Line R. Co.*, 91 S. C. 325, 74 S. E. 749.

88. **U. S.**—*French v. Edwards*, 4 Sawy. 125, 9 Fed. Cas. No. 5,097; *Henry v. Travelers' Ins. Co.*, 45 Fed. 299. **Kan.**—*Alexander v. Clarkson*, 96 Kan. 174, 150 Pac. 576; *Central Branch U. P. R. Co. v. Andrews*, 41 Kan. 370, 21 Pac. 276. **Minn.**—*Stacy v. Stephen*, 78 Minn. 480, 81 N. W. 391; *Voak v. National Inv. Co.*, 51 Minn. 450, 53 N. W. 708. **N. Y.**—*Medbury v. Swan*, 46 N. Y. 200; *Cheeseman v. Sturges*, 19 Abb. Pr. 293. **S. C.**—*Sparks v. Green*, 69 S. C. 198, 48 S. E. 61. **Wash.** *Davis v. Erickson*, 3 Wash. 654, 29 Pac. 86.

[a] "A supplemental bill brought for new matter must be filed as soon as practicable after the matter is discovered." *Henry v. Travelers' Ins. Co.*, 45 Fed. 299.

89. For specimen cases see the following: **Cal.**—*Heyman v. Lowell*, 23 Cal. 106, five years' delay after entry of decree unreasonable. See also *Grady v. Bramlet*, 59 Cal. 105, holding under the facts that motion for leave was made seasonably. **Kan.**—*Austin v. Jones*, 47 Kan. 565, 28 Pac. 621, if case is undisposed of supplemental pleadings may be filed even if leave is not asked until four or more years after the commencement of the action. **Neb.**—*Fitzgerald's Estate v. Union Sav. Bank*, 65 Neb. 97, 90 N. W. 994, holding that it is too late to introduce a supplemental pleading during the trial when no reason appears for not

having done so before. **N. J.**—*Woodruff v. Brugh*, 6 N. J. Eq. 465, a delay of twenty-two years unreasonable. **S. C.**—*Sparks v. Green*, 69 S. C. 198, 48 S. E. 61, over two years and a half since commencement of action and proposed trial, not unreasonable.

[a] **Statute of Limitations.**—"The 'reasonable time' for applying to the court in such cases is at least within the time fixed by the Statute of Limitations for the commencement of actions of a like character." *Heyman v. Lowell*, 23 Cal. 106.

90. *Central Trust Co. v. West India Imp. Co.*, 109 App. Div. 517, 96 N. Y. Supp. 519; *Rosenbaum v. Breslauer*, 54 Misc. 76, 104 N. Y. Supp. 506; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

91. **Cal.**—*Lincoln v. Sibeck*, 27 Cal. App. 61, 148 Pac. 967, where the record does not show any sufficient reason why a supplemental answer was not filed before the case was set down for trial, it cannot be said that the court abused its discretion in refusing to allow such answer at the commencement of the trial. **Ill.**—*Fisher v. Greene*, 95 Ill. 97. **Kan.**—*Central Branch U. P. R. Co. v. Andrews*, 41 Kan. 370, 21 Pac. 276. **Ky.**—*Asher v. Uhl*, 122 Ky. 114, 87 S. W. 307, 93 S. W. 29. **Minn.** *Stocking v. Hanson*, 22 Minn. 542. **Neb.**—*Fitzgerald's Estate v. Union Sav. Bank*, 65 Neb. 97, 90 N. W. 994. **Tenn.** *Peoples v. Carrol*, 11 Heisk. 417.

[a] **Affidavit showing facts and reasons for belated appearance** ought to be put in. *Fitzgerald's Estate v. Union Sav. Bank*, 65 Neb. 97, 90 N. W. 994.

**IV. WHO MAY FILE SUPPLEMENTAL PLEADINGS.**— Either party may file a supplemental bill,<sup>92</sup> but in a case where both the plaintiff and defendant may do so, preference will be given to the plaintiff's application.<sup>93</sup>

**V. NUMBER OF SUPPLEMENTAL PLEADINGS.**— The necessity for filing more than one supplemental pleading depends upon the exigencies of the case and the discretion of the court.<sup>94</sup>

**VI. MATTERS APPROPRIATE FOR SUPPLEMENTAL PLEADINGS.**— **A. GENERALLY.**— Since generally the purpose of supplemental pleadings is to reinforce and strengthen the original pleading, to which it is merely ancillary,<sup>95</sup> and not to correct vital defects in it,<sup>96</sup> or supply a new cause of action,<sup>97</sup> the facts set up must be material and germane to the case or defense set out in the original.<sup>98</sup> The practice in equity and under some codes and statutes permits the averment both of facts existing but not discovered before the filing of the original pleading and of facts subsequently occurring.<sup>99</sup> But under some statutes only the latter class of facts are a proper subject matter for supplemental pleadings.<sup>1</sup> A supplemental pleading, however, embodying such subsequently occurring facts, may also, with the court's permission, include matters which would have been appropriate subjects for amendment.<sup>2</sup> Supplemental matters that add nothing to

[a] **Substantial Compliance With Terms.**—Where twenty days was allowed within which to serve and file a supplemental complaint, the serving of the supplemental pleading within the time allowed was a substantial compliance with the order even though it was not filed in the clerk's office. *Murchison v. Atlantic Coast Line Ry. Co.*, 91 S. C. 325, 74 S. E. 749.

92. **U. S.**—*Baker v. Whiting*, 1 Story 218, 2 Fed. Cas. No. 786. **Md.**—*Pue v. Pue*, 4 Md. Ch. 386. **N. J.**—*O'Donnell v. McCann*, 77 N. J. Eq. 183, 75 Atl. 999. **Eng.**—*Barrington v. O'Brien*, 2 Ball & B. 140.

[a] **Supplemental Bill May Be Brought by the State.**—*State v. Black River Phosphate Co.*, 32 Fla. 82, 13 So. 640, 21 L. R. A. 189.

**Substitution of third persons acquiring interest pendente lite**, see *infra*, VI, D, and 20 STANDARD PROC. 968, 974.

93. *Chester v. Life Assn. of America*, 4 Fed. 487; *Carow v. Mowatt*, 1 Edw. Ch. (N. Y.) 9, twenty days given complainant in which to file supplemental bill and upon his failure other party was to be allowed to do so.

94. In the following cases more than one supplemental pleading was filed by the same party: **U. S.**—*Milwaukee & M. R. Co. v. Milwaukee & St. Paul R. Co.*,

6 Wall. 742, 18 L. ed. 856, two supplemental bills. **Cal.**—*Greenwood v. Adams*, 80 Cal. 74, 21 Pac. 1134, two supplemental answers. **Kan.**—*Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. 314. **La.**—*Succession of Dauphin*, 112 La. 103, 36 So. 287. **Miss.**—*Aust v. Rosenbaum*, 74 Miss. 893, 21 So. 555.

95. See *supra*, I.

96. See *infra*, VI, B.

97. See *infra*, VI, C.

98. *Rio Grande D. & Irr. Co. v. United States*, 215 U. S. 266, 30 Sup. Ct. 97, 54 L. ed. 190; *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. ed. 1123; *Baker v. Brickell*, 102 Cal. 620, 36 Pac. 950.

**Must be consistent**, see *infra*, VII, B.

[a] **Must Be for the Same Substantive Cause of Action.**—*Eastman v. St. Anthony Falls Water Power Co.*, 17 Minn. 48.

99. See *supra*, I.

**Previous knowledge as affecting exercise of court's discretion**, see *supra*, II, B, 2; III, B.

1. See *supra*, I.

2. **U. S.**—*Mellor v. Smither*, 114 Fed. 116, 52 C. C. A. 64; *St. Louis & S. F. R. Co. v. Hadley*, 155 Fed. 220. **Mich.**—*Graves v. Niles, Harr.* 332. **N. Y.**—*Stafford v. Howlett*, 1 Paige 200.



the original pleading,<sup>3</sup> or are merely cumulative evidence in support of the original charges,<sup>4</sup> or have no relation to the facts in the original pleadings,<sup>5</sup> or are of such a nature that independent actions might have been brought upon them,<sup>6</sup> or that every possible advantage within the scope of the original pleadings can be more readily attained without their introduction,<sup>7</sup> or a decree can be had on them without reference to the original pleadings,<sup>8</sup> cannot be made the basis of a supplemental pleading.

**Particular Matters.**—The release, compromise, or settlement of a case pendente lite is properly shown by means of a supplemental pleading,<sup>9</sup> as may other matters occurring after commencement of suit, such as an adjudication<sup>10</sup> or discharge in bankruptcy,<sup>11</sup> the necessity for an injunction,<sup>12</sup> or facts warranting a second or further injunction,<sup>13</sup> or that an injunction is no longer necessary,<sup>14</sup> the judgment or decree of a competent court rendered after the commencement of the suit determining the matters in controversy or a part thereof,<sup>15</sup> and other mat-

3. *Henry v. Montezuma Water & Land Co.*, 55 Colo. 182, 133 Pac. 747; *Atwood v. Shenandoah Valley Ry. Co.*, 85 Va. 966, 9 S. E. 748.

4. *N. J.*—*Barriclo v. Trenton M. L. & F. Ins. Co.*, 13 N. J. Eq. 154. *N. Y.* *Hasbrouck v. Shuster*, 4 Barb. 285. *Va.* *Atwood v. Shenandoah Valley Ry. Co.*, 85 Va. 966, 9 S. E. 748.

See *Lyster v. Stickney*, 4 McCrary 109, 12 Fed. 609. But see *Hodges v. Price*, 38 Wash. 1, 80 Pac. 202.

**In divorce action**, see 10 STANDARD PROC. 783, 784.

5. *Ill.*—*Shriver v. Day*, 276 Ill. 403, 114 N. E. 918; *Fahs v. Roberts*, 54 Ill. 192. *Ia.*—*Wapello State Sav. Bank v. Colton*, 143 Ia. 359, 122 N. W. 149. *Mich.*—*Austin v. Hayden*, 190 Mich. 528, 157 N. W. 93. *Okla.*—*Nat. Bank of Anadarko v. First Nat. Bank*, 39 Okla. 225, 134 Pac. 866.

6. *Park & Sons Co. v. Hubbard*, 198 N. Y. 136, 91 N. E. 261.

7. *Barriclo v. Trenton M. L. & F. Ins. Co.*, 13 N. J. Eq. 154.

8. *Prouty v. Lake Shore, etc. R. Co.*, 85 N. Y. 272.

9. *U. S.*—*Thames & M. Marine Ins. Co. v. Continental Ins. Co.*, 37 Fed. 286; *Cedar Valley Land & C. Co. v. Coburn*, 29 Fed. 586; *Veazie v. Williams*, 3 Story 54, 28 Fed. Cas. No. 16, 906. *Ala.*—*May v. Coleman*, 84 Ala. 325, 4 So. 144. *Cal.*—*Seehorn v. Big Meadows & B. W. Road Co.*, 60 Cal. 240, even though the plaintiff's attorneys were ignorant of the settlement. *N. Y.* *Matthews v. Chicopee Mfg. Co.*, 3 Robt. 711; *Varriale v. Metropolitan Street R.*

*Co.*, 54 App. Div. 633, 66 N. Y. Supp. 559. *Wash.*—*McRea v. Warehime*, 49 Wash. 194, 94 Pac. 924.

10. See *Styles v. Fuller*, 101 N. Y. 622, 4 N. E. 348, 3 How. Pr. (N. S.) 464, an adjudication of plaintiff's bankruptcy and passage of his cause of action to his assignee or trustee.

11. *Jensen v. Dorr*, 159 Cal. 742, 116 Pac. 553. See also 22 STANDARD PROC. 698; 15 STANDARD PROC. 624.

12. *Mackintosh v. Flint & P. M. R. Co.*, 34 Fed. 582 (shareholders restraining ultra vires act); *Craig v. Lambert*, 44 La. Ann. 885, 11 So. 464.

13. *Ala.*—*Whitley v. Dunham Lumb. Co.*, 89 Ala. 493, 7 So. 810; *Balkum v. Harper's Admr.*, 50 Ala. 372, where first injunction has been violated. *La.* *Howard v. Simmons*, 25 La. Ann. 668, 670. *Mich.*—*Long v. Schroeder*, 162 Mich. 690, 127 N. W. 811, violation of temporary injunction and necessity for mandatory injunction. *N. Y.*—*Fanning v. Dunham*, 4 Johns. Ch. 35, upon new facts stated in the supplemental bill a fresh injunction may be awarded even though the former injunction has been dissolved.

14. 13 STANDARD PROC. 115.

15. *Jenkins v. International Bank*, 127 U. S. 484, 8 Sup. Ct. 1196, 32 L. ed. 189 (judgment on notes secured by the mortgage which is being foreclosed); *Williams v. Hutton*, 164 N. C. 216, 80 S. E. 257. See Equity Rule 34, and 15 STANDARD PROC. 624.

[a] *By Statute.*—*Lawrence v. Church*, 128 N. Y. 324, 28 N. E. 499; *Jones v. Gould*, 56 Misc. 328, 107 N. Y.

ters as shown by the notes.<sup>16</sup>

**B. SUPPLYING VITAL DEFECTS IN ORIGINAL PLEADINGS.—1. Generally.**—If the original pleadings are totally defective, in that they are wanting in equity or fail to state a cause of action, and there is no ground for proceeding upon them, they cannot be sustained or aided by filing supplemental pleadings founded upon new matter, whether the original pleadings were in a suit in equity or in an action at law.<sup>17</sup>

Supp. 661 (answer); *Continental Construction & Imp. Co. v. Vinal*, 14 Civ. Proc. (N. Y.) 293.

[b] **Supplemental petition** setting up (1) the subsequent judgment of another state determining the controversy in the pending action, in favor of the plaintiff, is permissible. *Wright v. White*, 14 La. Ann. 583. *Contra*, *Swedish-American Nat. Bank v. Dickinson*, 6 N. D. 222, 69 N. W. 455, 49 L. R. A. 285. (2) If plaintiff wishes to avail himself of the benefit of a decree subsequent to the commencement of the action, determining part of the matters in controversy, he should plead it by supplemental complaint. *Lawrence v. Church*, 128 N. Y. 324, 28 N. E. 499. (3) This is not necessary, however, in an equity suit, where certain issues have been sent into a law court for determination. *Delaware, L. & W. R. Co. v. Breckenridge*, 56 N. J. Eq. 595, 40 Atl. 23.

16. See *infra*, this note.

[a] **A claim for recoupment, or a counterclaim** of the class equivalent to recoupment, accruing after the original answer was filed, may be set up by supplemental answer. *Atkinson v. Kirkpatrick*, 90 Kan. 515, 135 Pac. 579; *Howard v. Johnston*, 82 N. Y. 271. As to right to recoup or counterclaim matter occurring after commencement of the action, see the title "**Set-Off, Counterclaim and Recoupment.**"

[b] **Subsequent Breaches Showing Intent.**—In an action for rescission of a contract for defendants alleged misconduct in violation of the same, other similar acts of misconduct may be set up by supplemental petition to show the intent. *Hodges v. Price*, 38 Wash. 1, 80 Pac. 202.

[c] **Foreign Corporations.**—Compliance with statute since the action has been commenced may be shown by supplemental pleading, where non-compliance does not invalidate the contract sued but merely prevents the maintenance of a suit while the non-compli-

ance continues. *Shipman v. Portland Const. Co.*, 64 Ore. 1, 128 Pac. 989. *Compare* 5 STANDARD PROC. 725, 727, 730.

[d] **Setting Up Penal Law.**—"In equity, the courts will not permit a supplemental answer setting up as a defense a penal law by which the complainant's right is to be affected." *Stout v. Shew*, 1 Pin. (Wis.) 438, 42 Am. Dec. 579.

17. **U. S.**—*Mellor v. Smither*, 114 Fed. 116, 52 C. C. A. 64; *Kryptok Co. v. Haussmann*, 216 Fed. 267; *New York Security & Trust Co. v. Lincoln St. R. Co.*, 74 Fed. 67. **Ala.**—*Harper v. Raisin Fertilizer Co.*, 158 Ala. 329, 48 So. 589, 132 Am. St. Rep. 32; *Scheerer v. Agee*, 113 Ala. 383, 21 So. 81. **Cal.**—*Imperial Land Co. v. Imperial Irr. Dist.*, 173 Cal. 668, 161 Pac. 116; *Young v. Matthew Turner Co.*, 168 Cal. 671, 143 Pac. 1029. **Conn.**—*Dickerman v. New York, N. H. & H. R. Co.*, 72 Conn. 271, 44 Atl. 228; *Goodrich v. Stanton*, 71 Conn. 418, 42 Atl. 74. But see *Woodbridge v. Pratt & Whitney Co.*, 69 Conn. 304, 37 Atl. 688, holding that equitable proceedings rest upon different foundations than actions at law and that the rule will not be followed in equity. **D. C.**—*Morrison v. Shuster*, 1 Mackey 190. **Fla.** *Neubert v. Massman*, 37 Fla. 91, 19 So. 625; *Ledwith v. Jacksonville*, 32 Fla. 1, 13 So. 454. **Ill.**—*Brownback v. Keister*, 220 Ill. 544, 7 N. E. 75; *Lehmann v. Shimeall*, 195 Ill. App. 511. **Ind.** *East Chicago v. Interstate Iron & Steel Co.*, 183 Ind. 33, 107 N. E. 274; *Barker v. Prizer*, 150 Ind. 4, 48 N. E. 4. **Kan.** *Brown v. Galena Mining & Smelting Co.*, 32 Kan. 528, 4 Pac. 1013; *Dever v. Junction City*, 5 Kan. App. 180, 47 Pac. 152. *Contra*, *Shaffer v. School Dist. No. 1*, 8 Kan. App. 751, 61 Pac. 759. See also *King v. Hyatt*, 51 Kan. 504, 32 Pac. 1105, 37 Am. St. Rep. 304, uncertain on facts. **Ky.**—*Dant v. Head*, 90 Ky. 255, 13 S. W. 1073, 29 Am. St. Rep. 369. But see *Butler v. Butler*, 4 Litt. 201, rule not followed in equity.

**2. Premature Action.**—A party cannot in most jurisdictions, commence suit before a cause of action accrues and then after it accrues file a supplemental pleading alleging the facts showing this.<sup>15</sup> Conditions precedent to the maintenance of the action, occurring after its commencement, cannot be supplied by supplemental or amended

**Md.**—Schwab *v.* Schwab, 93 Md. 382, 49 Atl. 331, 52 L. R. A. 414; Bannon *v.* Comegys, 69 Md. 411, 16 Atl. 129. **Mass.** Bartlett *v.* New York, N. H. & H. R. Co., 226 Mass. 467, 115 N. E. 976; Bernard *v.* Topfritz, 160 Mass. 162, 35 N. E. 673, 39 Am. St. Rep. 465. **Me.** Birmingham *v.* Lesan, 77 Me. 494, 1 Atl. 151. **Minn.**—Meyer *v.* Berlandi, 39 Minn. 438, 40 N. W. 513, 12 Am. St. Rep. 663, 1 L. R. A. 777; Eastman *v.* St. Anthony Falls Water Power Co., 17 Minn. 48. **Miss.**—Brown Bros. & Co. *v.* Bank of Miss., 31 Miss. 454. **N. J.** Edgar *v.* Clevenger, 3 N. J. Eq. 258. **N. Y.**—Haddow *v.* Lundy, 59 N. Y. 320; Candler *v.* Pettit, 1 Paige 168, 19 Am. Dec. 399; South Shore Traction Co. *v.* Brookhaven, 53 Misc. 392, 102 N. Y. Supp. 1074. But see Merrihew *v.* Kingsbury, 150 App. Div. 40, 134 N. Y. Supp. 452, holding the rule in equity is different and that relief will be granted. **Okla.**—Reader *v.* Farriss, 49 Okla. 459, 153 Pac. 678, L. R. A. 1916D, 672. **Ore.** Clark *v.* Morrison, 80 Ore. 240, 156 Pac. 429. **Pa.**—Chesterman *v.* Seeley, 6 Pa. Dist. 159; *In re* Butler's Appeal, 6 Atl. 708, 4 Sad. 19. **Tex.**—Bradford *v.* Hamilton, 7 Tex. 55. **Vt.**—International Paper Co. *v.* Bellows Falls Canal Co., 88 Vt. 93, 90 Atl. 943. **Wash.**—Keeler *v.* Parks, 72 Wash. 255, 130 Pac. 111; Gunby *v.* Ingram, 57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232. **W. Va.** Straughan *v.* Hallwood, 30 W. Va. 274, 4 S. E. 394, 8 Am. St. Rep. 29. **Wis.** Orton *v.* Noonan, 29 Wis. 541. **Eng.** Tonkin *v.* Lethbridge, G. Coop. 43, 35 Eng. Reprint 471; Attorney-General *v.* Corporation of Avon, 3 De G. J. & S. 637, 33 Beav. 67, 33 L. J. Ch. 172, 2 New Rep. 564, 11 Wlky. Rep. 1050, 46 Eng. Reprint 783, 55 Eng. Reprint 291 ("The substratum falling the superstructure falls also").

*Contra*, Little *v.* Pottawattamie, 127 Iowa 376, 101 N. W. 752; Gribben *v.* Clement, 141 Iowa 144, 119 N. W. 596, 133 Am. St. Rep. 157; Scofield *v.* Excelsior Oil Co., 27 Ohio C. C. 347. Compare Clark *v.* First Congregational Society, 46 N. H. 272.

[a] **The proper course** in such a case is to commence a new suit founded upon the subsequently occurring matter. Mason *v.* Hartford, P. & F. R. Co., 10 Fed. 334.

[b] **Reason.**—It would violate the principle that in every case the cause of action must exist at the time the suit is brought. Straughan *v.* Hallwood, 30 W. Va. 274, 4 S. E. 394, 8 Am. St. Rep. 29.

**In a creditor's suit** a lack of jurisdictional requirements in the original pleadings cannot be cured by a supplemental bill. 6 STANDARD PROC. 185.

**In divorce cases**, unless the cause of action upon which the final relief is sought to be obtained existed at the commencement of the suit, the relief will be denied. 7 STANDARD PROC. 784.

18. **Cal.**—Morse *v.* Steele, 132 Cal. 456, 64 Pac. 690. **Ill.**—Embree *v.* Embree, 53 Ill. 394. **Ind.**—Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4. **Kan.**—Rogers *v.* Hodgson, 46 Kan. 276, 26 Pac. 732; Smith *v.* Smith, 22 Kan. 699, qualifying the rule where circumstances show an excuse for the premature commencement of the action and justice requires the change. **N. Y.**—Holly *v.* Graf, 29 Hun 443. **Ore.**—Mitchell *v.* Taylor, 27 Ore. 377, 41 Pac. 119. **Wash.** Gunby *v.* Ingram, 57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232. **Wis.** Turner *v.* Pierce, 31 Wis. 342.

But see Butler *v.* Butler, 4 Litt. (Ky.) 201, and the title "Suits and Actions."

[a] **Treating supplemental as original bill**, see Hughes *v.* Carne, 135 Ill. 519, 26 N. E. 517. Compare Milner *v.* Milner, 2 Edw. Ch. (N. Y.) 114.

[b] **If the original bill is at all sustainable**, and the court has possession of the cause even for the purpose of granting temporary relief, it will hold it for the more general and important purposes of the bill, and the complainant will be at liberty to file a supplemental bill. Edgar *v.* Clevenger, 3 N. J. Eq. 258.



pleadings.<sup>19</sup> Thus where the exhaustion of legal remedies against other persons or property as by judgment and execution, is regarded as a condition precedent to the existence of a cause of action, if the action has been begun before such condition has been satisfied, it can not be supplied by supplemental pleading though the required judgment has been subsequently obtained.<sup>20</sup> The rule is otherwise, however, where such judgment and execution, though necessary as evidence of insolvency, are not regarded as essential parts of the cause of action.<sup>21</sup> Where notice of the claim or injury sued upon, as in actions against public corporations, is a condition precedent, it would seem that the same rule as to supplemental pleadings should be applied as in case of any other condition precedent.<sup>22</sup>

**3. Title Subsequently Acquired.**—If the title set up in the original pleading is wholly bad it cannot be remedied by a supplemental pleading showing the subsequent acquisition of title;<sup>23</sup> though this rule does not apply in the case of an inchoate or partial title, the subsequent strengthening of which may be set forth in a supplemental pleading.<sup>24</sup>

**C. NEW CAUSE OF ACTION.—1. Generally.**—Both under the chancery and code practice a new or independent cause of action cannot be introduced by means of a supplemental bill or complaint,<sup>25</sup>

19. See cases in preceding note and the title "**Suits and Actions.**"

As to what matters constitute strict conditions precedent the courts are not always agreed. See the title "**Suits and Actions,**" and other titles dealing with particular matters.

Want of title, see *infra*, this section.

[a] **A bill brought by a minority shareholder** to enforce a liability to the corporation in which there is no allegation of an application to the board of directors cannot be made good by a supplemental bill which shows no ground for relief when the original bill was filed. *Bartlett v. New York, N. H. & H. R. Co.*, 226 Mass. 467, 115 N. E. 976.

20. See 10 STANDARD PROC. 174, note 4.

21. See *Scotfield v. Excelsior Oil Co.*, 27 Ohio C. C. 347 (action to enforce stockholders liability—subsequent judgment against corporation supplied by supplemental petition), relying on *Gibbon v. Dougherty*, 10 Ohio St. 365. Compare the title "**Stock and Stockholders.**"

22. See the titles "**Highways, Streets and Bridges;**" "**Municipal Corporations;**" "**Suits and Actions.**"

23. **U. S.**—*Emerson v. Hubbard*, 34 Fed. 327. **Md.**—*Bannon v. Comegys*, 69

**Md.** 411, 16 Atl. 129; *Winn v. Albert*, 2 Md. Ch. 42. **Mass.**—*Jaques v. Hall*, 3 Gray 194. **N. Y.**—*Haddow v. Lundy*, 59 N. Y. 320 (stating rule); *Staunton v. Swann*, 10 Civ. Proc. 12. **Eng.**—*Tonkin v. Lethbridge*, G. Cooper 43, 35 Eng. Reprint 471; *Attorney-General v. Corporation of Avon*, 3 De G. J. & S. 637, 33 Beav. 67, 33 L. J. Ch. 172, 2 New Rep. 564, 11 Wilk. Rep. 1050, 46 Eng. Reprint 783, 55 Eng. Reprint 291.

24. **U. S.**—*Reeve v. North Carolina Land & Timber Co.*, 141 Fed. 821, 72 C. C. A. 287, curative deed set up. **Mass.**—*First Baptist Church v. Harper*, 191 Mass. 196, 77 N. E. 778 (confirmatory deed); *Jaques v. Hall*, 3 Gray 194. See *Saunders v. Frost*, 5 Pick. 275. **Minn.**—*Lowry v. Harris*, 12 Minn. 255, if the original pleadings show an equitable title, the subsequent acquirement of the legal title may be shown by a supplemental pleading. **S. D.** See *Kirby v. Muench*, 12 S. D. 616, 82 N. W. 93. **Utah.**—*Kahn v. Old Telegraph Min. Co.*, 2 Utah 174. **Wash.** *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1050. **W. Va.**—See *Crumlish's Admr. v. Shenandoah Val. R. Co.*, 28 W. Va. 623. **Eng.**—*Mutter v. Chauvel*, 5 Russ. 42, 38 Eng. Reprint 943.

25. **U. S.**—*Rio Grande D. & Irr. Co. v. United States*, 215 U. S. 266, 30 Sup.

even though it sprang out of the transaction set forth in the original pleadings,<sup>26</sup> and even though the original pleading stated a cause of action,<sup>27</sup> or the second cause of action has arisen subsequent to the commencement of the action.<sup>28</sup> But it has been held that a supplemental petition setting up a judgment of another state determining the matters in controversy in favor of plaintiff, is not an infringement of this rule.<sup>29</sup>

**2. New and More Extensive Relief.**—The rule just stated does not prevent the bringing in by means of a supplemental pleading of

Ct. 97, 54 L. ed. 190. **Ala.**—*Hill v. Hill*, 10 Ala. 527. **Cal.**—*Young v. Matthew Turner Co.*, 168 Cal. 671, 143 Pac. 1029; *Brown v. Valley View Min. Co.*, 127 Cal. 630, 60 Pac. 424. **Conn.**—*Dickerman v. New York, N. H. & H. R. Co.*, 72 Conn. 271, 44 Atl. 228; *Goodrich v. Stanton*, 71 Conn. 418, 42 Atl. 74. But see *Woodbridge v. Pratt & Whitney Co.*, 69 Conn. 304, 37 Atl. 688. **Ind.**—*Barker v. Prizer*, 150 Ind. 4, 48 N. E. 4. **Ia.**—*Citizens' State Bank v. Jess*, 127 Iowa 450, 103 N. W. 471; *Leach v. Germania Bldg. Assn.*, 102 Iowa 125, 70 N. W. 1090. **La.**—*Succession of Dauphin*, 112 La. 103, 36 So. 287. **Md.**—*Schwab v. Schwab*, 93 Md. 382, 49 Atl. 331, 52 L. R. A. 414. **Mass.**—*Coffing v. Dodge*, 167 Mass. 231, 45 N. E. 928. **Minn.**—*Eastman v. St. Anthony Falls Water Power Co.*, 17 Minn. 48. **Mo.**—*Payne v. School Dist. No. 3-25-10*, 87 Mo. App. 415. **N. J.**—*Williams v. Winans*, 20 N. J. Eq. 392. **N. Y.**—*Park & Sons Co. v. Hubbard*, 198 N. Y. 136, 91 N. E. 261; *Buchanan v. Comstock*, 57 Barb. 582; *Candler v. Pettit*, 1 Paige 168, 19 Am. Dec. 399; *Wattson v. Tibbou*, 17 Abb. Pr. 184; *New England Water Works Co. v. Farmers' L. & T. Co.*, 23 App. Div. 571, 48 N. Y. Supp. 948. **N. D.**—*Swedish-American Nat. Bank v. Dickinson Co.*, 6 N. D. 222, 69 N. W. 455, 49 L. R. A. 285. **Ohio.**—*McGuire v. Louis Snider Paper Co.*, 6 Ohio Dec. 392. **Okla.**—*Nat. Bank of Anadarko v. First Nat. Bank*, 39 Okla. 225, 134 Pac. 866. **S. C.**—*Moon v. Johnson*, 14 S. C. 434. **Tex.**—*Simpson v. Thompson*, 43 Tex. Civ. App. 273, 95 S. W. 94; *Cooper Grocery Co. v. Blume* (Tex. Civ. App.), 156 S. W. 1157. **Va.**—*Keyser v. Renner's Admr.*, 87 Va. 249, 12 S. E. 406. **Wash.**—*Keeler v. Parks*, 72 Wash. 255, 130 Pac. 111; *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1050; *Davis v. Erickson*, 3 Wash. 654, 29 Pac. 86.

As to what constitutes a new cause

of action, see the title "New Cause of Action or Defense."

[a] Strictly new matter cannot be considered a new cause of action when it arose after the filing of the original bill and was properly set up by way of supplemental bill in support of the relief originally prayed for. *Jenkins v. International Bank*, 127 U. S. 484, 8 Sup. Ct. 1196, 32 L. ed. 189.

[b] In an action to subject property fraudulently conveyed, to plaintiff's judgment other judgments recovered by plaintiff against his debtor subsequent to the commencement of the action may be set up by supplemental complaint as they do not change the cause of action. *Kirby v. Muench*, 12 S. D. 616, 82 N. W. 93.

26. **U. S.**—*Mellor v. Smither*, 114 Fed. 116, 52 C. C. A. 64. **Conn.**—*Dickerman v. New York, N. H. & H. R. Co.*, 72 Conn. 271, 44 Atl. 228; *Goodrich v. Stanton*, 71 Conn. 418, 42 Atl. 74. **Ill.**—*Heffron v. Knickerbocker*, 57 Ill. App. 339. **Mo.**—*Payne v. School Dist. No. 3-25-10*, 87 Mo. App. 415.

27. See *Swedish-American Nat. Bank v. Dickinson Co.*, 6 N. D. 222, 69 N. W. 455, 49 L. R. A. 285.

28. **Conn.**—*Goodrich v. Stanton*, 71 Conn. 418, 42 Atl. 74. **Ind.**—*Barker v. Prizer*, 150 Ind. 4, 48 N. E. 4. **N. Y.**—*Wattson v. Tibbou*, 17 Abb. Pr. 184.

Other defamatory publications subsequent to the commencement of an action for slander or libel, see 18 STANDARD PROC. 942.

Subsequently accruing grounds for divorce, by amendment or supplemental pleading, see 7 STANDARD PROC. 783, 784.

29. *Wright v. White*, 14 La. Ann. 583. See *supra*, VI, A, and *Lawrence v. Church*, 128 N. Y. 324, 28 N. E. 499, pleading a decree determining part of the matters in controversy. *Contra*, *Swedish-American Nat. Bank v. Dick-*

facts entitling a party to new or more extensive relief or to relief of a different character from that asked for in the original pleadings,<sup>30</sup> as where the continuance of the same wrong entitles a party to additional or different relief.<sup>31</sup>

### D. ADDING OR EXCLUDING PARTIES. — 1. Generally. — Necessary

inson Co., 6 N. D. 222, 69 N. W. 455, 49 L. R. A. 285.

30. **U. S.**—Maynard v. Green, 30 Fed. 643. See also New York Security & Trust Co. v. Lincoln St. R. Co., 74 Fed. 67. **Ala.**—Ramey v. Green, 18 Ala. 771. **Cal.**—Baker v. Bartol, 6 Cal. 483; Melvin v. E. B. & A. L. Stone Co., 7 Cal. App. 324, 94 Pac. 389. **Ill.**—Miller v. Cook, 135 Ill. 190, 25 N. E. 756, 10 L. R. A. 292; Bernhard v. Brunner, 65 Ill. App. 641. **Ia.**—Christie v. Iowa Life Ins. Co., 111 Iowa 177, 82 N. W. 499. **La.**—McCaffrey v. Benson, 40 La. Ann. 10, 3 So. 393; Curtis v. Graham, 1 Mart. (N. S.) 583. **Md.**—Winn v. Albert, 2 Md. Ch. 42. **Mass.**—Bernard v. Topfritz, 160 Mass. 162, 35 N. E. 673, 39 Am. St. Rep. 465; Jaques v. Hall, 3 Gray 194. **Minn.**—Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513, 12 Am. St. Rep. 663, 1 L. R. A. 777. **Mo.**—Ward v. Davidson, 89 Mo. 445, 1 S. W. 846. **N. J.**—Vaiden v. Edson, 85 N. J. Eq. 65, 98 Atl. 635; Allen v. Taylor, 3 N. J. Eq. 435, 29 Am. Dec. 721; Edgar v. Clevenger, 3 N. J. Eq. 258. **N. Y.**—Hasbrouck v. Shuster, 4 Barb. 285; Candler v. Pettit, 1 Paige 168, 19 Am. Dec. 399; Eager v. Price, 2 Paige 333. See New York Cent. & H. R. R. Co. v. Haffen, 23 App. Div. 377, 48 N. Y. Supp. 316. **N. D.**—Swedish-American National Bank v. Dickinson Co., 6 N. D. 222, 69 N. W. 455, 49 L. R. A. 285. **Okla.**—Wade v. Gould, 8 Okla. 690, 59 Pac. 11. **Wis.**—Boorman v. Sunnucks, 42 Wis. 233.

[a] **Subsequently accruing damages**, (1) where recoverable, may be set up by supplemental pleading. **Ind.**—Schmoe v. Cotton, 167 Ind. 364, 79 N. E. 184; Vandalia R. Co. v. Yeager, 80 Ind. App. 118, 110 N. E. 230, additional damage from temporary obstruction of watercourse by railroad. **Mo.**—Alfter v. Hammitt, 54 Mo. App. 303. **N. Y.**—Brinberg v. Oliver Typewriter Co., 174 App. Div. 511, 161 N. Y. Supp. 226 (damages from personal injuries); Delisle v. Hunt, 36 Hun 620. See Musselman v. Manly, 42 Ind. 462. (2) But such a pleading, in some jurisdictions

at least, is unnecessary. See Hicks v. Drew, 117 Cal. 305, 49 Pac. 189; Morgan v. Reynolds, 1 Mont. 163.

[b] **Subsequently Accruing Instalments.**—**La.**—Mader v. Fox, 15 La. 132. **N. Y.**—Fincke v. Rourke, 20 Hun 264. **Wash.**—Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209. See 18 STANDARD PROC. 497, note 77. But see Bull v. Rothschild, 52 Hun 611, 4 N. Y. Supp. 826, 16 Civ. Proc. 356, 22 N. Y. St. 536.

[c] **In a foreclosure suit subsequently accruing instalments or items of the secured indebtedness may be but apparently need not be set forth by supplemental pleading.** See 19 STANDARD PROC. 967, 968 and the following: **Ia.**—Whiting v. Eichelberger, 16 Iowa 422. **Kan.**—Rogers v. Hodgson, 46 Kan. 276, 26 Pac. 732. **N. Y.**—Malcolm v. Allen, 49 N. Y. 448. **Ohio.**—Glenn v. Hoffman, 2 Ohio Dec. (Reprint) 401. But see Null v. Jones, 5 Neb. 500.

[d] **Subsequently Accruing Rents and Profits.**—Leach v. Germania Bldg. Assn., 102 Iowa 125, 70 N. W. 1090.

[e] **Further infringement of patent.** Banks Law Pub. Co. v. Lawyers' Co-operative Pub. Co., 139 Fed. 701.

[f] **Must Be With Respect to Same Subject Matter.**—Allen v. Taylor, 3 N. J. Eq. 435, 29 Am. Dec. 721.

31. **Fla.**—State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640, 21 L. R. A. 189. **Ind.**—Schmoe v. Cotton, 167 Ind. 364, 79 N. E. 184, continued removal of lateral support. **Mo.**—Childs v. Kansas City etc. R. Co., 117 Mo. 414, 17 S. W. 954, 23 S. W. 373, continued acts of waste.

[a] **Upon the consummation of the act sought to be enjoined, as in case of threatened trespass, damages and possession may be sought by supplemental pleading.** Richwine v. Presbyterian Church, 135 Ind. 80, 34 N. E. 737.

[b] **Where recovery of sheep is sought, their increase and wool subsequently sheared, may be claimed by supplemental pleading.** Buckley v. Buckley, 12 Nev. 423.



parties who have been omitted from the original pleadings,<sup>32</sup> or those who have acquired an interest pending suit,<sup>33</sup> may be brought before the court by means of a supplemental pleading when it is too late to employ other and more usual methods of accomplishing that result.<sup>34</sup>

**32. U. S.**—Nevada Nickel Syndicate v. National Nickel Co., 86 Fed. 486. **Ala.**—Glidden v. Andrews, 6 Ala. 190. **N. H.**—Dow v. Jewell, 18 N. H. 340, 45 Am. Dec. 371. **N. Y.**—Ensworth v. Lambert, 4 Johns. Ch. 605; Campbell v. Bowne, 5 Paige 34. **Tenn.**—Robertson v. Winchester, 85 Tenn. 171, 1 S. W. 781. **Wis.**—Hungerford v. Cushing, 8 Wis. 332, 344.

[a] The representative of one who has died since the commencement of the action, the decedent not having been made a party in his lifetime, may be joined by supplemental bill. *Hungerford v. Cushing*, 8 Wis. 332.

**33. U. S.**—Ross v. Fort Wayne, 63 Fed. 466, 11 C. C. A. 288; Hazleton Tripod-Boiler Co. v. Citizens' St. R. Co., 72 Fed. 325; Tappan v. Smith, 5 Biss. 73, 23 Fed. Cas. No. 13,748. **Ala.**—Toulmin v. Hamilton, 7 Ala. 362. **Ind.**—Pounder v. Tate, 132 Ind. 327, 30 N. E. 880. **Ia.**—Wright v. Meek, 3 G. Gr. 412. **Minn.**—Steele v. Taylor, 1 Minn. 274, 279, distinguishing voluntary purchasers pendente lite and those who have acquired title by operation of law. **N. J.**—O'Donnell v. McCann, 77 N. J. Eq. 188, 75 Atl. 999; Williams v. Winans, 22 N. J. Eq. 573. **N. Y.**—Stokes v. Manhattan Ry. Co., 47 App. Div. 58, 62 N. Y. Supp. 333, 30 Civ. Proc. 177; Campbell v. Bowne, 5 Paige 34; Ensworth v. Lambert, 4 Johns. Ch. 605. **Tenn.**—Trabue v. Bankhead, 2 Tenn. Ch. 412. **Tex.**—Standifer v. Bond Hardware Co. (Tex. Civ. App.), 94 S. W. 144, dissolution and merger of corporation by supplemental petition. **Va.**—Wilson v. Wilson, 93 Va. 546, 25 S. E. 596.

See 20 STANDARD PROC. 968, *et seq.*

[a] **Necessity for Supplemental Bill or Original Bill in the Nature of a Supplemental Bill.**—The right to introduce new parties, or to substitute one party for another, in equity, when there has been a change of interest pending the suit is well recognized. It is done either by a supplemental bill, or by an original bill in the nature of a supplemental bill,—the former being applicable properly to those cases where the same parties or the same interests remain before the court, while

the latter "is properly applicable when new parties, with new interests arising from events since the institution of the suit, are brought before the court." *Ross v. Fort Wayne*, 63 Fed. 466, 11 C. C. A. 288. See also to the same effect, *Hazleton Tripod-Boiler Co. v. Citizens' St. R. Co.*, 72 Fed. 325; *Tappan v. Smith*, 5 Biss. 73, 23 Fed. Cas. No. 13,748.

[b] If a complainant, suing in his own right, parts with (1) less than his entire interest, or if he is deprived of his entire interest but he is not the sole complainant, the defect in either case may be supplied by supplemental bill. *Ross v. Fort Wayne*, 63 Fed. 466, 11 C. C. A. 288. (2) But if a sole complainant suing in his own right is deprived of whole interest, as in the case of bankruptcy, or if he assigns his whole interest to another, he is no longer able to prosecute the suit, for want of interest, and the assignee may be complainant in his stead; but, as the title of the latter may be litigated, the substitution must be accomplished by means of an original bill in the nature of a supplemental bill. *Ross v. City of Fort Wayne*, *supra*.

[c] **A person entitled to the benefit of a decree by acquiring an interest** (1) in the subject-matter of the controversy subsequent to the decree is not entitled to invoke the aid of the court or take further action until he has made himself a party by supplemental bill and has brought in the representatives or successors in interest of the original parties plaintiff or defendant. *Secor v. Singleton*, 41 Fed. 725. (2) And if after final hearing and the direction of a decree in favor of the complainant, a third person succeeds to the interest of the complainant, such person cannot file a supplemental bill before the entry of the decree. *Hazleton Tripod-Boiler Co. v. Citizens' St. R. Co.*, 72 Fed. 325.

**34.** *Nevada Nickel Syndicate v. National Nickel Co.*, 86 Fed. 486. See *Nat. Bank of Anadarko v. First Nat. Bank*, 39 Okla. 225, 134 Pac. 866.

**Bringing in new party by amend-**

But supplemental pleading is not permissible merely to get rid of undesired parties to a suit.<sup>35</sup> If the matter introduced by supplemental pleading renders the further presence of certain parties unnecessary, it does not make the original pleading objectionable on this ground, but a motion to dismiss the action as to them is the proper remedy.<sup>36</sup>

**2. New Process.**—New process is necessary where new parties are brought in, but not for parties already before the court,<sup>37</sup> unless required by local rule or statute.<sup>38</sup>

**VII. FORM AND CONTENTS.**<sup>39</sup>—**A. IN GENERAL.**—Supplemental pleadings must be drawn in accordance with the ordinary rules applicable to pleadings generally.<sup>40</sup> The parties to the supplemental pleading would ordinarily remain the same as in the original,<sup>41</sup> unless new parties are added or substituted,<sup>42</sup> or the new facts render it necessary or desirable to dismiss as to some of the parties.<sup>43</sup> But in equity, where leave is given to file a supplemental bill to bring in parties wanting, the original defendants need not be made parties to it.<sup>44</sup>

**B. CONTENTS.**—Since generally the purpose of a supplemental

ment, see 20 STANDARD PROC. 952, *et seq.*

As to revivor, see the title "Revivor."

Proceedings where interest of party is transferred pending suit, see 20 STANDARD PROC. 968, *et seq.*

[a] It is not necessary to file a supplemental bill to bring before the court the husband of a female defendant who has been married since the beginning of the suit. *Campbell v. Bowne*, 5 Paige (N. Y.) 34.

[b] "The coming of age of an infant defendant, or even of an infant complainant, does not abate the suit, nor does it render a supplemental bill necessary, unless his interest in the subject of the suit is changed by that event." *Campbell v. Bowne*, 5 Paige (N. Y.) 34, 36. See 12 STANDARD PROC. 802.

35. *Mosgrove v. Kountze*, 4 McCrary 561, 14 Fed. 315.

36. *California Farm & Fruit Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593.

37. **U. S.**—*Shaw v. Bill*, 95 U. S. 10, 24 L. ed. 333. **Cal.**—*McMinn v. Whelan*, 27 Cal. 300, new publication. **Ill.**—*Mix v. Beach*, 46 Ill. 311. **Ky.**—*McGrath v. Balser*, 6 B. Mon. 141; *Moshell v. Reed*, 30 Ky. L. Rep. 10, 97 S. W. 372.

[a] The ancient and strict rule of English chancery required a subpoena on a supplemental bill. See *Mix v. Beach*, 46 Ill. 311.

38. See statutes and rules.

39. For forms of supplemental pleadings, see 9 STANDARD PROC. 1183, *et seq.*

40. See the following cases: **U. S.** *Nevada Nickel Syndicate v. National Nickel Co.*, 86 Fed. 486; *Lyster v. Stickney*, 4 McCrary 109, 12 Fed. 609. **Conn.** *Goodrich v. Stanton*, 71 Conn. 418, 42 Atl. 74. **Kan.**—*Central Branch U. P. R. Co. v. Andrews*, 41 Kan. 370, 21 Pac. 276. **N. Y.**—*Goddard v. Benson*, 15 Abb. Pr. 191.

See also generally the title "Pleading," and titles dealing with particular kinds and aspects of pleadings.

41. See *Blunt v. Hay*, 4 Sandf. (N. Y.) 362; *Adams v. Dowling*, 2 Madd. 53, 56 Eng. Reprint 255; *Jones v. Jones*, 3 Atk. 217, 26 Eng. Reprint 927.

[a] It is not necessary to make a mere formal party to the original bill a party to the supplemental bill when his rights or interests are not affected by such supplement. *Allen v. Taylor*, 3 N. J. Eq. 435, 29 Am. Dec. 721.

42. See *supra*, VI, D, and 20 STANDARD PROC. 962, 968.

43. See *California Farm & Fruit Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593, and 20 STANDARD PROC. 960.

Dismissal by omission of parties from amended pleading, see 7 STANDARD PROC. 654, note 22.

44. *Ensworth v. Lambert*, 4 Johns. Ch. (N. Y.) 605; *McGown v. Yerks*, 6 Johns. Ch. (N. Y.) 450.

pleading is merely to state additional new matter and it is not a substitute for the original but is merely ancillary thereto,<sup>45</sup> under most of the codes a party is not required to restate in a supplemental pleading his entire cause of action, defense, or reply,<sup>46</sup> though the rule is otherwise in some states.<sup>47</sup> Nor is it necessary in equity practice to reiterate in a supplemental bill all the charges or allegations of the original bill,<sup>48</sup> or to restate all the circumstances of the case at length,<sup>49</sup> but all that is necessary is to set them out by way of reference,<sup>50</sup> stating only so much of the original case as to show there was an equity therein.<sup>51</sup> The proceedings of the court touching the original pleadings should be set forth in the supplemental pleading,<sup>52</sup> and the supplemental and original pleadings should be connected together by special reference,<sup>53</sup> but a failure to do so does not necessarily deprive the pleader of the benefit of the original pleadings.<sup>54</sup> Supplemental pleadings must be drawn in accordance with the order allowing them to be filed;<sup>55</sup> they must also be consistent with the original pleadings,<sup>56</sup> ex-

45. See *supra*, I, A. Compare *infra*, VIII, B.

46. See the statutes and rules, and also *Robbins v. Wells*, 26 How. Pr. (N. Y.) 15, 18 Abb. Pr. 191, 1 Robt. 666.

[a] Allegations which were ordered stricken from the original cannot be put in supplemental complaint. *Camber's v. McDonald*, 40 Hun 639, 2 N. Y. St. 129.

47. See *Goodrich v. Stanton*, 71 Conn. 418, 42 Atl. 74; *Stearns v. Lichtenberger*, 48 App. Div. 498, 62 N. Y. Supp. 949.

[a] In Missouri and New Mexico a supplemental pleading must set forth all the facts so that there will be but one pleading, and all matters set forth in the original pleading and not carried forward into the supplemental are abandoned. *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846; *Kortzenborfer v. St. Louis*, 52 Mo. 204; *Albright v. Albright*, 21 N. M. 606, 157 Pac. 662, Ann. Cas. 1918E, 542; *Pople v. Orekar*, 22 N. M. 307, 161 Pac. 1110. See *McNichols v. Richter*, 13 Mo. App. 515.

48. U. S.—*Nevada Nickel Syndicate v. National Nickel Co.*, 86 Fed. 486, holding that useless repetitions will not be allowed to remain in a supplemental bill as the record is thereby unnecessarily incumbered and the costs increased. Federal Equity Rule 35. N. J. *Edgar v. Clevenger*, 3 N. J. Eq. 464. Eng.—*Vigers v. Lord Audley*, 9 Sim. 72, 59 Eng. Reprint 285.

*Contra*, *Chase v. Searles*, 45 N. H. 511.

49. *Vigers v. Lord Audley*, 9 Sim. 72, 59 Eng. Reprint 285.

50. *Edgar v. Clevenger*, 3 N. J. Eq. 464.

51. *Vigers v. Lord Audley*, 9 Sim. 72, 59 Eng. Reprint 285.

52. *Adams v. Dowding*, 2 Madd. 53, 56 Eng. Reprint 255.

[a] If proceedings are not set forth accurately the variance, if no importance, will be disregarded. *Vaiden v. Edson*, 85 N. J. Eq. 65, 98 Atl. 635.

53. *Gibbon v. Dougherty*, 10 Ohio St. 365; *Dormer v. Fortescue*, 3 Atk. 124, 133, 26 Eng. Reprint 875.

54. *Gibbon v. Dougherty*, 10 Ohio St. 365.

55. Alaska.—*Bush v. Pioneer Mining Co.*, 3 Alaska 610. Mich.—*Graves v. Niles*, Harr. 332. N. J.—*Stockton v. American Tobacco Co.*, 53 N. J. Eq. 400, 32 Atl. 261. N. Y.—*Otten v. Manhattan Ry. Co.*, 24 App. Div. 130, 48 N. Y. Supp. 945. Eng.—*Strange v. Collins*, 2 Ves. & B. 163, 35 Eng. Reprint 281.

[a] Leave to file bill of review gives no authority to file a bill of review with a supplemental bill added. *Buckingham v. Corning*, 29 N. J. Eq. 238.

56. Ill.—*Montague v. Selb*, 106 Ill. 49, could not set up title in supplemental answer inconsistent with a right distinctly admitted in the first answer. Ky.—*Michael & Bro. v. Billings Printing Co.*, 150 Ky. 253, 150 S. W. 77 (supplemental petition held not a departure from the original pleadings); *Asher v. Uhl*, 122 Ky. 114, 87 S. W. 307, 93 S. W. 29. Md.—*Schwab*



cept, perhaps, in so far as inconsistency would have been permissible in the original pleading,<sup>57</sup> and, of course, must state the supplemental matter making the use of such pleadings necessary,<sup>58</sup> together with any consequent alteration with respect to parties.<sup>59</sup> New and more extensive relief may be prayed for in the supplemental pleading than was asked for originally.<sup>60</sup>

**Verification.**—The necessity for verification depends upon statute and the general principles elsewhere discussed.<sup>61</sup>

**C. MISNAMING.**—In cases of misnomer of supplemental pleadings the courts will not be controlled by the name given to them, but will give effect to the pleadings according to their substance, when the substantial rights of the parties are not affected by the misnomer.<sup>62</sup>

*r. Schwab*, 93 Md. 382, 49 Atl. 331, 52 L. R. A. 414. **Minn.**—*Chouteau v. Rice*, 1 Minn. 106. **N. J.**—*Barriclo v. Trenton M. Life & Fire Ins. Co.*, 13 N. J. Eq. 164. **N. Y.**—*Western Reserve Bank v. Stryker*, *Clarke's Ch.* 380; *Hughes v. Bloomer*, 9 Paige 269, mistake may be corrected. **Wash.**—*Keeler v. Parks*, 72 Wash. 255, 130 Pac. 111. **W. Va.** *State v. Central Pocahontas Coal Co.*, 98 S. E. 214; *Straughan v. Hallwood*, 30 W. Va. 274, 4 S. E. 394, 8 Am. St. Rep. 29, court will liberally construe the original and supplemental pleadings so as to reconcile them and might disregard minor inconsistencies. **Wis.** *Stout v. Shew*, 1 Pin. 438, 42 Am. Dec. 579.

[a] *Compare*, *Williams v. Moorehead*, 33 Kan. 609, 7 Pac. 226, holding that supplemental petition should have been allowed notwithstanding its allegations were on certain points in conflict with those of the original petition.

57. See the titles "**Answers**;" "**Repugnancy**."

58. **U. S.**—*Ross v. Fort Wayne*, 63 Fed. 466, 11 C. C. A. 288. **Ind.**—*Musselman v. Manly*, 42 Ind. 462. **Md.** *Schwab v. Schwab*, 93 Md. 382, 49 Atl. 331, 52 L. R. A. 414. **Mass.**—*Pedrick v. White*, 1 Mete. 76. **N. Y.**—*McRoberts v. Pooley*, 1 N. Y. St. 725. **Eng.** *Adams v. Dowling*, 2 Madd. 53, 56 Eng. Reprint 255.

[a] **Pleading must show upon its face that it is supplemental to the commencement of the action.** *Musselman v. Manly*, 42 Ind. 462.

[b] **An allegation of ignorance should be made in jurisdictions where a distinction is observed between amended and supplemental pleadings with respect to matters arising before**

suit but not known till afterward. See *supra*, I, A.

**For form of such allegation**, see 9 STANDARD PROC. 1188.

59. *Adams v. Dowling*, 2 Madd. 53, 56 Eng. Reprint 255. See *supra*, VII, A.

60. See *supra*, VI, B, 1.

61. See the statutes and the title "**Verification**." See also *Kimble v. Seal*, 92 Ind. 276 (in absence of statute not necessary); *Pedrick v. White*, 1 Mete. (Mass.) 76, supplemental bill must be verified.

[a] **Statute Requiring Verification in Sequestration Proceedings.**—*Egan v. Fush*, 46 La. Ann. 474, 15 So. 539; *Bemis v. Wells*, 10 Tex. Civ. App. 626, 31 S. W. 827.

62. See 21 STANDARD PROC. 395, note 22, and the following cases: **U. S.** *White v. Joyce*, 158 U. S. 128, 15 Sup. Ct. 788, 39 L. ed. 921; *Bush v. Pioneer Min. Co.*, 179 Fed. 78, 102 C. C. A. 372. **Fla.**—*Ledwith v. Jacksonville*, 32 Fla. 1, 13 So. 454. **Ill.**—*Bauer Grocer Co. v. Zelle*, 172 Ill. 407, 50 N. E. 238; *Burke v. Smith*, 15 Ill. 158; *Bernhard v. Brunner*, 65 Ill. App. 641. **Ind.** *Davis v. Krug*, 95 Ind. 1. **Ia.**—*Seever v. Hamilton*, 11 Iowa 66. **Kan.**—*Gardner v. Leavenworth*, 94 Kan. 509, 146 Pac. 1000. **Md.**—*Brooks v. Brooke*, 12 Gill & J. 306, 38 Am. Dec. 310, "supplemental bill" held to be an original bill because it stated "the previous proceedings of the court, not with a view to their alteration or amendment, but as a portion of the facts out of which the complainant's equity arises." **Mich.**—*Cheever v. Ellis*, 144 Mich. 477, 108 N. W. 390, 11 L. R. A. (N. S.) 296. **N. J.**—*Barnegat City Beach Assn. v. Buzby* (N. J. Eq.), 20 Atl. 214. **N. Y.** *Howard v. Johnston*, 82 N. Y. 271;

**VII. METHODS OF OBJECTION.**—A. **GENERALLY.**—In addition to such opposition as may be interposed to the granting of the application for leave to file them,<sup>63</sup> supplemental pleadings may be subject to attack by motion to strike,<sup>64</sup> or to make more definite and certain,<sup>65</sup> in conformity with the rules elsewhere stated.

B. **DEMURRER.**—1. **Generally.**—Subject to the general principles elsewhere treated,<sup>66</sup> the general rule is that a supplemental pleading may be tested by demurrer,<sup>67</sup> except where demurrer has been abolished.<sup>68</sup> However, some courts have said that a demurrer cannot be interposed to a supplemental pleading alone since it is not an independent pleading but must be considered in connection with and as a part of the original pleading.<sup>69</sup> Thus a demurrer cannot be interposed

*Frisbie v. Averell*, 87 Hun 217, 33 N. Y. Supp. 1021, 67 N. Y. St. 758; *Myers v. Rosenback*, 9 Misc. 89, 29 N. Y. Supp. 34, 59 N. Y. St. 699. **Ohio.** *Cincinnati v. Cameron*, 33 Ohio St. 336. **S. C.**—*Saye v. Hill*, 104 S. C. 237, 88 S. E. 529 (wherein the misnomer was by motion and order); *Greenwood L. & G. Assn. v. Williams*, 71 S. C. 421, 51 S. E. 272. **Tenn.**—*Northman v. Liverpool L. & G. Ins. Co.*, 1 Tenn. Ch. 312. **Tex.**—*Chicago, R. I. & T. R. Co. v. Halsell*, 98 Tex. 244, 83 S. W. 15; *Mellville v. Wickham* (Tex. Civ. App.), 169 S. W. 1123. **Va.**—*Glenn v. Brown*, 99 Va. 322, 38 S. E. 189. **W. Va.**—*Columbia Finance & Trust Co. v. Fierbaugh*, 59 W. Va. 334, 53 S. E. 468; *Crumlish's Admr. v. Shenandoah Val. R. Co.*, 28 W. Va. 623. **Wyo.**—*Bank of Chadron v. Anderson*, 6 Wyo. 518, 48 Pac. 197.

[a] **Collateral Attack.**—Where an amended bill authorized by order of court was designated a supplemental bill, it was held that the propriety of such practice was not open to collateral attack. *Cheever v. Ellis*, 144 Mich. 477, 108 N. W. 390, 11 L. R. A. (N. S.) 296.

[b] **Though combined in a single document** called an amended and supplemental combined the portion containing the supplemental matter must be treated as a separate pleading. *California Farm & Fruit Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593.

63. See *supra*, II, B, 3.

64. See the title "**Striking Out and Withdrawal**," and *Ellis v. Indianapolis*, 148 Ind. 70, 47 N. E. 218 (where demurrer has been sustained to the original); *Stockton v. American Tobacco Co.*, 53 N. J. Eq. 400, 32 Atl. 261 (where not in conformity with the order permitting); and also titles dealing with

particular matters such as "**Frivolous and Sham Pleadings**;" "**Surplusage and Scandal**."

Where filed without leave, see *supra*, II, B, 1. Not ground for demurrer, see *infra*, VIII, B, 2.

65. See the title "**Certainty in Pleading**," and *Stith v. Fullinwider*, 40 Kan. 73, 19 Pac. 314.

66. See the title "**Demurrer**."

67. See *infra*, this section and *Duesel v. Proch*, 78 Conn. 343, 62 Atl. 152, 3 L. R. A. (N. S.) 854.

68. See Federal Equity Rule 19.

69. **Ind.**—*Cincinnati, H. & D. R. Co. v. McCullom*, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165; *Ellis v. Indianapolis*, 148 Ind. 70, 47 N. E. 218; *Lewis v. Rowland*, 131 Ind. 37, 30 N. E. 796; *Peters v. Banta*, 120 Ind. 416, 22 N. E. 95, 23 N. E. 84. **Okl.**—*Reynolds v. Hill*, 28 Okla. 533, 114 Pac. 1108. **Eng.**—*Milner v. Lord Harewood*, 17 Ves. Jr. 144, 3+ Eng. Reprint 56. Lord Eldon: "Upon the form of the supplemental, and the nature of the reference to the answer to the original bill, I must look at the original bill and the answer."

But see *Eckert v. Binkley*, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441 (distinguishing earlier Indiana cases above cited, and holding proper a demurrer to a supplemental answer setting up a distinct defense, as a means of testing the sufficiency of that defense); *Stearns v. Lichtenberger*, 48 App. Div. 498, 62 N. Y. Supp. 949, a demurrer will lie to a supplemental complaint when intended as a substitute for and to supersede the original complaint.

[a] **The rule which forbids the filing of a demurrer to a supplemental pleading results from the general rule that a demurrer will not lie to a part**

to a supplemental complaint under the code on the ground that it fails to state a cause of action, since it is not intended to embody a complete cause of action.<sup>70</sup> However, in equity, a supplemental bill may be demurred to,<sup>71</sup> and, in some code states, so may a supplemental complaint on grounds going to the propriety of the supplemental matter.<sup>72</sup>

A supplemental answer attempting to set up a new and independent defense may be demurred to as not constituting a defense,<sup>73</sup> or, it seems, as not a proper matter for a supplemental pleading.<sup>74</sup>

Where the supplemental pleading restates the original,<sup>75</sup> a demurrer may of course be interposed to the supplemental pleading.<sup>76</sup>

On demurrer to the original and supplemental bill or complaint the two may be considered together for the purpose of showing no equity or cause of action.<sup>77</sup> But the latter cannot be considered for the purpose

of a pleading. *Farris v. Jones*, 112 Ind. 498, 14 N. E. 484.

[b] If separate demurrers are entered to the original and to the supplemental pleadings they ought to be rejected or at least disregarded. *Peters v. Banta*, 120 Ind. 416, 22 N. E. 95, 23 N. E. 84.

70. *Peters v. Banta*, 120 Ind. 416, 22 N. E. 95, 23 N. E. 84; *Morey v. Ball*, 90 Ind. 450. See also *Lewis v. Rowland*, 131 Ind. 37, 30 N. E. 796; *Hayward v. Hood*, 44 Hun 128; *Myers v. Metropolitan El. Ry. Co.*, 16 Daly 410, 12 N. Y. Supp. 2, 19 Civ. Proc. 448, 34 N. Y. St. 293. Compare *Stearns v. Lichtenberger*, 48 App. Div. 498, 62 N. Y. Supp. 949, in preceding note.

71. See the following cases: III. *Winslow v. Leland*, 128 Ill. 304, 21 N. E. 588. N. J.—*Commercial Union Assur. Co. v. N. J. Rubber Co.*, 64 N. J. Eq. 338, 51 Atl. 451; *Woodruff v. Brugh*, 6 N. J. Eq. 465; *Allen v. Taylor*, 3 N. J. Eq. 435, 29 Am. Dec. 721. N. Y. *McElwain v. Willis*, 3 Paige 505. Eng. *Baldwin v. Mackown*, 3 Atk. 817, 26 Eng. Repr. 1267; *Adams v. Dowding*, 2 Madd. 53, 56 Eng. Reprint 255.

[a] **Right of New Party To Demur.** An assignee or successor in interest to an original defendant brought in as a party by a supplemental bill is bound by the prior proceedings, and if an answer to the original bill has been filed by his assignor he is bound thereby and cannot demur to anything in the original bill. He may, however, demur to the supplemental bill. *Williams v. Winans*, 20 N. J. Eq. 392.

72. See *infra*, this section, and

*Baker v. Brickell*, 102 Cal. 620, 36 Pac. 950; *Lowry v. Harris*, 12 Minn. 255.

73. *Goddard v. Benson*, 15 Abb. Pr. (N. Y.) 191, attempting to plead as a bar a judgment since the commencement of the action. See also *Eckert v. Binkley*, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441.

[a] **Right To Demur Need Not be Given by Statute.**—"Where the code allows a supplemental answer, it necessarily allows what is incident to such a pleading, the right to demur to it. This was the rule before the Code, where a plea was put in *pais darrien*." *Goddard v. Benson*, 15 Abb. Pr. (N. Y.) 191. Compare *Myers v. Metropolitan El. R. Co.*, 16 Daly (N. Y.) 410, 19 Civ. Proc. 448, 12 N. Y. Supp. 2, 34 N. Y. St. 293.

74. See *Blewitt v. Greene*, 57 Tex. Civ. App. 588, 122 S. W. 914.

75. See *supra*, VII, B.

76. *Leusch v. Nickel*, 16 N. M. 28, 113 Pac. 595; *Stearns v. Lichtenberger*, 48 App. Div. 498, 62 N. Y. Supp. 949.

77. **Fla.**—*Nadel v. Weber Bros. Shoe Co.*, 70 Fla. 218, 70 So. 20, L. R. A. 1916D, 1230, original weakened by supplemental bill. **Ind.**—*Cincinnati, H. & D. R. Co. v. McCullom*, 183 Ind. 556, 109 N. E. 206, Ann. Cas. 1917E, 1165, supplemental pleading showing abatement of tort action by death of plaintiff. **Okla.**—*Reynolds v. Hill*, 28 Okla. 533, 114 Pac. 1108, demurrer to supplemental complaint treated as demurrer to both.

Compare *California Farm & Fruit Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593, original does not become demurrable for misjoinder of parties because



of supplying vital defects in the former.<sup>78</sup>

**2. Grounds of Demurrer.**—Where a demurrer is proper it may be based on the ground of lack of equity,<sup>79</sup> or because the matter set forth in the supplemental pleading is not properly supplemental,<sup>80</sup> as where it is an attempt to supply fundamental deficiencies in the original pleading,<sup>81</sup> or to state a new case or cause of action,<sup>82</sup> or the matters charged in the supplemental pleading arose before the filing of the original pleadings,<sup>83</sup> and on various other grounds for which a demurrer usually lies.<sup>84</sup> Demurrer is proper where laches appears from the allegations of the supplemental pleading,<sup>85</sup> but objection that a supplemental pleading was filed without leave is not a matter for demurrer,<sup>86</sup> and a demurrer will be considered as a waiver of such

supplemental sets up subsequent facts rendering certain parties no longer necessary.

**78.** *Straughan v. Hallwood*, 30 W. Va. 274, 4 S. E. 394, 8 Am. St. Rep. 29. See *supra*, VI, B.

[a] Where a supplemental petition is in the nature of a replication to new matter in the answer, it cannot be considered in determining whether a demurrer to the original should be sustained. *Merchants' & Bankers' Fire Underwriters v. Williams* (Tex. Civ. App.), 181 S. W. 859.

**79.** *Williams v. Winans*, 22 N. J. Eq. 573; *Pinkus v. Peters*, 5 Beav. 253, 49 Eng. Reprint 575.

**80.** *Cal.*—*Baker v. Brickell*, 102 Cal. 620, 36 Pac. 950. *Ill.*—*Winslow v. Leland*, 128 Ill. 304, 21 N. E. 588. *N. J.* *Barrielo v. Trenton M. L. & F. Ins. Co.*, 13 N. J. Eq. 154. *Tenn.*—*Wing v. Champion*, 1 Tenn. Ch. 517. *Eng.*—*Milner v. Lord Harewood*, 17 Ves. Jr. 149, 34 Eng. Reprint 56; *Adams v. Dowding*, 2 Madd. 53, 56 Eng. Reprint 255; *Baldwin v. Mackown*, 3 Atk. 817, 26 Eng. Reprint 1267.

**81.** *Fla.*—*Crump v. Perkins*, 18 Fla. 353. *Mass.*—*Pinch v. Anthony*, 10 Allen 470. *Minn.*—*Lowry v. Harris*, 12 Minn. 255.

[a] A demurrer for lack of equity is not sufficient to raise this point. *Crump v. Perkins*, 18 Fla. 353; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. (Pa.) 180, 218.

**82.** *U. S.*—*Maynard v. Green*, 30 Fed. 643. *N. J.*—*Williams v. Winans*, 20 N. J. Eq. 392; *Barrielo v. Trenton Mut. L. & F. Ins. Co.*, 13 N. J. Eq. 154. *Tenn.*—*Wing v. Champion*, 1 Tenn. Ch. 517.

**83.** *U. S.*—*Henry v. Travelers' Ins. Co.*, 45 Fed. 299. *N. J.*—*Barrielo v.*

*Trenton M. L. & F. Ins. Co.*, 13 N. J. Eq. 154. *N. Y.*—*Stafford v. Howlett*, 1 Paige 200. *N. C.*—*Murray v. King*, 40 N. C. 223.

[a] If it does not distinctly appear by the supplemental bill, that the new matters charged therein arose before the filing of the original bill, the defendant can only take advantage of the irregularity by a plea alleging the fact. *Stafford v. Howlett*, 1 Paige (N. Y.) 200. See *infra*, IX.

**84.** See generally the title "Demurrer."

[a] **A Supplemental Bill Is Demurrable for Multifariousness.**—*Siglin v. Smith*, 168 Ala. 398, 53 So. 260; *Bonney v. Lamb*, 210 Ill. 95, 71 N. E. 375. See also *Jenkins v. International Bank*, 111 Ill. 462; 20 STANDARD PROC. 70.

[b] **Vagueness and Uncertainty.** "The objection, that the statements of the supplemental bill are vague and uncertain, is to their form and manner, and is not good on general demurrer." *Choteau v. Rice*, 1 Minn. 106.

**85.** *U. S.*—*Henry v. Travelers' Ins. Co.*, 45 Fed. 299. *Ill.*—*Winslow v. Leland*, 128 Ill. 304, 21 N. E. 588. *N. J.* *Woodruff v. Brugh*, 6 N. J. Eq. 465.

See the title "Laches."

**86.** *U. S.*—*Henry v. Travelers' Ins. Co.*, 45 Fed. 299. *Ill.*—*Orvis v. Cole*, 14 Ill. App. 283. *N. J.*—*Barrielo v. Trenton Mut. L. & F. Ins. Co.*, 13 N. J. Eq. 154.

See *Pedrick v. White*, 1 Mete. (Mass.) 76, query.

**Motion to strike** is the remedy, see *supra*, II, B, 1.

[a] In New Hampshire it has been held attack by demurrer is proper in such case. *Tappan v. Evans*, 12 N. H. 330.

irregularity.<sup>87</sup> In case of a supplemental answer, failure to state a ground of defense may be ground for demurrer.<sup>88</sup>

C. **WAIVER OF OBJECTIONS.**—The right to demur is not waived by answering the original pleading subsequent to the filing of a supplemental pleading of which there was no notice,<sup>89</sup> but objection to a supplemental pleading on the ground of want of notice is waived by demurring without assigning that as a reason.<sup>90</sup> If the supplemental pleading is answered and the case is contested upon the merits it cannot be insisted for the first time on appeal that the supplemental pleading was improperly filed;<sup>91</sup> and waiver of the right to object results also when the parties who might properly have objected that the facts set up in a non-supplementary pleading should have been set up by means of a supplemental pleading, or vice versa, appear and contest the case on its merits without proper and timely objection.<sup>92</sup> Objection

87. *Allen v. Taylor*, 3 N. J. Eq. 435, 29 Am. Dec. 721.

88. *Goddard v. Benson*, 15 Abb. Pr. (N. Y.) 191.

89. *Bonney v. Lamb*, 210 Ill. 95, 71 N. E. 375.

90. *Allen v. Taylor*, 3 N. J. Eq. 435, 29 Am. Dec. 721.

91. *Cal.*—*Sinnige v. Oswald*, 170 Cal. 55, 148 Pac. 203. *Conn.*—*Steele v. Steele*, 35 Conn. 48. *Ill.*—*Van Wert v. Boyes*, 140 Ill. 89, 29 N. E. 710. *Kan.* *King v. Hyatt*, 51 Kan. 504, 32 Pac. 1105, 37 Am. St. Rep. 304. *La.*—*Bat-taile v. O'Neil*, 3 La. Ann. 229. *Md.* *Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375. *Mass.*—*Pinch v. Anthony*, 8 Allen 536, 10 Allen 470. *Minn.*—*Lowry v. Harris*, 12 Minn. 255. *Miss.*—*Walker v. Gilbert*, 7 Smed. & M. 456. *Mo.* *Alfter v. Hammitt*, 54 Mo. App. 303. *N. Y.*—*Wetmore v. Truslow*, 51 N. Y. 338. *N. C.*—*Puffer v. Lucas*, 101 N. C. 281, 7 S. E. 734. *Okla.*—*Reynolds v. Hill*, 28 Okla. 533, 114 Pac. 1108. *Ore.* *Mitchell v. Taylor*, 27 Ore. 377, 41 Pac. 119. *S. C.*—*Murchison v. Atlantic Coast Line Ry. Co.*, 91 S. C. 325, 74 S. E. 749. *Tex.*—*Johnson v. White* (Tex. Civ. App.), 27 S. W. 174; *Merchant v. Bowyer*, 3 Tex. Civ. App. 367, 22 S. W. 763. *Vt.*—*Waterman v. Buck*, 63 Vt. 544, 22 Atl. 15. *Va.*—*Wilson v. Wilson*, 93 Va. 546, 25 S. E. 596. *Wash.* *Hodges v. Price*, 38 Wash. 1, 80 Pac. 202. *Wis.*—*Hopkins v. Gilman*, 47 Wis. 581, 3 N. W. 382.

See also *Bush v. Pioneer Mining Co.*, 179 Fed. 78, 102 C. C. A. 372. *Contra*, *Straughan v. Hallwood*, 30 W. Va. 274, 4 S. E. 394, 8 Am. St. Rep. 29. See

generally the title "**Time To Plead.**"

[a] **Failure to demur** on the ground that the subject matter of the supplemental bill is improper, is a waiver of this ground of objection. *Crump v. Perkins*, 18 Fla. 353. See also *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. Cas. (Pa.) 180, 218, failure to demur on this ground or to make the objection in the answer, is a waiver.

[b] **Hearing Before Master as Waiver.**—Where by consent of parties a cause as set out in a bill and supplemental bill is sent to a master and is fully heard upon its merits, the objection that the suit is sought to be maintained upon facts occurring since the filing of the original bill is waived where there is a failure to demur to it upon that ground. *Pinch v. Anthony*, 8 Allen (Mass.) 536, 10 Allen 470. Criticised and disapproved in *Straughan v. Halwood*, 30 W. Va. 274, 4 S. E. 394, 8 Am. St. Rep. 29.

[c] **Misjoinder Waived.**—(1) "If it be true that the [supplemental] petition discloses two causes of action which should have been separately stated, still that can be of no avail here; for the remedy in such a case is by motion." *Childs v. Kansas City, etc. R. Co.*, 117 Mo. 414, 23 S. E. 373. (2) If pending an action matters occur which constitute a misjoinder of parties plaintiff, objection must be taken promptly by supplemental answer or it is waived. *Calderwood v. Calderwood*, 31 Cal. 333.

92. *U. S.*—*Coburn v. Cedar Valley Land & S. Co.*, 138 U. S. 196, 11 Sup. Ct. 258, 34 L. ed. 876; *French v. Hay*,

to an affidavit accompanying a supplemental pleading may be waived in the same way.<sup>93</sup> As objection to a supplemental pleading filed without leave is made by a motion to strike and not by demurrer, the objection is waived if a demurrer is filed to the supplemental pleading.<sup>94</sup> Consent to the filing of a supplemental pleading does not constitute a waiver of the right to object in the usual way to the sufficiency of such pleading.<sup>95</sup> In any case, objection must be made promptly or it is waived.<sup>96</sup>

**IX. PLEA, ANSWER OR REPLY.**—Facts not apparent from the pleading itself, which show that its subject matter is not properly supplemental, may be set up by special plea.<sup>97</sup>

If defendant has answered the original bill, petition, or complaint he may answer the supplemental pleading,<sup>98</sup> provided he is a party thereto,<sup>99</sup> but he cannot make a new or further answer to the original pleading without special permission,<sup>1</sup> because the original answer remains in full force and an answer is required only as to the supplemental matter.<sup>2</sup> But, except where statute or rule requires it,<sup>3</sup> the defendant is under no obligation to file such answer but may rely on his original answer.<sup>4</sup> And an answer or defense to the original plead-

22 Wall. 238, 22 L. ed. 854; *Kelsey v. Hobby*, 16 Pet. 269, 10 L. ed. 961; *Seattle, L. S. & E. Ry. Co. v. Union Trust Co.*, 79 Fed. 179, 24 C. C. A. 512. *Miss. Walker v. Gilbert*, 7 Smed. & M. 456. *Eng.*—*York v. Stapleton*, 2 Atk. 136, 26 Eng. Reprint 486.

93. *Steiner v. Scholze*, 105 Ala. 607, 18 So. 79.

94. *Allen v. Taylor*, 3 N. J. Eq. 435, 29 Am. Dec. 721. See *supra*, VIII, A, 1; VIII, B, 2.

95. *Turner v. Pierce*, 31 Wis. 342.

96. *Calderwood v. Calderwood*, 31 Cal. 333; *Jones v. Jones*, 3 Atk. 217, 26 Eng. Reprint 927, objection for want of proper parties waived.

97. *Stafford v. Howlett*, 1 Paige (N. Y.) 200, otherwise the objection is waived.

For form of plea, see 9 STANDARD PROC. 978.

98. *Ind.*—*Musselman v. Manly*, 42 Ind. 462. *N. Y.*—*Dann v. Baker*, 12 How. Pr. 521. *Vt.*—*Duplesse v. Haskell*, 89 Vt. 166, 94 Atl. 503.

99. *American L. Ins. & T. Co. v. Bayard*, 3 Barb. Ch. (N. Y.) 610.

1. *Ind.*—*Musselman v. Manly*, 42 Ind. 462. *Md.*—*Swan v. Dent*, 2 Md. Ch. 111. *N. Y.*—*Dann v. Baker*, 12 How. Pr. 521; *American L. Ins. & T. Co. v. Bayard*, 3 Barb. Ch. 610. *Tex.* *Blewitt v. Greene*, 57 Tex. Civ. App. 588, 122 S. W. 914.

[a] In some cases, as of transmis-

sion or transfer of interest, and new parties, where a discovery was desired, a supplemental bill might pray for an answer to both the supplemental and the original bill; though usually a supplemental bill in chancery called upon the defendant to answer the supplemental matter only. *Dann v. Baker*, 12 How. Pr. (N. Y.) 521.

2. *Dann v. Baker*, 12 How. Pr. (N. Y.) 521. But see *supra*, VII, B.

3. *Rio Grande Dam & Irr. Co. v. United States*, 215 U. S. 266, 30 Sup. Ct. 97, 54 L. ed. 190, *affirming*, 13 N. M. 386, 85 Pac. 393.

[a] Failure to demur, answer, or plead to a supplemental pleading within the time prescribed by statute justifies the court in taking the supplemental pleading as confessed. *Rio Grande Dam & Irr. Co. v. United States*, 215 U. S. 266, 30 Sup. Ct. 97, 54 L. ed. 190.

[b] It is not error to require a defendant already in court by service, to answer a supplemental bill, and on his failing to do so to render a decree *pro confesso* to such supplement. *Mix v. Beach*, 46 Ill. 311.

4. *McRoberts v. Pooley*, 1 N. Y. St. 725.

[a] But if he does not file an additional answer he cannot be heard after the trial to say that there was no formal joinder of issue upon the new facts. *Kimble v. Seal*, 92 Ind. 276.



ing, which has already been unfavorably passed upon, cannot be incorporated in the answer to the supplemental pleading.<sup>5</sup> Subject to and within the limitations of the rules governing replication and reply,<sup>6</sup> the plaintiff may reply to an answer to a supplemental petition, complaint, or bill,<sup>7</sup> or to a supplemental answer.<sup>8</sup>

**Time.**—The statute<sup>9</sup> or rule or order of court<sup>10</sup> may prescribe the time for answer or reply to supplemental pleadings.

**X. AMENDING SUPPLEMENTAL PLEADINGS.**—Under the chancery and code practice supplemental pleadings may be amended,<sup>11</sup> subject, of course, to the general limitations elsewhere discussed.<sup>12</sup>

**XI. HEARING OR TRIAL.**—If the supplemental pleading is filed before a hearing or trial on the original, they are considered together in the ordinary way;<sup>13</sup> if filed after, the second hearing or trial is on the issues made by the supplemental pleading only,<sup>14</sup> unless

5. *Western Union Tel. Co. v. State*, 146 Ind. 54, 44 N. E. 793. See also *Pentlarge v. Pentlarge*, 22 Blatchf. 120, 22 Fed. 412; *Scott v. Lazell*, 177 Fed. 608.

6. See the title "**Replication and Reply.**"

7. *Perkins v. Hendryx*, 31 Fed. 522.

8. *Graef v. Bernard*, 162 Mass. 300, 38 N. E. 503; *Radley v. Houghtaling*, 4 How. Pr. (N. Y.) 251. See Federal Equity Rules 31 and 32.

[a] **No reply is necessary** in some states where the supplemental matter does not constitute a counterclaim. *Williams v. Hutton*, 164 N. C. 216, 80 S. E. 257. See the title "**Replication and Reply.**"

9. See the statutes.

[a] **Failure to comply with statute** requiring an answer or other pleading to be filed within a certain time justifies the court in taking the allegations of the supplemental pleading for confessed. *Rio Grande Dam & Irr. Co. v. United States*, 215 U. S. 266, 30 Sup. Ct. 97, 54 L. ed. 190, *affirming*, 13 N. M. 386, 85 Pac. 393.

10. **U. S.**—*Perkins v. Hendryx*, 31 Fed. 522. **Neb.**—*Orr v. Orr*, 1 Neb. 309. **N. Y.**—*Hasbrouck v. Shuster*, 4 Barb. 285. **S. C.**—*Murchison v. Atlantic Coast Line Ry. Co.*, 91 S. C. 325, 74 S. E. 749.

[a] **Waiver.**—"The proceeding to the hearing may well be regarded as a waiver by the plaintiff of the technical objection that the answer to the supplemental bill was not filed in strict conformity to the rules in point of time." *Perkins v. Hendryx*, 31 Fed. 522.

[b] **Twenty-four hours in which to file an answer** to a supplemental petition is probably unreasonable. *Reader v. Farriss*, 49 Okla. 459, 153 Pac. 678, L. R. A. 1916D, 672.

11. **U. S.**—*Nevada Nickel Syndicate v. National Nickel Co.*, 86 Fed. 486, supplemental bill can be amended in open court. **Mass.**—*Aldrich v. Aldrich*, 143 Mass. 45, 8 N. E. 870, within discretion of court to permit amendment of supplemental answer the allegations of which are not sufficiently certain. **N. Y.**—*Divine v. Duncan*, 2 Abb. N. C. 328, 52 How. Pr. 446, "the supplemental complaint is a pleading, and as such amendable once as of course." **Tex.**—*Merchant v. Bowyer*, 3 Tex. Civ. App. 367, 22 S. W. 703, supplemental answer.

12. See the titles "**Amendments and Jeofails**," "**Bills and Answers**," "**New Cause of Action or Defense**," "**Parties.**"

13. See *Waterman v. Buck*, 63 Vt. 544, 22 Atl. 15; *Adams v. Dowding*, 2 Madd. 253, 56 Eng. Reprint 255 (supplemental bill), and generally the titles "**Hearing**," "**Trial**;" and the cross-references there made.

[a] **Decretal Order—Vermont Practice.**—It is the practice in Vermont when a cause is heard or brought on for hearing upon a bill and a supplemental bill for the decretal order to say so. *International Paper Co. v. Belows Falls Canal Co.*, 88 Vt. 93, 90 Atl. 943.

14. *Bandler v. Bradley*, 110 Minn. 66, 124 N. W. 644; *Adams v. Dowling*, 2 Madd. 253, 56 Eng. Reprint 255.

[a] **As to new note of issue or no-**

the issues raised by the two pleadings are so interdependent as to require a new trial of all the issues.<sup>15</sup> In the case of a supplemental answer, if it appears upon the hearing that the defendant is entitled to a judgment against the plaintiff it should be rendered in his favor.<sup>16</sup>

**XII. APPEAL AND ERROR.**—If there is an abuse of discretion in granting or refusing leave to file supplemental pleadings the action of the court may be assigned as error and reviewed upon appeal.<sup>17</sup> However, the higher courts are inclined to leave unquestioned the right of the lower court to grant or refuse leave to file supplemental pleadings, and abuse of discretion must be affirmatively shown to exist and to be prejudicial to the rights of the complainant or the decision of the lower court will not be disturbed upon this ground upon appeal.<sup>18</sup>

tice of trial, see *Myers v. Metropolitan El. R. Co.*, 16 Daly (N. Y.) 410, 19 Civ. Proc. 448, 12 N. Y. Supp. 2, 34 N. Y. St. 293; *Fisher v. Gunn*, 12 Misc. 207, 34 N. Y. Supp. 27, and the title "Trial."

15. See *Bandler v. Bradley*, 110 Minn. 66, 124 N. W. 644.

16. *Howard v. Johnston*, 82 N. Y. 271, case of overpayment by the defendant.

17. *Ark.*—*Brooks v. Moody*, 25 Ark. 452. *Cal.*—*Jensen v. Dorr*, 159 Cal. 742, 116 Pac. 553; *Grady v. Bramlet*, 59 Cal. 105. *Ind.*—*Louisville, N. A. & C. Ry. Co. v. Hubbard*, 116 Ind. 193, 18 N. E. 611. *Kan.*—*Austin v. Jones*, 47 Kan. 565, 28 Pac. 621. *Mont.*—*Nichols v. Williams*, 38 Mont. 552, 100 Pac. 969. *N. Y.*—*Harrington v. Slade*, 22 Barb. 161. *N. D.*—*Swedish-American Nat. Bank v. Dickinson Co.*, 6 N. D. 222, 69 N. W. 455, 49 L. R. A. 285. *S. C.*—*Sparks v. Green*, 69 S. C. 198, 48 S. E. 61; *Moon v. Johnson*, 14 S. C. 434. *S. D.*—*Schouweiler v. Hough*, 7 S. D. 163, 63 N. W. 776. *Tenn.*—*Peoples v. Carrol*, 11 Heisk. 417. *Wash.*—*Davis v. Erickson*, 3 Wash. 654, 29 Pac. 86.

*Contra*, *Frisby v. Parkhurst*, 29 Md. 58, 96 Am. Dec. 503. See also *Harper v. Raisin Fertilizer Co.*, 158 Ala. 329, 48 So. 589, 132 Am. St. Rep. 32; *Cahaba Southern Min. Co. v. Pratt*, 146 Ala. 245, 40 So. 943; *Mechanics & Traders' Ins. Co. v. Gerson*, 38 La. Ann. 349.

[a] **Necessity for Exceptions.**—(1) It has been held that an order refusing leave cannot be reviewed upon appeal unless incorporated in the bill of exceptions. *Giddings v. Seventy-Six Land & Water Co.*, 109 Cal. 116, 41 Pac. 788. (2) On the other hand, it has been decided that such an order if embodied in a written order and

journal entry is a self-excepting order, and no formal exception is necessary to make the order reviewable on appeal. *Burnett v. Ewing*, 39 Wash. 45, 80 Pac. 855. (3) Nor for purpose of reviewing court's action in striking supplemental pleading out, is it necessary that the pleading be preserved by a bill of exceptions as it is still a part of the record, although for the purpose of pleading it treated as excluded therefrom. The clerk should incorporate it in the transcript. *Henry v. Montezuma Water & Land Co.*, 55 Colo. 182, 133 Pac. 747. (4) But where leave to file a supplemental pleading is refused, it cannot be considered on appeal though actually filed with the clerk and by him embodied in the judgment roll. *Wood v. Brush*, 72 Cal. 224, 13 Pac. 627.

18. *U. S.*—*Knott v. Chicago B. & Q. Ry. Co.*, 230 U. S. 474, 33 Sup. Ct. 975, 57 L. ed. 1571; *Berliner Gramophone Co. v. Seaman*, 113 Fed. 750, 51 C. C. A. 440, "gross" abuse. *Cal.*—*McLennan v. Ohmen*, 75 Cal. 558, 17 Pac. 687, "conceding that the court erred in permitting the supplemental complaint to be filed, still we are unable to see that defendant was prejudiced." No reversal. *Ill.*—*Turner v. Berry*, 8 Ill. 541. *Ind.*—*Louisville, N. A. & C. Ry. Co. v. Hubbard*, 116 Ind. 193, 18 N. E. 611. *Kan.*—*Alexander v. Clarkson*, 96 Kan. 174, 150 Pac. 576; *Clark v. Spencer*, 14 Kan. 398, 19 Am. Rep. 96. In *Smith v. Fullinwider*, 40 Kan. 73, 19 Pac. 314, it was said that there is no ground for error unless it affirmatively appears that the lower court was guilty of a "flagrant" abuse of discretion. *Ky.*—*Aylor v. Aylor*, 158 Ky. 713, 166 S. W. 216. *Mont.*—*Nichols v. Williams*, 38 Mont. 552, 100 Pac. 969. *N. Y.*—*Spears*

The trial court is in a better position to know the facts and circumstances of the case and its refusal to grant leave will be presumed to be upon mature deliberation.<sup>19</sup> It devolves upon the party who assails the action of the court to show affirmatively that there was an abuse of discretion.<sup>20</sup> Such abuse is sufficiently shown if it appears that a defense or ground of action going to the merits of the case is shut out by the court's order.<sup>21</sup> If the action of the lower court is controlled by some error of law reversal will result,<sup>22</sup> unless such error is not deemed prejudicial.<sup>23</sup>

*v. New York*, 72 N. Y. 442. **S. C.** *Pickett v. Fidelity & Cas. Co.*, 60 S. C. 477, 38 S. E. 160, 629. **S. D.**—*Murphy v. Plankinton Bank*, 18 S. D. 317, 100 N. W. 614. **Wash.**—*Long v. Eisenbeis*, 23 Wash. 556, 63 Pac. 249. **Wis.**—*Matteson v. Curtis*, 14 Wis. 436.

[a] Where the supplemental pleading was entirely unnecessary, but in no way prejudiced the rights of the opposing party, there is no ground to complain of the action of the lower court in allowing such pleading to be filed. *Bradstreet v. Gill*, 22 N. M. 202, 160 Pac. 354.

[b] "Unless some greater wrong is shown than the mere matter of delay and costs, ordinarily the action of the court in refusing leave to file a supplemental petition will not be ground for reversal." *Smith v. Smith*, 22 Kan. 699.

19. **Cal.**—*Harding v. Minear*, 54 Cal. 502. **Kan.**—*Alexander v. Clarkson*, 96 Kan. 174, 150 Pac. 576. **N. D.**—*Erickson v. Elliott*, 17 N. D. 389, 117 N. W. 361. **Okla.**—*Lewis v. Allen*, 42 Okla. 584, 142 Pac. 384.

[a] Where the record does not dis-

close the character of the supplemental pleading for which leave is asked, the higher court will presume it was of such character as warranted the court below in refusing to permit it to be filed. *Schmidt v. Braley*, 112 Ill. 48, 1 N. E. 267.

20. **Louisville, N. A. & C. Ry. Co. v. Hubbard, 116 Ind. 193, 18 N. E. 611; *Matteson v. Curtis*, 14 Wis. 436.**

21. **Ark.**—*Brooks v. Moody*, 25 Ark. 452. **Cal.**—*Jensen v. Dorr*, 159 Cal. 742, 116 Pac. 553; *Seehorn v. Big Meadows & B. W. Road Co.*, 60 Cal. 240. **Kan.**—*Austin v. Jones*, 47 Kan. 565, 28 Pac. 621. **Tenn.**—*Peoples v. Carrol*, 11 Heisk. 417.

22. *Pickett v. Fidelity & Cas. Co.*, 60 S. C. 477, 38 S. E. 160, 629.

[a] Where a party has a legal right to file a supplemental pleading as in case of a defense subsequently accruing (see *supra*, II, B, 2, a) the denial of the right will be reversed on appeal. See *Drought v. Curtis*, 8 How. Pr. (N. Y.) 56.

23. *McLennan v. Ohmen*, 75 Cal. 558, 17 Pac. 687.



# SUPPLEMENTARY PROCEEDINGS

By the Editorial Staff.

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For forms, see 9 STANDARD PROC. 1189.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. NATURE AND OBJECT OF.**—Supplementary proceedings are extraordinary,<sup>1</sup> statutory,<sup>2</sup> judicial,<sup>3</sup> and civil<sup>4</sup> proceedings, summary<sup>5</sup>1. *Reardon v. Henry*, 82 Iowa 134, 47 N. W. 1022; *Hinsdale v. Sinclair*, 83 N. C. 338.2. *In re Burrows*, 33 Kan. 675, 7 Pac. 148; *First Nat. Bank v. Cook*, 12 Wyo. 492, 524, 76 Pac. 674, 78 Pac. 1083, 2 L. R. A. (N. S.) 1012. See *infra*, VIII, A.3. *McCullough v. Clark*, 41 Cal. 298.4. *Feinberg v. Kuteosky*, 147 App. Div. 393, 132 N. Y. Supp. 9.5. *Ind.*—*D. L. Adams Co. v. Federal Glass Co.*, 180 Ind. 576, 103 N. E. 98; *Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412; *Beckman Supply Co. v. Newell*, (Ind. App.), 118 N. E. 962. But see *Harris v. Howe*, 2 Ind. App. 419, 28 N. E. 711, and *infra* this section. *Ia.*—*Bennett v. Valley Min. Co.*, 142 Iowa 53, 120 N. W. 654. *Mo.* *Ackerman v. Green*, 201 Mo. 231, 241, 100 S. W. 30. *N. Y.*—*Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493. *Wyo.*

in nature, and auxiliary to the original action,<sup>6</sup> instituted subsequent to execution,<sup>7</sup> for the purpose of discovering assets of the judgment debtor,<sup>8</sup> and subjecting them to execution or to the control of the receiver,<sup>9</sup> or applying them to the satisfaction of the judgment.<sup>10</sup> Some courts, however, regard them as independent civil actions,<sup>11</sup> and, for some purposes, as special proceedings.<sup>12</sup> They have many of the characteristics of a bill of discovery,<sup>13</sup> and are in many respects a substitute for a creditor's bill,<sup>14</sup> or *capias ad satisfaciendum*.<sup>15</sup>

**II. JURISDICTION AND VENUE.**—Only the court or judge upon whom the statute confers power to order an examination can grant the order.<sup>16</sup> The jurisdiction of the court once obtained con-

First Nat. Bank *v.* Cook, 12 Wyo. 492, 514, 76 Pac. 674, 78 Pac. 1083, 2 L. R. A. (N. S.) 1012.

See generally the title "Summary Proceedings."

6. Cal.—High *v.* Bank of Commerce, 95 Cal. 386, 30 Pac. 556, 29 Am. St. Rep. 121; Collins *v.* Angell, 72 Cal. 513, 14 Pac. 135. Kan.—*In re* Burrows, 33 Kan. 675, 7 Pac. 148. N. Y.—Mulstein Co. *v.* New York, 213 N. Y. 308, 107 N. E. 651. S. C.—Kennesaw Mills Co. *v.* Walker, 19 S. C. 104. Wash.—Flood *v.* Libby, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851. Wis.—Barker *v.* Dayton, 28 Wis. 367.

7. See *infra*, III.

8. Ia.—Bennett *v.* Valley Min. Co., 142 Iowa 53, 120 N. W. 654; Reardon *v.* Henry, 82 Iowa 134, 47 N. W. 1022.

Ky.—Koester *v.* McNamara, 4 Ky. L. Rep. 525. Mo.—Ackerman *v.* Green, 201 Mo. 231, 240, 100 S. W. 30; Murphy *v.* Wilson, 84 Mo. App. 178, 184. N. Y.—Lathrop *v.* Clapp, 40 N. W. 328, 100 Am. Dec. 493.

9. Hazewell *v.* Penman, 13 How. Pr. (N. Y.) 114.

As to receiver, see *infra*, XVI.

10. Baker *v.* State, 109 Ind. 47, 9 N. E. 711. See *infra*, XV.

11. Hutchinson *v.* Trauerman, 112 Ind. 21, 13 N. E. 412; Baker *v.* State, 109 Ind. 47, 9 N. E. 71; Pounds *v.* Chatham, 96 Ind. 342. See Harris *v.* Howe, 2 Ind. App. 49, 28 N. E. 711.

[a] Not An Action on the Return. D. L. Adams Co. *v.* Federal Glass Co., 180 Ind. 576, 103 N. E. 98.

12. Mulstein Co. *v.* New York, 213 N. Y. 308, 107 N. E. 651; Deane *v.* Sire, 95 N. Y. Supp. 556.

As to special proceedings generally, see the title "Suits and Actions."

13. *In re* Koehler, 174 Mo. App.

297, 156 S. W. 982. See generally the title "Discovery."

14. Herrlich *v.* Kaufmann, 99 Cal. 271, 33 Pac. 857, 37 Am. St. Rep. 50; Bonner *v.* Lehfeltdt (Cal. App.), 179 Pac. 722; Cushman *v.* Gephart, 97 Ind. 46; Figg *v.* Snook, 9 Ind. 202. See 6 STANDARD PROC. 185. But see Lewis *v.* Chamberlain, 108 Cal. 525, 41 Pac. 413.

[a] Resort to Remedy by Creditors' Bill.—Where for any reason the remedy by supplementary proceedings does not afford adequate relief, the old remedy by creditors' bill remains. Bonner *v.* Lehfeltdt (Cal. App.), 179 Pac. 722.

15. Hinsdale *v.* Sinclair, 83 N. C. 338.

16. Shannon *v.* Steger, 75 App. Div. 279, 78 N. Y. Supp. 163. See Bowersock *v.* Adams, 55 Kan. 681, 41 Pac. 971 (the probate judge when acting acts as a subordinate officer of the district court); White Sew. Machine Co. *v.* Wait, 24 Kan. 136, probate judge.

[a] No Court Has Inherent Power Over.—Ward *v.* Stoddard, 144 App. Div. 143, 128 N. Y. Supp. 846.

[b] Any court of record in the county to which an execution issued may grant the order. Cooke *v.* Ross, 22 Ind. 157; Harper *v.* Bebagg, 14 Ind. App. 427, 42 N. E. 1115. See Ackerly & Gerard Co. *v.* Partz, 60 Hun 579, 14 N. Y. Supp. 466, 20 Civ. Proc. 382, 39 N. Y. St. 17.

[c] County Judge.—People *ex rel.* Fitch *v.* Mead, 29 How. Pr. (N. Y.) 360.

[d] One Judge May Grant Order Returnable to Judge In Another District.—Lewis *v.* Beach, 112 N. Y. Supp. 200.



tinues until the orders are fully obeyed.<sup>17</sup>

**Change of Venue.** — It has been held that a change of venue may be granted in proceedings supplementary to execution.<sup>18</sup>

**III. PREREQUISITES TO PROCEEDING.** — To authorize supplementary proceedings, a valid judgment must have been rendered,<sup>19</sup> in the amount prescribed by statute,<sup>20</sup> after such appearance or service as to make it binding personally.<sup>21</sup>

**Execution.** — The issuance of a valid execution<sup>22</sup> to the officer of the place specified in the statute<sup>23</sup> is necessary as a basis for an order of

[e] **Court may make order though statute provides for an order of the "judge."** Gould v. Dodge, 30 Wis. 621. *Contra*, Ward v. Stoddard, 144 App. Div. 143, 128 N. Y. Supp. 846.

[f] **By Judge in Chambers.**—Crouse v. Wheeler, 33 How. Pr. (N. Y.) 337; Hulsaver v. Wiles, 11 How. Pr. (N. Y.) 446. But see 16 STANDARD PROC. 621.

[g] **Authority of Judge To Make Order an Order of Examination Is Co-extensive With the State.**—Bingham v. Disbrow, 37 Barb. (N. Y.) 24, 14 Abb. Pr. 251.

17. In the matter of Morris, 39 Kan. 28, 18 Pac. 171, 7 Am. St. Rep. 512.

18. Burkett v. Bowen, 118 Ind. 379, 21 N. E. 38. See 5 STANDARD PROC. 5, 6, note 29.

19. West v. State, 168 Ind. 77, 79 N. E. 361; *In re* Korpolski, 84 Misc. 96, 146 N. Y. Supp. 859.

[a] **A Money Decree in a Federal Equity Suit.**—Sage v. St. Paul S. & T. F. R. Co., 47 Fed. 3.

[b] **On judgment for costs, supplementary proceedings (1) may be had.** Burke v. Burke, 27 Misc. 684, 58 N. Y. Supp. 676. But (2) not on an interlocutory order for costs. *In re* Stoddard, 128 App. Div. 759, 113 N. Y. Supp. 157.

[c] **On judgment Against Administrator.**—Rhodes v. Casey, 20 S. C. 491. But see Sartorelli v. Ezagni, 64 Misc. 115, 118 N. Y. Supp. 46.

[d] **On Judgments Against Infants.** Lederer v. Ehrenfeld, 49 How. Pr. (N. Y.) 403.

[e] **On Judgments Against Lunatics.**—Wilkinson-Gaddis & Co. v. Markert, 65 N. J. L. 518, 47 Atl. 488; Blake v. Respass, 77 N. C. 193.

[f] **On Judgment Against a Married Woman.**—Thompson v. Sargent, 15 Abb. Pr. (N. Y.) 452.

[g] **On Judgment for Deficiency in Foreclosure Suit.**—Clement, Bane & Co. v. Oceana Circ. Judge, 119 Mich.

605, 78 N. W. 666. See Kriegman v. Dumphy, 66 Misc. 221, 122 N. Y. Supp. 1116.

[h] **This requirement is jurisdictional, and cannot be waived by consent.** Hildreth v. Seebach, 18 Misc. 387, 41 N. Y. Supp. 653, 75 N. Y. St. 1040.

20. Milan v. Kerlansky, 87 Misc. 15, 149 N. Y. Supp. 1048.

21. See Hildreth v. Seebach, 18 Misc. 387, 41 N. Y. Supp. 653, 75 N. Y. St. 1040, and the title "**Service of Process and Papers.**"

22. West v. State, 168 Ind. 77, 79 N. E. 361; Balz v. Benninghof, 5 Ind. App. 522, 32 N. E. 595; Bank of Port Jefferson v. Darling, 102 App. Div. 431, 92 N. Y. Supp. 483; Shannon v. Steger, 75 App. Div. 279, 78 N. Y. Supp. 163. See generally 15 STANDARD PROC. 721.

[a] **Issuance against replevin bail also is requisite.** Dandistel v. Kronenberger, 39 Ind. 405.

[b] **Fl. fa. against personalty alone suffices.** Westfall v. Dunning, 50 N. J. L. 459, 14 Atl. 486. But see Importers' & Traders' Nat. Bank v. Quackenbush, 143 N. Y. 567, 38 N. E. 728.

23. See *infra*, this note.

[a] **To the County Where the Debtor Resides.**—Ind.—McKinney v. Snider, 116 Ind. 160, 18 N. E. 526. N. Y.—Katz v. Kosower, 63 Misc. 25, 117 N. Y. Supp. 316; Zelig v. Vroman, 22 Misc. 486, 50 N. Y. Supp. 836. See Franey v. Smith, 88 Hun 215, 34 N. Y. Supp. 780, 68 N. Y. St. 714. N. D. Minkler v. United States Sheep Co., 4 N. D. 507, 62 N. W. 594, 33 L. R. A. 546.

[b] **To the county where the debtor has a place for the regular transaction of business in person.** Bank of Port Jefferson v. Darling, 102 App. Div. 431, 92 N. Y. Supp. 483; De Angelli v. Dixey, 101 Misc. 606, 167 N. Y. Supp.

examination, unless the debtor is shown to be insolvent.<sup>24</sup> After return of execution unsatisfied, the debtor may be examined as to his property generally.<sup>25</sup> But an examination may be had before return of execution where he has known property which he unjustly refuses to apply to the satisfaction of the judgment.<sup>26</sup> Debtors of the judgment debtor may in some jurisdictions, be examined before or after return of execution.<sup>27</sup>

**IV. WHO MAY PROCURE EXAMINATION.**—Every judgment creditor who can make the required showing may institute supplementary proceedings,<sup>28</sup> or the proceedings may be had at the instance of, or on the affidavit of, his executor,<sup>29</sup> his assignee,<sup>30</sup> or attorney,<sup>31</sup> or, under some statutes, his agent.<sup>32</sup>

**V. AGAINST WHOM SUPPLEMENTARY PROCEEDINGS MAY BE HAD.**—Supplementary proceedings may be had against any judgment debtor,<sup>33</sup> except corporation debtors, in which event there

663; *Burke v. Burke*, 27 Misc. 684, 58 N. Y. Supp. 676.

[c] **To the county where the judgment** was rendered or where the judgment roll is filed, if the debtor is a nonresident. *McKinney v. Snider*, 116 Ind. 160, 18 N. E. 526.

24. *Minkler v. United States Sheep Co.*, 4 N. D. 507, 62 N. W. 594, 33 L. R. A. 546.

25. **U. S.**—*Tomlinson & Webster Mfg. Co. v. Shatto*, 34 Fed. 380. **Cal.** *Collins v. Angell*, 72 Cal. 513, 14 Pac. 135; *Adams v. Hackett*, 7 Cal. 187. **Ind.** *West v. State*, 168 Ind. 77, 79 N. E. 361; *Burkett v. Bowen*, 118 Ind. 379, 21 N. E. 38. **Neb.**—*English v. Smith*, 1 Neb. (Unof.) 670, 96 N. W. 60. **N. J.** *Seyfert v. Edison*, 47 N. J. L. 428, 1 Atl. 502. **S. C.**—*Robinson v. McMaster*, 109 S. C. 20, 95 S. E. 110. **Wash.** *Klepsch v. Donald*, 18 Wash. 150, 51 Pac. 352. **Wis.**—*Smith v. Weeks*, 60 Wis. 94, 18 N. W. 773; *Second Ward Bank v. Upmann*, 12 Wis. 499.

[a] **Collusive return** insufficient. *Spencer v. Cuyler*, 9 Abb. Pr. 382, 17 How. Pr. (N. Y.) 157.

[b] **Return nulla bona before return day** does not preclude supplementary proceedings. *Curtis v. Morton*, 39 R. I. 331, 97 Atl. 803.

[c] **Where Return Is False in Fact.** A return nulla bona entitles the creditor to an order of examination even though the debtor shows he has property subject to execution. *Eleventh Ward Bank v. Heather*, 22 Misc. 87, 48 N. Y. Supp. 449, 27 Civ. Proc. 90, 5 N. Y. Ann. Cas. 80. See *Flint v.*

*Webb*, 25 Minn. 263, as to remedy in such case.

26. **Cal.**—*Collins v. Angell*, 72 Cal. 513, 14 Pac. 135. **N. Y.**—*Bank of Port Jefferson v. Darling*, 102 App. Div. 431, 92 N. Y. Supp. 483; *Sackett v. Newton*, 10 How. Pr. 560, property not reachable by levy. **Wis.**—*Smith v. Weeks*, 60 Wis. 94, 18 N. W. 778.

**As to showing necessary**, see *infra*, VIII, B, 2.

27. *Gibson v. Haggerty*, 37 N. Y. 555, 97 Am. Dec. 752.

28. *Righton v. Pruden*, 73 N. C. 61; *Sparks v. Davis*, 25 S. C. 381.

[a] **But a judgment creditor who has brought an action to set aside transfer of the property sought to be reached cannot institute supplementary proceedings pending such action.** *Mutual Film Corporation v. Davis*, 176 N. Y. Supp. 320.

29. *Walker v. Donovan*, 6 Daly 552, 53 How. Pr. (N. Y.) 3.

[a] **Revivor Unnecessary.**—*Walker v. Donovan*, 6 Daly 552, 53 How. Pr. (N. Y.) 3.

30. *Burns v. Bangert*, 16 Mo. App. 22; *Crill v. Kornmeyer*, 56 How. Pr. (N. Y.) 276; *Frederick v. Decker*, 18 How. Pr. (N. Y.) 96.

31. **U. S.**—*Meyer v. Consolidated Ice Co.*, 163 Fed. 400. **Ind.**—*Eden v. Everson*, 65 Ind. 113. **N. Y.**—*Ward v. Roy*, 69 N. Y. 96; *Beardsley v. Stone Valley Dist. Co.*, 122 N. Y. Supp. 686.

32. See *Westfall v. Dunning*, 50 N. J. L. 459, 14 Atl. 486, decided before amendment.

33. See the statutes.

is no right to supplementary proceedings,<sup>34</sup> unless the statute is sufficiently broad to include both natural and artificial persons.<sup>35</sup>

**VI. WHO MAY BE EXAMINED.**—The judgment debtor may, of course, be examined,<sup>36</sup> and statutes generally provide for examination of persons or corporations having property of or indebted to<sup>37</sup>

[a] **Joint Debtor.**—*Emery v. Emery*, 9 How. Pr. (N. Y.) 130; *Jones v. Lawlin*, 1 Sandf. (N. Y.) 722, 1 Code Rep. 94; *Lewis v. Rosler*, 19 W. Va. 61.

[b] **Trustee.**—*In re Gough*, 31 App. Div. 307, 52 N. Y. Supp. 627, 28 Civ. Proc. 23, 5 N. Y. Ann. Cas. 194.

[c] **Joint Stock Association.**—*Courtois v. Harrison*, 1 Hilt. (N. Y.) 109, 3 Abb. Pr. 96, 12 How. Pr. 359.

[d] **Lunatic.**—*Wilkinson-Gaddis & Co. v. Markert*, 65 N. J. L. 518, 47 Atl. 488; *Blake v. Respass*, 77 N. C. 193.

[e] **Married Woman.**—*Thompson v. Sargent*, 15 Abb. Pr. (N. Y.) 452; *Lockwood v. Worstell*, 15 Abb. Pr. (N. Y.) 430n; *Clinkseales v. Hall*, 15 S. C. 602. As to whether a married woman may be examined in supplementary proceedings against the husband see *infra*, VI.

[f] **Sheriff.**—*Potts v. Davidson*, 1 How. Pr. N. S. (N. Y.) 216.

[g] **But a discharged bankrupt** cannot be examined as to debts affected by the discharge. *Leo v. Joseph*, 56 Hun 644, 9 N. Y. Supp. 612, 31 N. Y. St. 152; *Smith v. Paul*, 20 How. Pr. (N. Y.) 97.

34. **U. S.**—*Meyer v. Consolidated Ice Co.*, 163 Fed. 400. **Mo.**—*In re Koehler*, 174 Mo. App. 297, 311, 156 S. W. 982. **N. J.**—*Conner v. Todd*, 48 N. J. L. 361, 7 Atl. 477.

[a] **When a corporation is not subject to examination**, persons indebted to the corporation cannot be examined. *Vietor v. Richards Co.*, 20 Misc. 289, 45 N. Y. Supp. 800. *Fitchburgh Nat. Bank v. Bushwick Chem. Wks.*, 13 N. Y. Civ. Proc. 155.

35. **U. S.**—*Bates v. International Co.*, 84 Fed. 518; *Sage v. St. Paul S. & T. F. R. Co.*, 47 Fed. 3. **Ind.**—*Tompkins v. Floyd Co. A. & M. Assn.*, 19 Ind. 197. **N. Y.**—*Boucher Contr. Co. v. Callahan Contr. Co.*, 218 N. Y. 321, 113 N. E. 257, *affirming* 172 App. Div. 906, 910, 156 N. Y. Supp. 1116, 157 N. Y. Supp. 1119. See *Groshut v. Kinetophote Corp.*, 93 Misc. 558, 157 N. Y. Supp. 312. But see *Sherwood*

*v. Buffalo & N. Y. C. R. Co.*, 12 How. Pr. 136; *Hammond v. Hudson River Iron & M. Co.*, 11 How. Pr. 29; *Hinds v. Canandaigua & N. F. R. Co.*, 10 How. Pr. 487, decided under a previous statute. **S. D.**—*South Bend Toy Mfg. Co. v. Pierre F. & M. Ins. Co.*, 4 S. D. 173, 56 N. W. 98.

[a] **Foreign Corporation.**—*De Bemer v. Drew*, 57 Barb. (N. Y.) 438.

[b] **A trust company** may be examined as to the property of a judgment debtor in its possession. *Title Ins. & Trust Co. v. Superior Court* (Cal.), 176 Pac. 678.

36. See the statutes and *supra*, V.

37. See generally the statutes and the following: **Cal.**—*Title Ins. & Trust Co. v. Superior Court*, 176 Pac. 678; *Bronzan v. Drobaz*, 93 Cal. 647, 29 Pac. 254; *Adams v. Hackett*, 7 Cal. 187. **Ind.**—*Baker v. State*, 109 Ind. 47, 9 N. E. 711; *Earl v. Skiles*, 93 Ind. 178; *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661. **Ky.**—*Koester v. McNamara*, 4 Ky. L. Rep. 525. **N. Y.**—*Smith v. Cutter*, 64 App. Div. 412, 72 N. Y. Supp. 99; *Boice v. Turner*, 4 How. Pr. 195; *Davis v. Turner*, 4 How. Pr. 190; *Howe v. Stuart*, 123 N. Y. Supp. 971. **N. C.**—*Farmers' & M. Nat. Bank v. Burns*, 109 N. C. 105, 13 S. E. 871; *Coates Bros. v. Wilkes*, 94 N. C. 174. **S. C.**—*Deer Island Lumber Co. v. Virginia-Carolina Chemical Co.*, 97 S. E. 833.

[a] **Private Corporations.**—*Semmes v. Noell*, 18 Civ. Proc. (N. Y.) 200; *Pendergast v. Dempsey*, 18 Civ. Proc. 198, 10 N. Y. Supp. 938; *Wainwright v. Tiffany*, 13 Civ. Proc. (N. Y.) 222.

[b] **Executor** must answer as to funds of legatee in his hands. *Murphy v. Busick*, 22 Ind. App. 247, 53 N. E. 475, 72 Am. St. Rep. 304; *King v. Burnett*, 102 Misc. 161, 168 N. Y. Supp. 405.

[c] **Assignee of Judgment Debtor.** *In re Sickel*, 52 Hun 527, 5 N. Y. Supp. 703, 17 Civ. Proc. 138, 23 N. Y. St. 585; *Bruce v. Crabtree*, 116 N. C. 528, 21 S. E. 194.



defendant, and authorize the calling of witnesses in the proceeding.<sup>38</sup> While either party may go upon the stand in his own behalf, or may be called by the other,<sup>39</sup> it is not necessary that the debtor be examined.<sup>40</sup> It has been held, however, that no examination can be had or required of a receiver of the debtor,<sup>41</sup> an officer of a court having custody of a fund in court,<sup>42</sup> or a bank holding funds of a bankruptcy court,<sup>43</sup> a foreign consul,<sup>44</sup> or a municipal corporation.<sup>45</sup> In some states the wife of a judgment debtor may be examined, in supplementary proceedings against the debtor,<sup>46</sup> but in others, she is incompetent.<sup>47</sup> So also in proceedings against a married woman debtor, it has been held that the husband cannot testify except as to transactions in which he acted as her agent.<sup>48</sup>

**VII. PARTIES.**—The creditors generally of the defendant are neither necessary nor proper parties, to a supplementary proceeding instituted by a judgment creditor in his own behalf.<sup>49</sup> But the exe-

[d] The statute providing for examination of the judgment debtor does not authorize the examination of third persons. *Osborne v. Reardon*, 79 Iowa 175, 44 N. W. 346; *In re Koehler*, 174 Mo. App. 297, 311, 156 S. W. 982.

Third persons as parties, see *supra*, VI.

38. Cal.—*McCullough v. Clark*, 41 Cal. 298. Ind.—*Bipus v. Deer*, 106 Ind. 135, 5 N. E. 894; *Devan v. Ellis*, 29 Ind. 72. Ia.—*McDonnell v. Henderson*, 74 Iowa 619, 38 N. W. 512. N. J. *Seyfert v. Edison*, 47 N. J. L. 428, 1 Atl. 502; *Colton v. Bigelow*, 41 N. J. L. 266. N. Y.—*Sandford v. Carr*, 2 Abb. Pr. 462; *Semmes v. Noell*, 18 Civ. Proc. 200n; *Clapp v. Lathrop*, 23 How. Pr. 423; *Tompkins County Bank v. Trapp*, 21 How. Pr. 17. N. C.—*Coates Bros. v. Wilkes*, 92 N. C. 376.

But see *In re Koehler*, 174 Mo. App. 297, 314, 156 S. W. 982.

39. *Colton v. Bigelow*, 41 N. J. L. 266.

40. *Wilkinson-Gaddis & Co. v. Markert*, 65 N. J. L. 518, 47 Atl. 488; *Seyfert v. Edison*, 47 N. J. L. 428, 1 Atl. 502; *Colton v. Bigelow*, 41 N. J. L. 266; *McBride v. Farmers' Bank*, 28 Barb. (N. Y.) 476, 7 Abb. Pr. 347; *Graves v. Lake*, 12 How. Pr. (N. Y.) 33.

41. *Fitchburgh Nat. Bank v. Bushwick Chem. Wks.*, 13 Civ. Proc. (N. Y.) 155.

[a] Receiver of Foreign Corporation.—*Smith v. McNamara*, 15 Hun (N. Y.) 447; *Victor v. Richards Co.*, 20 Misc. 289, 45 N. Y. Supp. 800.

42. Anonymous, 1 Code Rep. N. S.

(N. Y.) 211; *Smith v. McNamara*, 15 Hun (N. Y.) 447.

43. *Havens v. National City Bank*, 4 Hun (N. Y.) 131, 6 Thomp. & C. 346.

44. *Griffin v. Dominguez*, 2 Duer (N. Y.) 656.

45. *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661; *South Bend Toy Mfg. Co. v. Pierre F. & M. Ins. Co.*, 4 S. D. 173, 56 N. W. 98.

[a] On Grounds of Public Policy. *South Bend Toy Mfg. Co. v. Pierre F. & M. Ins. Co.*, 4 S. D. 173, 56 N. W. 98.

[b] But an officer of a municipal corporation may be examined. *Lowber v. New York*, 5 Abb. Pr. (N. Y.) 268.

46. *Frankenthal v. Solomonson*, 20 Wash. 460, 55 Pac. 754, 72 Am. St. Rep. 116, 44 L. R. A. 311; *O'Brien's Petitions*, 24 Wis. 547.

Competency of wife as witness for or against her husband, see *ENCY. OF EV.*, title "Husband and wife."

47. *Andrews v. Nelson*, 7 Abb. Pr. (N. Y.) 3n; *Macondray v. Wardle*, 26 Barb. 612, 7 Abb. Pr. (N. Y.) 3.

[a] She cannot be examined as a third party having property of the debtor. *Osborne v. Reardon*, 79 Iowa 175, 44 N. W. 346.

48. *Blabon v. Gilchrist*, 67 Wis. 38, 29 N. W. 220.

49. *Eden v. Everson*, 65 Ind. 113.

[a] Statute providing for examination of third persons does not make them parties. *Estey v. Fuller Imp. Co.*, 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025. *Contra Howe v. Stuart*, 123 N.

cution defendant is a necessary party to proceedings for the examination of his debtor.<sup>50</sup> New parties may under some statutes be brought into supplementary proceedings,<sup>51</sup> and all known adverse claimants to a fund sought to be reached should have an opportunity to be heard.<sup>52</sup>

**VIII. PROCEEDINGS TO PROCURE EXAMINATION.**—A. **GENERALLY.**—Statutes relating to supplementary proceedings are strictly construed,<sup>53</sup> and conformity with them is necessary to secure the benefit of the proceedings.<sup>54</sup> No formal pleadings or framing of issues are contemplated,<sup>55</sup> but where the statute is silent as to the practice, and the proceeding is regarded as a civil action, the general rules of procedure have been held to apply.<sup>56</sup>

B. **SHOWING AND AFFIDAVIT.**—1. **Generally.**—Before an order may be made for supplementary proceedings the statutes require a showing of the essential prerequisites, usually by affidavit.<sup>57</sup> The particularity required in averments in pleadings is not required in the affidavit.<sup>58</sup> Alternative allegations are bad,<sup>59</sup> but surplusage does not vitiate.<sup>60</sup> If the affidavit is on information and belief, the name of the informant with his means of knowledge must be stated.<sup>61</sup>

Y. Supp. 971, he is a party and entitled to costs but not witness fees.

50. *Mitchell v. Bray*, 106 Ind. 265, 6 N. E. 617; *Cushman v. Gephart*, 97 Ind. 46; *Earl v. Skiles*, 93 Ind. 178. Compare, VIII, C.

[a] **Unless He Is Out of the State.** *Billson v. Linderberg*, 66 Minn. 66, 68 N. W. 771.

51. *American White Bronze Co. v. Clark*, 123 Ind. 230, 23 N. E. 855; *Harper v. Behagg*, 14 Ind. App. 427, 42 N. E. 1115; *Harris v. Howe*, 2 Ind. App. 419, 28 N. E. 711.

[a] **Interpleader statute is not applicable** to the proceeding. *Collins v. Angell*, 72 Cal. 513, 14 Pac. 135.

[b] **The intervention of a person claiming an interest in the fund is allowable.** *Wilson v. Chichester*, 107 N. C. 386, 12 S. E. 139, 10 L. R. A. 572.

[c] **Other creditors cannot be brought in.** *Righton v. Pruden*, 73 N. C. 61.

52. *Bonner v. Lehfeldt* (Cal. App.), 179 Pac. 722.

53. *In re Koehler*, 174 Mo. App. 297, 313, 156 S. W. 582.

54. **Cal.**—*Bryant v. Bank of California*, 68 Cal. xix, 7 Pac. 128, 8 Pac. 644. **Mo.**—*In re Koehler*, 174 Mo. App. 297, 313, 156 S. W. 982. **N. J.** *Adler v. Turnbull*, 57 N. J. L. 62, 30 Atl. 319. **N. Y.**—*German Exch. Bank*

*v. Schlang*, 92 Misc. 351, 155 N. Y. Supp. 924.

[a] **Strict Conformity.**—*In re Koehler*, 174 Mo. App. 297, 313, 156 S. W. 982.

[b] **Substantial Compliance.**—*In re Downey*, 31 Mont. 441, 78 Pac. 772; *Juekett v. Fargo Merc. Co.*, 19 S. D. 150, 102 N. W. 604.

55. See *infra*, XIV.

56. *Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412; *Beckman Supply Co. v. Newell* (Ind. App.), 118 N. E. 962; *Balz v. Benninghof*, 5 Ind. App. 522, 32 N. E. 595.

**As to demurrer and motions**, see *infra*, XIX.

57. See the statutes and *infra*, this section.

58. *Ackerman v. Green*, 201 Mo. 231, 242, 100 S. W. 30.

59. *Bank of Port Jefferson v. Darling*, 102 App. Div. 431, 92 N. Y. Supp. 483; *Zelie v. Vroman*, 22 Misc. 486, 50 N. Y. Supp. 836.

60. *Hobbs v. Eaton*, 38 Ind. App. 628, 78 N. E. 333.

61. **U. S.**—*Meyer v. Consolidated Ice Co.*, 163 Fed. 400. **Neb.**—*Clarke v. Nebraska Nat. Bank*, 57 Neb. 314, 77 N. W. 805, 73 Am. St. Rep. 507. **N. Y.**—*Manken v. Pape*, 65 How. Pr. 453; *Smith v. Haverty's Stables*, 157 App. Div. 777, 142 N. Y. Supp. 764; *National Printing & E. Co. v. Armstrong*, 150 N. Y. Supp. 433.

**2. For Examination of Debtor Himself.** — Before issuing an order for examination of a judgment debtor, by affidavit or otherwise,<sup>62</sup> the creditor must show the rendition of a valid judgment on which supplementary proceedings may be based,<sup>63</sup> the issuance of an execution to the officer of the proper county,<sup>64</sup> the debtor's residence or place of business,<sup>65</sup> the amount due,<sup>66</sup> and the inability to satisfy the judgment by an ordinary execution against the debtor.<sup>67</sup> If a person other

62. Cal.—*Bryant v. Bank of California*, 68 Cal. xix, 7 Pac. 128, 8 Pac.

644. Ind.—*Carpenter v. Vanscoten*, 20 Ind. 50; *Beckman Supply Co. v. Newell* (Ind. App.), 118 N. E. 962; *Murphy v. Busick*, 22 Ind. App. 247, 53 N. E. 475, 72 Am. St. Rep. 304. complaint against executor. Neb. *English v. Smith*, 1 Neb. (Unof.) 670, 96 N. W. 60, affidavit is not necessary. N. Y.—*Bridges v. Koppelman*, 63 Misc. 27, 117 N. Y. Supp. 306.

[a] Where execution is returned unsatisfied, an affidavit is not required. *Collins v. Angell*, 72 Cal. 513, 14 Pac. 135.

[b] The affidavit is to be entitled in county court when transcript of judgment of justice is filed in county court. *People ex rel. Mace v. Oliver*, 66 Barb. (N. Y.) 570.

63. *Seeley v. Connors*, 109 App. Div. 279, 95 N. Y. Supp. 1109; *Webster v. Sawens*, 3 How. Pr. N. S. (N. Y.) 320 (sufficient allegation); *Whitlock's Case*, 1 Abb. Pr. (N. Y.) 320. See *supra*, III.

[a] Date of judgment need not be stated, as the court takes judicial notice thereof. *Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851.

[b] Mistake as to date not fatal. *In re Hatfield*, 17 App. Div. 430, 45 N. Y. Supp. 270.

[c] Docketing of judgment to be stated. *Hawes v. Barr*, 7 Robt. (N. Y.) 452.

[d] Filing of transcript before issuance of execution, should be stated. *Hawes v. Barr*, 7 Robt. (N. Y.) 452.

[e] That judgment was rendered on personal service or appearance need not be alleged. *Sayer v. MacDonald*, 2 How. Pr. N. S. (N. Y.) 119. See *Bridges v. Koppelman*, 63 Misc. 27, 117 N. Y. Supp. 306.

[f] That court rendering judgment was a court of record need not be

stated. *Sayer v. MacDonald*, 2 How. Pr. N. S. (N. Y.) 119.

64. Ind.—*Kelley v. Bell*, 172 Ind. 590, 88 N. E. 58; *McKinney v. Snider*, 116 Ind. 160, 18 N. E. 526; *Fowler v. Griffin*, 83 Ind. 297. N. Y.—*Bank of Port Jefferson v. Darling*, 102 App. Div. 431, 92 N. Y. Supp. 483; *Groshut v. Kinetophote Corp.*, 93 Misc. 558, 157 N. Y. Supp. 312; *Webster v. Sawens*, 3 How. Pr. N. S. 320. N. D.—*Minkler v. United States Sheep Co.*, 4 N. D. 507, 62 N. W. 594, 33 L. R. A. 546. See *supra*, III.

[a] Date of issuance of execution need not be stated. *Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851. But see *Walker v. Donovan*, 6 Daly 552, 53 How. Pr. (N. Y.) 3.

[b] That execution was "duly issued" etc., held sufficient to show regular issuance. *Sherl v. Kurzman*, 60 Misc. 332, 113 N. Y. Supp. 288.

65. *Katz v. Kosower*, 63 Misc. 25, 117 N. Y. Supp. 316; *Zelie v. Vroman*, 22 Misc. 486, 50 N. Y. Supp. 836; *Franey v. Smith*, 88 Hun 215, 34 N. Y. Supp. 780, 68 N. Y. St. 714; *Mutual Film Corp. v. Davis*, 176 N. Y. Supp. 320.

66. *Ackerly & Gerard Co. v. Partz*, 60 Hun 579, 14 N. Y. Supp. 466, 20 Civ. Proc. 382, 39 N. Y. St. 17; *Douglass v. Mainger*, 40 Hun (N. Y.) 75.

67. *Vordermark v. Wilkinson*, 147 Ind. 56, 46 N. E. 336; *Baker v. State*, 109 Ind. 47, 9 N. E. 711; *Cushman v. Gephart*, 97 Ind. 46; *Matter of First Nat. Bank*, 52 App. Div. 601, 65 N. Y. Supp. 439; *Garcia v. Morris*, 51 Misc. 592, 101 N. Y. Supp. 253.

[a] This is sufficiently shown by a return unsatisfied. Ind.—*D. L. Adams Co. v. Federal Glass Co.*, 180 Ind. 576, 103 N. E. 98 (sufficient allegation); *Cushman v. Gephart*, 97 Ind. 46. Mich.—*Berles v. Comstock*, 104 Mich. 129, 62 N. W. 148. N. C.—*Magruder v. Shelton*, 98 N. C. 545, 4 S. E. 141, 2 Am. St. Rep. 349; *Hinsdale v. Sinclair*, 83 N. C. 338.



than the judgment creditor institutes the proceedings, his right to do so must be stated.<sup>68</sup> It is not necessary to state that no previous application was made.<sup>69</sup>

**Showing That Debtor Has Property.** — Where the execution is returned unsatisfied in whole or part, a showing that the debtor has property which he refuses to apply to the satisfaction of the debt is not required.<sup>70</sup> Where the execution has not been returned, the statutes require a showing that the debtor has property which he unjustly refuses to apply to the satisfaction of the judgment.<sup>71</sup>

That a demand was made is sometimes required to show unjust refusal to apply property to the satisfaction of the judgment,<sup>72</sup> but it is not necessary where there is a return of execution unsatisfied.<sup>73</sup>

**3. For Examination of Third Person.** — An affidavit for examination of a third person must show either that he has property of the judgment debtor,<sup>74</sup> or that he is indebted to him in an amount exceed-

68. Seeley v. Connors, 109 App. Div. 279, 95 N. Y. Supp. 1109; Walker v. Donovan, 53 How. Pr. (N. Y.) 3; Frederick v. Decker, 18 How. Pr. (N. Y.) 96.

[a] Unless made by the attorney of the creditor. Compare Title Guar. & Trust Co. v. Brown, 136 App. Div. 843, 121 N. Y. Supp. 891; Beardsley v. Stone Valley Dist. Co., 122 N. Y. Supp. 686.

[b] Nature of agency must be stated. Hawes v. Barr, 7 Robt. (N. Y.) 452.

69. Sayer v. MacDonald, 2 How. Pr. N. S. (N. Y.) 119.

70. Cal.—Collins v. Angell, 72 Cal. 513, 14 Pac. 135. Ind.—Cushman v. Gephart, 97 Ind. 46. Mich.—Berles v. Comstock, 104 Mich. 129, 62 N. W. 148. S. C.—Robinson v. McMaster, 109 S. C. 20, 95 S. E. 110.

But see *In re Koehler*, 174 Mo. App. 297, 314, 156 S. W. 982 (under statute); Magruder v. Shelton, 98 N. C. 545, 4 S. E. 141, 2 Am. St. Rep. 349; Hinsdale v. Sinclair, 83 N. C. 338; Weiller & Co. v. Lawrence, 71 N. C. 65; the affidavit must show the want of known property liable to execution, the non-existence of equitable assets in land within the lien of the judgment, and the existence of property uneffected by any lien and incapable of levy.

71. Cal.—Collins v. Angell, 72 Cal. 513, 14 Pac. 135. Ind.—Mitchell v. Bray, 106 Ind. 265, 6 N. E. 617; Cushman v. Gephart, 97 Ind. 46; Dandistel v. Kronenberger, 39 Ind. 405. N. C. Farmers' & Mechanics' Bank v. Burns, 109 N. C. 105, 13 S. E. 871. Ore.

State v. Downing, 40 Ore. 309, 320, 58 Pac. 863, 66 Pac. 917. S. C.—Robinson v. McMaster, 109 S. C. 20, 95 S. E. 110. Wis.—Smith v. Weeks, 60 Wis. 94, 106, 18 N. W. 778.

[a] Facts showing the refusal was unjust and that the remedy by execution is inadequate must be shown. Matter of First Nat. Bank, 52 App. Div. 601, 65 N. Y. Supp. 439; Garcia v. Morris, 51 Misc. 592, 101 N. Y. Supp. 253.

[b] A showing that the debtor has property not subject to levy, or so kept that it cannot be clearly identified and reached by execution with ordinary diligence must be made. Garcia v. Morris, 51 Misc. 592, 101 N. Y. Supp. 253. See also Sackett v. Newton, 10 How. Pr. (N. Y.) 560. Compare Lowry v. McAlister, 86 Ind. 543.

[c] Property must be described where the statute requires it. Cushman v. Gephart, 97 Ind. 46; Manken v. Pape, 65 How. Pr. (N. Y.) 453.

[d] An allegation that defendant has no other property unconcealed and subject to execution must be made where a concealment of certain property is alleged. Vordermark v. Wilkinson, 147 Ind. 56, 63, 46 N. E. 336.

72. Manken v. Pape, 65 How. Pr. (N. Y.) 453.

73. Flint v. Webb, 25 Minn. 263.

74. Coffee v. Haynes, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99; Miller v. Adams, 52 N. Y. 409; Steinmann v. Hosier, 139 N. Y. Supp. 863. See Brett v. Browne, 1 Abb. Pr. N. S. (N. Y.) 155.

[a] Conclusion of Law.—A state-

ing the statutory amount,<sup>75</sup> as well as the fact of issuance of an execution to the sheriff of the proper county.<sup>76</sup> But it need not allege that the debtor unjustly refuses to apply the property or debt sought to be reached.<sup>77</sup>

**4. Filing of Affidavit.**—The affidavit should be filed before presentation to the judge for an order of examination.<sup>78</sup>

**5. Amendment.**—The plaintiff's affidavit or verified complaint may be amended.<sup>79</sup>

**C. NOTICE.**—Notice to the debtor of an application for an order of his examination is not required,<sup>80</sup> but where a third person is to be examined, the judge may in his discretion require notice of subsequent proceedings to be given the debtor.<sup>81</sup>

**D. ORDER FOR EXAMINATION.**—**1. Generally.**—An order of examination is a matter of right on a proper and sufficient showing.<sup>82</sup> An order for the examination of the debtor is not a prerequisite to an order to examine his debtors.<sup>83</sup>

**2. Form of Order.**<sup>84</sup>—The order for examination must require the debtor to answer concerning his property,<sup>85</sup> before the judge to whom

ment in the words of the text is not objectionable as being a conclusion of law. *Coffee v. Haynes*, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99.

[b] **Positive proof** not required. *Carley v. Todd*, 56 App. Div. 170, 67 N. Y. Supp. 640.

**75.** *Miller v. Adams*, 52 N. Y. 409.

[a] **But allegation in the alternative** that he has property of the debtor or is indebted to him is bad. *Smith v. Cutter*, 64 App. Div. 412, 72 N. Y. Supp. 99.

**76.** *In re Gagnon*, 32 App. Div. 22, 52 N. Y. Supp. 309 (defendant's residence must be stated); *Schenck v. Irwin*, 60 Hun 361, 15 N. Y. Supp. 55, 21 Civ. Proc. 96, 38 N. Y. St. 603.

**77.** *Mitchell v. Bray*, 106 Ind. 265, 6 N. E. 617. *Contra*, *Earl v. Skiles*, 93 Ind. 178.

[a] **Demand need** not be stated. *Potts v. Davidson*, 1 How. Pr. N. S. (N. Y.) 216.

**78.** *Collins v. Angell*, 72 Cal. 513, 14 Pac. 135; *Bryant v. Bank of California*, 68 Cal. xix, 7 Pac. 128, 8 Pac. 644; *Stell v. British Union & N. Ins. Co.*, 78 Misc. 40, 137 N. Y. Supp. 703.

[a] **Filing with referee's report** held sufficient. *Collins v. Angell*, 72 Cal. 513, 14 Pac. 135.

**79. Ind.**—*Burkett v. Bowen*, 118 Ind. 379, 21 N. E. 38; *Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412 (under statute relating to amendments generally); *Harper v. Behagg*, 14 Ind.

App. 427, 42 N. E. 1115. **N. Y.**—*Goodall v. Demarest*, 2 Hilt. 534. **N. C.** *Weiller & Co. v. Lawrence*, 71 N. C. 65.

**80. Cal.**—*Coffee v. Haynes*, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99. **Mo.**—*Ackerman v. Green*, 201 Mo. 231, 100 S. W. 30. **N. J.**—*Seyfert v. Edison*, 47 N. J. L. 428, 1 Atl. 502. **N. Y.** *Ellenbogen v. Hantman*, 126 N. Y. Supp. 164.

**81.** *Lynch v. Johnson*, 48 N. Y. 27; *Sinnott v. First Nat. Bank*, 34 App. Div. 161, 54 N. Y. Supp. 417; *Ward v. Beebe*, 17 Abb. Pr. (N. Y.) 1; *Wilmington v. Sprunt*, 114 N. C. 310, 19 S. E. 348. But see *Shannon v. McMurtrie*, 48 N. J. L. 427, 5 Atl. 658, notice must be given.

**82.** See *supra*, VIII, B.

[a] **On Return of Nulla Bona.** **Minn.**—*Flint v. Webb*, 25 Minn. 263. **N. Y.**—*Eleventh Ward Bank v. Heather*, 22 Misc. 87, 48 N. Y. Supp. 449, 27 Civ. Proc. 90, 5 N. Y. Ann. Cas. 80. **S. C.**—*Robinson v. McMaster*, 109 S. C. 20, 95 S. E. 110.

**83.** *Gibson v. Haggerty*, 37 N. Y. 555, 97 Am. Dec. 752.

**84. Form.**—See 9 STANDARD PROC. 1189; *White Sew. Mach. Co. v. Wait*, 24 Kan. 136; *Rugg v. Spencer*, 59 Barb. (N. Y.) 383, 397. See also *Owens v. Ford*, 68 Misc. 522, 124 N. Y. Supp. 839, as to entitling of order.

**85.** *Smith v. Weeks*, 60 Wis. 94, 106, 18 N. W. 778, to answer concerning

the order is returnable,<sup>86</sup> or before a referee designated therein,<sup>87</sup> at a time<sup>88</sup> and place<sup>89</sup> specified in the order. It has been held that the order need not recite facts necessary to confer jurisdiction,<sup>90</sup> or recite the contents of the affidavit.<sup>91</sup> The order must be signed by the judge or justice issuing it.<sup>92</sup>

**3. Service and Filing.**—The order for examination of a debtor must be served upon him.<sup>93</sup> The debtor may compel the filing of an order for the examination of a third person.<sup>94</sup>

**4. Amendment.**—The order for examination of a debtor may be amended.<sup>95</sup>

**5. Subsequent Order.**—If an order for a debtor's examination is not served, a new order may be issued.<sup>96</sup>

specific property when the order is made before return. But see *Carpenter v. Vanscoten*, 20 Ind. 50, holding an ordinary summons sufficient.

86. *Mulstein Co. v. New York*, 213 N. Y. 308, 107 N. E. 651; *Barrington v. Watkins*, 36 App. Div. 31, 55 N. Y. Supp. 97.

[a] **Omission a Mere Irregularity.** *Lewis v. Beach*, 112 N. Y. Supp. 200.

87. *Mulstein Co. v. New York*, 213 N. Y. 308, 107 N. E. 651. See *Cal. Bonner v. Lehfeldt* (Cal. App.), 179 Pac. 722. **N. Y.**—*Green v. Bullard*, 8 How. Pr. 313. *Wash.*—*Howard v. Hanson*, 49 Wash. 314, 95 Pac. 265.

88. *Arctic F. Ins. Co. v. Hicks*, 7 Abb. Pr. (N. Y.) 204.

89. *Kelty v. Yerby*, 31 How. Pr. (N. Y.) 95. See *infra*, XIII.

90. *People ex rel. Mace v. Oliver*, 66 Barb. (N. Y.) 570.

91. *People ex rel. Mace v. Oliver*, 66 Barb. (N. Y.) 570.

92. *Ward v. Stoddard*, 144 App. Div. 143, 128 N. Y. Supp. 846, not by the clerk.

93. *Seyfert v. Edison*, 47 N. J. L. 428, 1 Atl. 502; *Turner v. Holden*, 109 N. C. 182, 13 S. E. 731.

[a] **Any person** (1) may serve the order (*Utica City Bank v. Buel*, 9 Abb. Pr. [N. Y.] 385, 17 How. Pr. 498), other (2) than the judgment creditor. *In re Dawes*, 108 App. Div. 174, 96 N. Y. Supp. 52.

[b] **Service in Any Part of State.** *Deane v. Sire*, 95 N. Y. Supp. 556.

[c] **Service on the defendant out of the jurisdiction of the court** may be had. *Seyfert v. Edison*, 47 N. J. L. 428, 1 Atl. 502.

[d] **Not exempt from service while attending court as a witness or juror.**

*Brown v. Edinger*, 61 Misc. 366, 144 N. Y. Supp. 116; *Fletcher v. Franko*, 15 N. Y. Supp. 674, 21 Civ. Proc. 34. See generally the title "Privilege."

[e] **Original Order Should Be Exhibited.**—*Newell v. Cutler*, 19 Hun (N. Y.) 74.

[f] **Affidavit To Be Served With Order.**—*Arctic F. Ins. Co. v. Hicks*, 7 Abb. Pr. (N. Y.) 204. But see *Utica City Bank v. Buel*, 9 Abb. Pr. (N. Y.) 385, 17 How. Pr. 498.

[g] **Defective copy not ground for dismissal of proceedings.** *Dilling, Baker & Co. v. Foster*, 21 S. C. 334.

[h] **Substituted Service.**—*Turner v. Holden*, 109 N. C. 182, 13 S. E. 731.

[i] **Service on Corporation.**—*Meyer v. Consolidated Ice Co.*, 196 N. Y. 471, 90 N. E. 54. See *Bates v. International Co.*, 84 Fed. 518, service on attorney of corporation sufficient.

94. *Sinnott v. First Nat. Bank*, 34 App. Div. 161, 54 N. Y. Supp. 417, though statute does not specifically require filing.

95. *Dorfman v. Jacobs*, 100 Misc. 592, 166 N. Y. Supp. 403 (by the judge making it only); *Ward v. Stoddard*, 144 App. Div. 143, 128 N. Y. Supp. 846. See generally the title "Orders."

96. *Dorfman v. Jacobs*, 100 Misc. 592, 166 N. Y. Supp. 403.

[a] **Revival of order (1) by changing return date and initialing margin** is permissible (*German Exch. Bank v. Schlang*, 92 Misc. 351, 155 N. Y. Supp. 924; *Bridges v. Koppelman*, 63 Misc. 27, 117 N. Y. Supp. 306), if done (2) by the judge who made the order. *Ward v. Stoddard*, 144 App. Div. 143, 128 N. Y. Supp. 846.

[b] **Vacating the original or dis-**



**E. ARREST AND BAIL.**—Instead of making an order for the examination of the judgment debtor, or at any time after making an order for examination of the debtor, the court may under some statutes, issue an order or warrant of arrest,<sup>97</sup> on proof by affidavit, that there is danger of the debtor leaving the state or concealing himself,<sup>98</sup> and there is reason to believe he has property which he refuses to apply to the judgment.<sup>99</sup> After arrest he may be required to enter into the undertaking required by statute.<sup>1</sup>

**IX. RESTRAINING TRANSFER OF PROPERTY.**—The court, in supplementary proceedings, may restrain a disposition of his property by the judgment debtor,<sup>2</sup> or by a third person who has possession thereof,<sup>3</sup> pending an order directing its application towards the payment of the judgment.

**X. STAY OF PROCEEDINGS.**—A motion to stay supplementary proceedings is addressed to the discretion of the court.<sup>4</sup>

continuing proceedings under it not necessary. *Dorfman v. Jacobs*, 100 Misc. 592, 166 N. Y. Supp. 403. See *German Exch. Bank v. Schlang*, 92 Misc. 351, 155 N. Y. Supp. 924.

[c] Issuance of first order must be stated in application. *Dorfman v. Jacobs*, 101 Misc. 592, 166 N. Y. Supp. 403.

97. See *infra*, this note.

[a] Referee may issue warrant. *Marriage v. Woodruff*, 77 Iowa 291, 42 N. W. 198.

[b] A recital of facts conferring jurisdiction to issue warrant and showing purpose of arrest must be made. *Barnett v. Lewinsky*, 66 Misc. 141, 121 N. Y. Supp. 378.

Arrest of the person on mesne process, see the title "Arrest in Civil Cases;" on final process, see 16 STANDARD PROC. 269, et seq.

98. *Enders v. Smith*, 122 Wis. 640, 100 N. W. 1061. See *Frost v. Craig*, 9 N. Y. Supp. 528, 18 Civ. Proc. 296, 16 Daly 107, 30 N. Y. St. 848.

99. *Enders v. Smith*, 122 Wis. 640, 100 N. W. 1061.

[a] Specification of debtor's property is not required. *Enders v. Smith*, 122 Wis. 640, 100 N. W. 1061.

1. *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969, 10 L. R. A. (N. S.) 362.

[a] Complaint on bond need not set up the issuing and return of an execution unsatisfied. *Kelly v. McCormick*, 2 E. D. Smith (N. Y.) 503.

2. **U. S.**—*Tomlinson & Webster Mfg. Co. v. Shatto*, 34 Fed. 380. **Minn.** *Flint v. Zimmerman*, 70 Minn. 346, 73

N. W. 175. **N. J.**—*Githens v. Mount*, 64 N. J. L. 166, 44 Atl. 851. **N. Y.** *Moynihan v. Devaney*, 89 Misc. 291, 153 N. Y. Supp. 666; *Rathers v. Kaplan*, 138 N. Y. Supp. 1002. **Wis.**—*Holton v. Burton*, 78 Wis. 321, 47 N. W. 624.

[a] Verification of petition on information and belief does not authorize injunction. *Githens v. Mount*, 64 N. J. L. 166, 44 Atl. 851.

[b] Copy of affidavit need not be served with order. *Green v. Bullard*, 8 How. Pr. (N. Y.) 313.

[c] Effect on injunction of appointment of receiver, see *People ex rel. Morris v. Randall*, 73 N. Y. 416.

3. **Cal.**—*Union Collection Co. v. Snell*, 5 Cal. App. 130, 89 Pac. 859. **N. Y.**—*Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493, fraudulent transferee. **N. C.**—*Farmers' & Mechanics' Nat. Bank v. Burns*, 109 N. C. 105, 13 S. E. 871. **Ohio.**—*Union Bank v. Union Bank*, 6 Ohio St. 254. **S. C.**—*Globe Phosphate Co. v. Pinson*, 52 S. C. 185, 29 S. E. 549. **Wash.**—*Smith v. Weed*, 75 Wash. 452, 134 Pac. 1070.

[a] Whether he be proceeded against under a third party order or not. *First Nat. Bank v. Gow*, 139 App. Div. 576, 582, 124 N. Y. Supp. 449, 454.

[b] Except Where the Ownership of the Property Is in Dispute.—*Rathers v. Kaplan*, 138 N. Y. Supp. 1002.

[c] Notice of application for injunction. *Meier v. Fidelity Nat. Bank*, 43 Wash. 324, 86 Pac. 574.

4. *McCray v. Whitney*, 56 Ind. App. 94, 104 N. E. 979. See generally the

**XI. DISMISSAL AND DISCONTINUANCE.**—Supplementary proceedings may be dismissed or discontinued by order of the judge on application of a party.<sup>5</sup>

**XII. ABATEMENT.**—It has been held that supplementary proceedings, though instituted during the life of a judgment, abate when the judgment ceases to have vitality.<sup>6</sup> Under some statutes, the proceedings do not abate on the death of a party.<sup>7</sup>

**XIII. SIMULTANEOUS AND SUCCESSIVE PROCEEDINGS.** Simultaneous supplementary proceedings may be instituted against a debtor by different creditors,<sup>8</sup> and an examination by one creditor does not preclude examinations by other creditors.<sup>9</sup> The proceedings may be maintained contemporaneously with a suit in equity to subject the debtor's property to the judgment or a creditor's suit,<sup>10</sup> or with proceedings under a second execution.<sup>11</sup>

**XIV. EXAMINATION AND SECOND EXAMINATION.**—A default cannot be entered but the debtor or other persons must be examined.<sup>12</sup> The debtor is not entitled to a jury trial,<sup>13</sup> except, perhaps, where the statute permits of and issues of fact are framed;<sup>14</sup> but persons examined may be allowed the aid of counsel.<sup>15</sup> The examination is taken orally,<sup>16</sup> and errors and mistakes in the testimony may be corrected.<sup>17</sup>

title "Supersedeas and Stay of Proceedings."

5. *Westervelt v. Shapiro*, 132 N. Y. Supp. 338; *Crystal v. Crystal*, 120 N. Y. Supp. 50.

[a] Though actually abandoned, the supplementary proceedings are not terminated until entry of an order under the statute. *Westervelt v. Shapiro*, 132 N. Y. Supp. 338.

[b] If the judgment is satisfied pending the proceedings, they will be dismissed. *Cobb v. Edson*, 84 N. Y. Supp. 916. See *Union Sur. & Guar. Co. v. Sire*, 34 Misc. 221, 68 N. Y. Supp. 943.

[c] Order a prerequisite to new proceedings. *Schwarmecke v. Glenny*, 103 N. Y. Supp. 499.

6. *Merchants' Nat. Bank v. Braithwaite*, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653.

7. *Wilkinson v. Vordermark*, 32 Ind. App. 633, 70 N. E. 538. *Contra*, *Hazewell v. Penman*, 13 How. Pr. (N. Y.) 114. See generally the title "Survival."

8. *Sparks v. Davis*, 25 S. C. 381. Compare *Sorrentino v. Langlois*, 144 App. Div. 271, 128 N. Y. Supp. 1003, denying order for examination of third person when there is a receiver.

[a] May Be Heard Together.—Ken-

nesaw Mills Co. v. Walker, 19 S. C. 104.

9. *Murphy v. Cram*, 157 App. Div. 609, 142 N. Y. Supp. 972.

10. *Estey v. Fuller Imp. Co.*, 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025; *In re Bachiller De Ponce De Leon*, 69 N. Y. Supp. 242.

11. *Smith v. Davis*, 63 Hun 100, 17 N. Y. Supp. 614, 43 N. Y. St. 504.

[a] An election between remedies will not be compelled where there is a question as to the ownership of the property taken under the second execution. *Smith v. Davis*, 63 Hun 100, 17 N. Y. Supp. 614, 43 N. Y. St. 504.

12. *Hathaway v. Brady*, 26 Cal. 581; *Rourke v. Turrell*, 138 N. Y. Supp. 648.

13. *In re Burrows*, 33 Kan. 675, 7 Pac. 148.

14. See *American White Bronze Co. v. Clark*, 123 Ind. 230, 23 N. E. 855.

15. *Corning v. Tooker*, 5 How. Pr. (N. Y.) 16; *Schwab v. Cohen*, 13 N. Y. St. 709, in the discretion of the court or referee.

16. *Corning v. Tooker*, 5 How. Pr. (N. Y.) 16. Compare *Falkenberg v. Frank*, 20 Misc. 692, 46 N. Y. Supp. 675, as to filing record of testimony.

17. *Corning v. Tooker*, 5 How. Pr. (N. Y.) 16, by supplemental statement.

**Place of Examination.** — Statutes sometimes require the examination of the debtor to be had in the county in which he resides or has a place of business,<sup>18</sup> or in a county to which execution was issued.<sup>19</sup>

**Before Whom Examination Had.** — The examination of the debtor may be had before a court or judge,<sup>20</sup> or referee.<sup>21</sup>

**Issues and Scope.** — No formal framing of issues or pleadings are contemplated in the examination.<sup>22</sup> It has a wide range.<sup>23</sup> If the examination of the debtor is had after return of execution unsatisfied, the inquiry may be as to his property generally; if had before return,

18. *State v. Burrows*, 33 Kan. 10, 5 Pac. 449; *Mulstein Co. v. New York*, 213 N. Y. 308, 107 N. E. 651.

[a] **Statute does not apply to foreign corporation defendant.** *Bates v. International Co.*, 84 Fed. 518.

[b] **Waiver of objection.** *State v. Burrows*, 33 Kan. 10, 5 Pac. 449.

19. *Crouse v. Wheeler*, 33 How. Pr. (N. Y.) 337; *Wilson & Calkins v. Andrews*, 9 How. Pr. (N. Y.) 39; *Kenne-saw Mills Co. v. Walker*, 19 S. C. 104.

20. *Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412, before judge in vacation.

21. **Kan.**—*Hunter v. Betts* (Kan. App.), 53 Pac. 86. **Mo.**—*Ackerman v. Green*, 201 Mo. 231, 241, 100 S. W. 30. **Wis.**—*Gould v. Dodge*, 30 Wis. 621.

[a] **Notice.**—Order appointing referee may be made ex parte. *Ackerman v. Green*, 201 Mo. 231, 241, 100 S. W. 30.

[b] **Before Master in Chancery.** *Rogge v. Seymour* (N. J. L.), 88 Atl. 699.

[c] **Before Supreme Court Examiners.**—*Hershenstein v. Hahn*, 77 N. J. L. 39, 71 Atl. 105.

[d] **Referee May Be Clerk of Creditor.**—*Adams v. Hackett*, 7 Cal. 187, 201.

[e] **Judge has supervisory power over examination before referee.** *Feinberg v. Kuteosky*, 147 App. Div. 393, 132 N. Y. Supp. 9.

[f] **Report of Referee.**—*Parker v. Page*, 38 Cal. 522; *Dorr v. Noxon*, 5 How. Pr. (N. Y.) 29; *Jones v. Lawlin*, 1 Sandf. (N. Y.) 722, 1 Code Rep. 94.

[g] **Removal of Referee.**—*Rouse v. Goodman*, 8 Misc. 691, 28 N. Y. Supp. 524, 58 N. Y. St. 830.

22. *McCullough v. Clark*, 41 Cal. 298; *Bennett v. Valley Min. Co.*, 142 Iowa 53, 120 N. W. 654.

[a] **If unauthorized pleadings are**

filed, they may be disregarded. *Beckman Supply Co. v. Newell* (Ind. App.), 118 N. E. 962.

[b] **An answer by the judgment debtor is not authorized.** *Carpenter v. Vanscoten*, 20 Ind. 50.

[c] **In Indiana supplementary proceedings are declared by statute to be summary in nature without further pleadings after order made requiring the parties to appear and answer. Formal pleadings other than the affidavit; the demurrer and the motions authorized by statute are dispensed with. The code has not entirely abrogated the rules as to pleadings in the old creditor's bill and the plaintiff must disclose the nature of the claims he seeks to enforce against a third party. The proceeding is regarded as a civil action except as to pleadings.** *Harris v. Howe*, 2 Ind. App. 419, 28 N. E. 711. To quote from *Burkett v. Holeman*, 104 Ind. 6, 3 N. E. 406. "The proceedings . . . are to be 'summary' in the sense that they are 'without further pleadings,' but in no other sense." To similar effect, see *American White Bronze Co. v. Clark*, 123 Ind. 230, 23 N. E. 855; *Eden v. Everson*, 65 Ind. 113; *Beckman Supply Co. v. Newell* (Ind. App.), 118 N. E. 962; *First Nat. Bank v. Stanley*, 4 Ind. App. 213, 30 N. E. 799.

23. *McCullough v. Clark*, 41 Cal. 298; *People ex rel. Roache v. Hanbury*, 145 N. Y. Supp. 483 (affirmed in 162 App. Div. 337, 147 N. Y. Supp. 851); *First Nat. Bank v. Gow*, 139 App. Div. 576, 582, 124 N. Y. Supp. 454, 459. See 12 ENCY. OF EV. 237.

[a] **But a general inquiry into a debtor's private affairs is not permissible.** *Bradley v. Burk*, 81 Minn. 368, 84 N. W. 123.

**Scope of the evidence, see ENCY. OF EV., title "Supplementary Proceedings."**



the inquiry is confined to the property described in the affidavit.<sup>24</sup> The court in supplementary proceedings cannot determine the title to property claimed by third persons in good faith,<sup>25</sup> or decide the question of indebtedness where the third person in good faith denies the debt.<sup>26</sup> the creditor in such cases being compelled to resort to other proceedings.<sup>27</sup> It has been held under some statutes, however, that such an issue may be tried,<sup>28</sup> and under others, that an inquiry as to the bona fides of transfers of the debtor's property may be had.<sup>29</sup> The judgment,<sup>30</sup> or the regularity of the proceedings in the action,<sup>31</sup> cannot be assailed however.

**Adjournments.**—An adjournment of the proceedings from time to time is authorized.<sup>32</sup>

24. *Smith v. Weeks*, 60 Wis. 94, 104, 18 N. W. 778. See *West v. State*, 168 Ind. 77, 79 N. E. 361; *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493.

25. **Cal.**—*Lewis v. Chamberlain*, 108 Cal. 525, 41 Pac. 413; *McDowell v. Bell*, 86 Cal. 615, 25 Pac. 128. *Compare Herrlich v. Kaufmann*, 99 Cal. 271, 33 Pac. 857, 37 Am. St. Rep. 50. **Idaho.** *Spaulding v. Coeur d'Alene R. & N. Co.*, 6 Idaho 638, 59 Pac. 426. **Kan.** *Honce v. Schram*, 73 Kan. 368, 85 Pac. 535. **Nev.**—*Persing v. Reno S. B. Co.*, 30 Nev. 342, 351, 96 Pac. 1054; *Hagerman v. Tong Lee*, 12 Nev. 331. **N. Y.** *Kenney v. South Shore N. G. & F. Co.*, 201 N. Y. 89, 94 N. E. 606; *In re Flynn*, 80 Misc. 79, 140 N. Y. Supp. 799. **N. C.**—*Farmers' & Mechanics' Nat. Bank v. Burns*, 109 N. C. 105, 13 S. E. 8/1. **Ohio.**—*Edgerton v. Hanna*, 11 Ohio St. 323. **Utah.**—*Wallace, Smuin & Co. v. McLaughlin*, 12 Utah 411, 433, 43 Pac. 109. **Wis.**—*Blabon v. Gilchrist*, 67 Wis. 38, 29 N. W. 220. **Wyo.**—*First Nat. Bank v. Cook*, 12 Wyo. 492, 514, 76 Pac. 674, 78 Pac. 1083, 2 L. R. A. (N. S.) 1012.

**Ordering surrender in case of disputed title**, see *infra*, XV.

[a] **Where the third party is a mortgagee or lienor**, the same rule applies. *First Nat. Bank v. Cook*, 12 Wyo. 492, 542, 76 Pac. 674, 78 Pac. 1083, 2 L. R. A. (N. S.) 1012. To similar effect, see *Spaulding v. Coeur d'Alene R. & N. Co.*, 6 Idaho 638, 59 Pac. 426.

[b] **The mere claim of ownership does not prevent a continuance of the examination.** *First Nat. Bank v. Gow*, 139 App. Div. 576, 582, 124 N. Y. Supp. 449, 454.

[c] **Whether the witness has a de-**

fense to an action for the property cannot be inquired into. *First Nat. Bank v. Gow*, 67 Misc. 547, 124 N. Y. Supp. 755.

26. *Parker v. Page*, 38 Cal. 522; *Hagerman v. Tong Lee*, 12 Nev. 331.

27. See *infra*, XV and XVI.

28. See *Harris v. Howe*, 2 Ind. App. 419, 28 N. E. 711, reviewing Indiana cases.

29. *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493. See also *Comstock v. Grindle*, 121 Ind. 459, 23 N. E. 94; *Harris v. Howe*, 2 Ind. App. 419, 28 N. E. 711.

[a] **As to assignment for benefit of creditors**, see *In re Rindskopf*, 8 N. Y. Civ. Proc. 246 n, 16 Abb. N. C. 316 n; *In re Siekle*, 52 Hun 527, 5 N. Y. Supp. 703, 17 Civ. Proc. 138, 23 N. Y. St. 585; *Beebe v. Kenyon*, 3 Hun (N. Y.) 73, 5 Thomp. & C. 271; *Seymour v. Wilson*, 15 How. Pr. (N. Y.) 355; *Seligman v. Wallace*, 16 Abb. N. C. (N. Y.) 317, 6 Civ. Proc. 232, 67 How. Pr. 514; *Schloss v. Wallach*, 16 Abb. N. C. (N. Y.) 319; *Wilson Bros. W. & T. Co. v. Daggett*, 9 Civ. Proc. 408, 1 N. Y. St. 297.

30. *West v. State*, 168 Ind. 77, 79 N. E. 361; *Lederer v. Ehrenfeld*, 49 How. Pr. (N. Y.) 403. See 15 **STANDARD PROC.** 382.

31. *People ex rel. Mace v. Oliver*, 66 Barb. (N. Y.) 570.

32. *Underwood v. Sutcliffe*, 10 Hun (N. Y.) 453. See *Cowen v. Bernard*, 80 Misc. 394, 141 N. Y. Supp. 252.

[a] **Adjournments to harass debtor unauthorized.** *Feinberg v. Kutcosky*, 147 App. Div. 393, 132 N. Y. Supp. 9.

[b] **Entry of Adjournment.**—*Holton v. Burton*, 78 Wis. 321, 47 N. W. 624.

**Restraining Examination.**—If the supplementary proceedings are for the avowed purpose of obtaining evidence for another action, the examination may be restrained on motion.<sup>33</sup>

**Second Examination.**—Further examinations of a debtor may be had in the sound discretion of a court on a proper showing of new facts.<sup>34</sup> made by affidavit.<sup>35</sup>

**XV. DETERMINATION OF PROCEEDINGS AND SURRENDER OF PROPERTY.**—Findings of fact and conclusions of law need not be filed and cannot be required by the parties,<sup>36</sup> but some statutes seem to contemplate the filing of the record of the testimony and proceedings had.<sup>37</sup>

Any property of the debtor disclosed by the examination,<sup>38</sup> unless

33. *Jones v. Ramsdell*, 174 App. Div. 13, 159 N. Y. Supp. 209.

34. *People ex rel. Dorris v. McKamy*, 28 Cal. App. 196, 151 Pac. 743; *Murphy v. Cram*, 157 App. Div. 609, 142 N. Y. Supp. 972; *Livingston v. Livingston*, 164 N. Y. Supp. 419.

[a] *On ex parte* application. *Goodall v. Demarest*, 2 Hilt. (N. Y.) 534.

[b] *Good reason must be shown* therefor, even though the second application is founded on another judgment. *Livingston v. Livingston*, 164 N. Y. Supp. 419.

[c] *Subsequent acquisition of property* authorizes second examination. *Livingston v. Livingston*, 164 N. Y. Supp. 419; *Goodall v. Demarest*, 2 Hilt. (N. Y.) 534.

[d] *Examination limited to time* subsequent to first examination. *Goodall v. Demarest*, 2 Hilt. (N. Y.) 534.

[e] *Vacation of former order unnecessary* to obtain examination as to newly acquired property, and proceedings under the two orders may be consolidated. *Bendick v. Meyer*, 129 N. Y. Supp. 772.

35. *People ex rel. Dorris v. McKamy*, 28 Cal. App. 196, 151 Pac. 743; *Shane Bros. & Wilson Co. v. Henshaw*, 174 App. Div. 606, 161 N. Y. Supp. 115; *Livingston v. Livingston*, 164 N. Y. Supp. 419.

[a] *If the second examination is a continuation* of the first, an affidavit is not required. *McDonnell v. Henderson*, 74 Iowa 619, 38 N. W. 512.

[b] *Previous proceedings* should be stated. *Goodall v. Demarest*, 2 Hilt. (N. Y.) 534.

36. *Lyons v. Marcher*, 119 Cal. 382, 51 Pac. 559; *Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412 (statute re-

lating thereto is not applicable); *Beckman Supply Co. v. Newell* (Ind. App.), 118 N. E. 962; *Balz v. Benninghof*, 5 Ind. App. 522, 32 N. E. 595. *Compare Parker v. Page*, 38 Cal. 522.

[a] *A special finding made* will be treated as a general finding only. *Beckman Supply Co. v. Newell* (Ind. App.), 118 N. E. 962.

37. *Falkenberg v. Frank*, 20 Misc. 692, 46 N. Y. Supp. 675.

38. *Cal.*—See *Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 100 Pac. 242, 132 Am. St. Rep. 81. *Kan.*—*Honce v. Schram*, 73 Kan. 368, 85 Pac. 535. *Wis.*—*Williams v. Smith*, 117 Wis. 142, 93 N. W. 464.

[a] *"Property"* defined. *Baker v. State*, 109 Ind. 47, 9 N. E. 711; *Figg v. Snook*, 9 Ind. 202.

[b] *Any Property Reachable By Creditors' Bill.*—*Staples v. May*, 87 Cal. 178, 191, 25 Pac. 346; *Pacific Bank v. Robinson*, 57 Cal. 522, 40 Am. Rep. 120.

[c] *Property Subject to Execution.* *Dilling, Baker & Co. v. Foster*, 21 S. C. 334.

[d] *Property must be within jurisdiction* of the court or judge. *Bennett v. Valley Min. Co.*, 142 Iowa 53, 120 N. W. 654.

[e] *After Acquired Property.*—*Baker v. State*, 109 Ind. 47, 9 N. E. 711; *Kelsey v. Webb*, 94 App. Div. 571, 88 N. Y. Supp. 4; *Livingston v. Livingston*, 164 N. Y. Supp. 419.

[f] *Choses in Action.*—*Burkett v. Bowen*, 118 Ind. 379, 21 N. E. 38; *Baker v. State*, 109 Ind. 47, 9 N. E. 711.

[g] *Seats in Stock Exchange.* *Habenicht v. Lissak*, 78 Cal. 351, 20 Pac. 874, 12 Am. St. Rep. 63, 5 L. R. A. 713.

exempt from execution,<sup>39</sup> whether it is in the hands of the debtor himself, or another person,<sup>40</sup> and though not reachable by the execution unaided,<sup>41</sup> may be ordered applied to the satisfaction of the judgment<sup>42</sup> where there is no dispute as to its ownership,<sup>43</sup> or the amount

39. **Haw.**—*Holt v. Tullett*, 17 Hawaii 416. **Ind.**—*Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661. **N. Y.**—*Tillotson v. Wolcott*, 48 N. Y. 188; *Seeley v. Connors*, 109 App. Div. 279, 95 N. Y. Supp. 1109. **Wash.**—*Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851.

As to what property is exempt, see 16 STANDARD PROC. 24.

[a] **A Judgment for the Taking or Loss of Exempt Property.**—*Tillotson v. Wolcott*, 48 N. Y. 188. See 16 STANDARD PROC. 83.

[b] **Salary of public officials** cannot be reached. *Oetjen v. Hintemann*, 91 N. J. L. 429, 106 Atl. 213. See 16 STANDARD PROC. 41.

40. **Ind.**—*Baker v. State*, 109 Ind. 47, 9 N. E. 711. **Kan.**—*Honce v. Schram*, 73 Kan. 368, 85 Pac. 535. **Wis.**—*Williams v. Smith*, 117 Wis. 142, 93 N. W. 404.

[a] **Where a third person is not a party** to the supplementary proceedings property in his possession belonging to the debtor cannot be reached. *Bowlin Liquor Co. v. Fauver*, 43 Mont. 472, 117 Pac. 103.

41. **Ind.**—*Baker v. State*, 109 Ind. 47, 9 N. E. 711; *Earl v. Skiles*, 93 Ind. 178. **Mont.**—*In re Downey*, 31 Mont. 441, 78 Pac. 772. **S. C.**—*Deer Island Lumber Co. v. Virginia-Carolina Chemical Co.*, 97 S. E. 833. **Wis.**—*Smith v. Weeks*, 60 Wis. 94, 18 N. W. 778. **Wyo.**—*First Nat. Bank v. Cook*, 12 Wyo. 492, 523, 76 Pac. 674, 78 Pac. 1083, 2 L. R. A. (N. S.) 1012.

42. **Ind.**—*Baker v. State*, 109 Ind. 47, 59, 9 N. E. 711. **Kan.**—*Nichols v. Quinn*, 94 Kan. 742, 147 Pac. 1103 (holding as to concealment not required); *State v. Burrows*, 33 Kan. 10, 17, 5 Pac. 449. **Minn.**—*Flint v. Webb*, 25 Minn. 263. **N. Y.**—*Brein v. Light*, 36 Misc. 110, 72 N. Y. Supp. 655; *Serven v. Lowerre*, 3 Misc. 113, 23 N. Y. Supp. 1052. **Ohio.**—*Union Bank v. Union Bank*, 6 Ohio St. 254. **Wash.**—*Klepsch v. Donald*, 18 Wash. 150, 51 Pac. 352.

[a] **Absence of debtor does not prevent** the making of an order applying

the property to the judgment, on the testimony of witnesses. *Honce v. Schram*, 73 Kan. 368, 85 Pac. 535; *State v. Downing*, 40 Ore. 309, 320, 58 Pac. 863, 66 Pac. 917.

[b] **Although the Property Is in the Possession of the Third Person.**—*Rice v. Jones*, 103 N. C. 226, 9 S. E. 571, 14 Am. St. Rep. 801.

[c] **Although a Receiver Has Been Appointed.**—*Clark v. Shaw*, 91 Misc. 245, 154 N. Y. Supp. 1101.

[d] **Court may compel application directly or appoint a receiver** in its discretion. *Flint v. Webb*, 25 Minn. 263. See *infra*, XVI.

[e] **If a transfer of the property was fraudulent**, the court cannot set aside the transfer and order the surrender of the property. *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493, a receiver must be appointed who must sue for it. See *Burt v. Hoettinger*, 28 Ind. 214. But as to right to levy on property fraudulently conveyed, see 15 STANDARD PROC. 879, et seq.

[f] **If the debtor has no property** which can be reached, the affidavit or petition should be dismissed with costs. *Seyfert v. Edison*, 47 N. J. Eq. 428, 1 Atl. 502. See *Gray v. Ashley*, 24 Misc. 396, 53 N. Y. Supp. 547.

43. **Nev.**—*Persing v. Reno S. B. Co.*, 30 Nev. 342, 351, 96 Pac. 1054; *Hagerman v. Tong Lee*, 12 Nev. 331. **N. Y.**—*Kenney v. South Shore N. G. & F. Co.*, 201 N. Y. 89, 94 N. E. 606; *First Nat. Bank v. Gow*, 139 App. Div. 576, 124 N. Y. Supp. 449. **Wash.**—*Smith v. Weed*, 75 Wash. 452, 134 Pac. 1070. **Wis.**—*Blabon v. Gilchrist*, 67 Wis. 38, 29 N. W. 220. **Wyo.**—*First Nat. Bank v. Cook*, 12 Wyo. 492, 516, 76 Pac. 674, 78 Pac. 1083, 2 L. R. A. (N. S.) 1012.

**No right to inquire** into disputed title, see *supra*, XIV.

[a] **Not Substantially Disputed.** Under some statutes such order can be made only when the judgment debtor's right to possession of the money or property "is not substantially disputed." If there is a real controversy in this respect, it cannot be settled in supplementary proceedings, but must



of the debt due.<sup>44</sup> If the third person holding the property claims an interest adverse to the debtor,<sup>45</sup> or the third party garnished, denies his indebtedness,<sup>46</sup> a surrender of the property cannot be ordered unless the claim or denial is merely simulated.<sup>47</sup> In case of such claim or denial the remedy is by other appropriate, legal or equitable remedy.<sup>48</sup>

The court or judge who granted the original order,<sup>49</sup> or to whom it was returnable,<sup>50</sup> may make the order of surrender of the property.

**Notice.** — The order may be made without notice,<sup>51</sup> or on such notice as the judge deems just.<sup>52</sup> If third persons have an interest in the property, notice to them should be given.<sup>53</sup>

**Form of Order.** — The order should direct the application of the property to the satisfaction of the judgment,<sup>54</sup> or under some statutes direct the payment of the money or delivery of personalty to the officer

await determination in an appropriate action. *Kenney v. South Shore Nat. Gas & F. Co.*, 201 N. Y. 89, 94 N. E. 606; *Burn v. Sandfort*, 172 N. Y. Supp. 820. See also *Smith v. Weed*, 75 Wash. 452, 134 Pac. 1070.

[b] **Ownership by third persons not parties** to the suit is referred to. *Smith v. Weed*, 75 Wash. 452, 134 Pac. 1070.

44. *Blabon v. Gilchrist*, 67 Wis. 38, 29 N. W. 220.

45. **Cal.**—*Lewis v. Chamberlain*, 108 Cal. 525, 41 Pac. 413; *Colyear v. Superior Court* (Cal. App.), 181 Pac. 74; *Union Collection Co. v. Snell*, 5 Cal. App. 130, 89 Pac. 859. **Idaho.** *Spaulding v. Coeur d'Alene R. & N. Co.*, 6 Idaho 638, 59 Pac. 426. **Nev.** *Hagerman v. Tong Lee*, 12 Nev. 331. **N. Y.**—*Kenney v. South Shore N. G. & F. Co.*, 201 N. Y. 89, 94 N. E. 606; *In re Flynn*, 80 Misc. 79, 140 N. Y. Supp. 799 (where there is a substantial dispute); *Harding v. Conlon*, 138 N. Y. Supp. 1014. **Va.**—*Freitas v. Griffith*, 112 Va. 343, 71 S. E. 531.

See cases in preceding notes, and *supra*, XIV.

46. *Parker v. Page*, 38 Cal. 522; *Hagerman v. Tong Lee*, 12 Nev. 331.

47. **Kan.**—*Honce v. Schram*, 73 Kan. 368, 85 Pac. 535. **N. Y.**—*Hall v. McMahon*, 10 Abb. Pr. 103. **Utah.**—*Wallace Smuin & Co. v. McLaughlin*, 12 Utah 411, 434, 43 Pac. 109.

[a] **Where the claim or denial is rejected** on the ground that it was made in bad faith, the court or referee should so state in the finding. *Parker v. Page*, 38 Cal. 522. But see as to findings, *supra*, this section.

48. See *infra*, XVII, and the titles

“Creditors’ Suits;” “Fraudulent Conveyances;” “Garnishment;” “Judgments and Decrees, Enforcement of.”

49. *Shannon v. Steger*, 75 App. Div. 279, 78 N. Y. Supp. 163; *Clark v. Shaw*, 91 Misc. 245, 154 N. Y. Supp. 1101 (although another court appointed the receiver); *State v. Downing*, 40 Ore. 309, 58 Pac. 863, 66 Pac. 917.

[a] **By Court.**—(1) The preliminary order may be made by a judge and the final order by the court. *State v. Downing*, 40 Ore. 309, 319, 58 Pac. 863, 66 Pac. 917. (2) Order by court is erroneous (*Chestnut v. Greenberg*, 162 N. Y. Supp. 137), but (3) not void. *Goldreyer v. Shatz*, 114 N. Y. Supp. 339.

50. *Shannon v. Steger*, 75 App. Div. 279, 78 N. Y. Supp. 163.

51. *Gibson v. Haggerty*, 37 N. Y. 555, 97 Am. Dec. 752; *Shannon v. Steger*, 75 App. Div. 279, 78 N. Y. Supp. 163; *Serven v. Lowerre*, 3 Misc. 113, 23 N. Y. Supp. 1052.

52. *Gibson v. Haggerty*, 37 N. Y. 555, 97 Am. Dec. 752; *Shannon v. Steger*, 75 App. Div. 279, 78 N. Y. Supp. 163.

53. *Shannon v. Steger*, 75 App. Div. 279, 78 N. Y. Supp. 163.

54. **Cal.**—*Adams v. Hackett*, 7 Cal. 187. **Kan.**—*State v. Burrows*, 22 Kan. 10, 5 Pac. 449. **Mont.**—*In re Downey*, 31 Mont. 441, 78 Pac. 772; *Wilson v. Harris*, 21 Mont. 374, 409, 54 Pac. 46. **Ohio.**—*Union Bank v. Union Bank*, 6 Ohio St. 254. **S. D.**—*Aberdeen Clothing Co. v. Just*, 32 S. D. 560, 143 N. W. 900.

[a] **A payment of only so much as is necessary to pay the judgment, in-**

designated in the order,<sup>55</sup> describing it.<sup>56</sup> But the order should not provide for imprisonment of the defendant in default of compliance therewith.<sup>57</sup> And, according to some authorities, the order may not direct the execution debtor to pay the debt, without finding that he has the necessary money to do it,<sup>58</sup> nor, in any event, should it, in so many words, direct a third party to pay the debt,<sup>59</sup> since payment must be accomplished through the sheriff or a receiver.<sup>60</sup> However, it seems that payment of a specific sum of money found in the hands of the party examined, may be ordered.<sup>61</sup>

**Service** on the debtor of an order requiring a third person to surrender property is unnecessary where the debtor is in court when it is made.<sup>62</sup>

**Amendment.**—An order requiring surrender of property may be amended.<sup>63</sup>

terest and costs should be ordered. *Kennesaw Mills Co. v. Walker*, 19 S. C. 104, 114. See *McDonald v. Creager*, 96 Iowa 659, 65 N. W. 1021.

55. *Reardon v. Henry*, 82 Iowa 134, 47 N. W. 1022 (order to deliver up or in any other manner applied to the satisfaction of the judgment); *Fraser v. Ward*, 13 Daly (N. Y.) 431; *Boelger v. Swivel*, 1 How. Pr. N. S. (N. Y.) 372.

[a] **Delivery to Receiver.**—*Murphy v. Cram*, 157 App. Div. 609, 142 N. Y. Supp. 972.

[b] **Payment of the money to the clerk instead of the sheriff** may be ordered. *Belknap v. Platter*, 54 Wash. 1, 103 Pac. 432, 132 Am. St. Rep. 1097.

[c] **Delivery to plaintiff or his attorney** cannot be required. *N. Y. Gray v. Ashley*, 24 Misc. 396, 53 N. Y. Supp. 547; *Boelger v. Swivel*, 1 How. Pr. (N. S.) 372. **N. C.**—*In re Daves*, 81 N. C. 72. **Wis.**—*Nieuwankamp v. Ullman*, 47 Wis. 168, 2 N. W. 131.

[d] **Delivery of articles not capable of manual delivery** cannot be compelled. *Smith v. McQuade*, 59 Hun 374, 13 N. Y. Supp. 62, 36 N. Y. St. 556.

[e] **The debtor cannot be compelled to go out of the state** and get the money. A transfer of his title is all that can be ordered. *Buchanan v. Hunt*, 98 N. Y. 560.

[f] **A conveyance of his real estate** by the debtor cannot be ordered as this would defeat his right of redemption. *Bennett v. Valley Min. Co.*, 142 Iowa 53, 120 N. W. 654.

56. *Smith v. McQuade*, 59 Hun 374, 13 N. Y. Supp. 62, 36 N. Y. St. 556.

[a] **Payment in particular coin** cannot be ordered, where the money has been loaned. *Hathaway v. Brady*, 26 Cal. 581.

57. *Kennesaw Mills Co. v. Walker*, 19 S. C. 104, 114; *Aberdeen Clothing Co. v. Just*, 32 S. D. 560, 143 N. W. 900. Compare *Crouse v. Wheeler*, 33 How. Pr. (N. Y.) 337, 347, order in alternative granting attachment is proper.

58. *Aberdeen Clothing Co. v. Just*, 32 S. D. 560, 143 N. W. 900, finding that he has sufficient property is not enough. See *State v. Burrows*, 33 Kan. 10, 17, 5 Pac. 449.

[a] **Payment at stated periods of stated amounts of the debtor's earnings** may be directed under statute. *Rogge v. Seymour* (N. J. L.), 88 Atl. 699.

[b] **He cannot be ordered to collect** a chose in action in his hands and apply the proceeds to the debt. *In re Downey*, 31 Mont. 441, 78 Pac. 772.

59. **Mont.**—*In re Downey*, 31 Mont. 441, 78 Pac. 772. **N. Y.**—*Kantor Bros. v. Wile*, 93 Misc. 438, 158 N. Y. Supp. 115. **Ohio.**—*Union Bank v. Union Bank*, 6 Ohio St. 254.

60. See cases in preceding note, and *infra*, this section, the catchline "Effect and Enforcement of Order."

61. *Kennesaw Mills Co. v. Walker*, 19 S. C. 104.

62. *McDonnell v. Henderson*, 74 Iowa 619, 38 N. W. 512.

63. See *infra*, this note.

[a] **At the instance of the third person** ordered to surrender. *Kantor Bros. v. Wile*, 93 Misc. 438, 158 N. Y. Supp. 115.

**Effect and Enforcement of Order.**—An order made in supplementary proceedings directing the application of property discovered to the satisfaction of a judgment is a final determination of the rights of the parties in the proceedings. It, in effect constitutes a judgment,<sup>64</sup> not collaterally attackable,<sup>65</sup> on which an execution might be issued<sup>66</sup> and from which an appeal might be taken.<sup>67</sup> But it does not bar a subsequent proceeding for recovery of other property since acquired or not involved in the first,<sup>68</sup> nor is it binding on other creditors not parties.<sup>69</sup> So far as the judgment debtor is concerned the order may be enforced by contempt proceedings against him.<sup>70</sup> But it has been held that an order requiring third persons to deliver property of the debtor cannot be enforced by contempt proceedings,<sup>71</sup> but must be enforced by execution,<sup>72</sup> garnishment,<sup>73</sup> or equitable proceedings.<sup>74</sup>

**XVI. RECEIVERS.**—A. GENERALLY.<sup>75</sup>—Statutes authorize the appointment of a receiver in supplementary proceedings,<sup>76</sup> in the dis-

64. *Bronzan v. Drobaz*, 93 Cal. 647, 29 Pac. 254; *Societa di Mutuo Socorso v. Mantel*, 1 Cal. App. 107, 81 Pac. 659.

[a] A judgment on an issue tendered by an affidavit or verified complaint in a supplementary proceeding is a bar to a subsequent proceeding for the same thing. *McCullough v. Clark*, 41 Cal. 298; *Baker v. State*, 109 Ind. 47, 9 N. E. 711, judgment on supplementary proceeding bars proceeding for execution against the body.

[b] An order directing application by the garnishee of a sum due the debtor, is res judicata in a subsequent proceeding by the creditor against him. *Societa di Mutuo Socorso v. Mantel*, 1 Cal. App. 107, 81 Pac. 659. *Contra*, *Honce v. Schram*, 73 Kan. 368, 85 Pac. 535. And see *Estey v. Fuller Imp. Co.*, 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025.

65. *In re Downey*, 31 Mont. 441, 78 Pac. 772.

66. Cal.—*Bronzan v. Drobaz*, 93 Cal. 647, 29 Pac. 254; *Societa di Mutuo Socorso v. Mantel*, 1 Cal. App. 107, 81 Pac. 659. Ia.—See also *Estey v. Fuller Imp. Co.*, 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025. Mo.—*Ackerman v. Green*, 201 Mo. 231, 100 S. W. 30.

67. *Bronzan v. Drobaz*, 93 Cal. 647, 29 Pac. 254; *Societa di Mutuo Socorso v. Mantel*, 1 Cal. App. 107, 81 Pac. 659. See *infra*, XX.

68. *Baker v. State*, 109 Ind. 47, 9 N. E. 711. See *supra*, XIII and XIV.

69. *Holton v. Burton*, 78 Wis. 321, 47 N. W. 624.

70. See *infra*, XVIII.

71. *Estey v. Fuller Imp. Co.*, 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025. See *Union Bank v. Union Bank*, 6 Ohio St. 254, query. But see *Kennesaw Mills Co. v. Walker*, 19 S. C. 104, and cases *supra*, this section under the catchline "Form of Order."

72. *Estey v. Fuller Imp. Co.*, 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025. See *Ackerman v. Green*, 201 Mo. 231, 100 S. W. 30; *In re Knap*, 144 Mo. 653, 46 S. W. 151, 66 Am. St. Rep. 435.

73. *Estey v. Fuller Imp. Co.*, 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025.

74. *Estey v. Fuller Imp. Co.*, 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025.

75. See generally the title "Receivers."

76. U. S.—*Bates v. International Co.*, 84 Fed. 518 (under California practice); *Tomlinson & Webster Mfg. Co. v. Shatto*, 34 Fed. 380. Cal.—*Hathaway v. Brady*, 26 Cal. 581. Minn.—*Flint v. Zimmerman*, 70 Minn. 346, 73 N. W. 175. Mont.—*Forsell v. Pittsburg & M. C. Co.*, 42 Mont. 412, 113 Pac. 479; *In re Downey*, 31 Mont. 441, 78 Pac. 772. N. J.—*Wilkinson-Gaddis & Co. v. Markert*, 65 N. J. L. 518, 47 Atl. 488. N. Y.—*Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493. Ohio.—*Edgerton v. Hanna*, 11 Ohio St. 323. S. C.—*Deer Island Lumber Co. v. Virginia-Carolina Chemical Co.*, 97 S. E. 833. S. D.—*Juckett v. Fargo Merc. Co.*, 19 S. D. 150, 102 N. W. 604. Wash.



cretion of the court.<sup>77</sup> To authorize an appointment, the creditor must have exhausted his legal remedies,<sup>78</sup> and caused execution to issue,<sup>79</sup> which must be returned unsatisfied in whole or in part,<sup>80</sup> save in exceptional cases, where supplementary proceedings may be had before return.<sup>81</sup> It must appear that the debtor has property applicable to the judgment,<sup>82</sup> or that there is reasonable ground to believe that he has property.<sup>83</sup> The fact that the title to property is in dispute does not preclude an appointment,<sup>84</sup> although it does preclude the court from making an order directing a delivery of the property to the receiver.<sup>85</sup>

**Number of Receivers and Extension of Receivership.**—Some statutes

*Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851. **Wis.**—Second Ward Bank *v.* Upmann, 12 Wis. 499. **Wyo.**—First Nat. Bank *v.* Cook, 12 Wyo. 492, 76 Pac. 674, 78 Pac. 1083, 2 L. R. A. (N. S.) 1012.

[a] **Receiver of real property** as well as personalty. *Smith v. Weed*, 75 Wash. 452, 134 Pac. 1070.

[b] **Receiver of personalty** only cannot be appointed. *In re Stoddard*, 128 App. Div. 759, 113 N. Y. Supp. 157.

[c] **Receiver to take charge of whiskey** cannot be appointed. *Howell v. Mathieson*, 146 Ga. 838, 92 S. E. 520.

[d] **Receivers of corporation defendants** cannot be appointed in supplementary proceedings. *Boucker Contr. Co. v. Callahan Contr. Co.*, 218 N. Y. 321, 113 N. E. 257. But see *De Bemer v. Drew*, 57 Barb. (N. Y.) 438.

[e] **Receiver of foreign corporation** cannot be appointed. *Bennett v. Valley Min. Co.*, 142 Iowa 53, 120 N. W. 654.

[f] **Limitation of receivership to property sufficient to satisfy judgment** not required. *Dilling, Baker & Co. v. Foster*, 21 S. C. 334.

[g] **Appointment does not discontinue proceedings** and dispense with examination. *Smith v. Cutter*, 64 App. Div. 412, 72 N. Y. Supp. 99.

[h] **Appearance of debtor waives irregularities** in appointment. *Underwood v. Sutcliffe*, 10 Hun (N. Y.) 453.

77. **Minn.**—*Flint v. Zimmerman*, 70 Minn. 346, 73 N. W. 175; *Flint v. Webb*, 25 Minn. 263. **N. Y.**—See *Connolly v. Kretz*, 78 N. Y. 620. **N. C.** *Rodman v. Harvey*, 102 N. C. 1, 8 S. E. 888. **Wash.**—*Smith v. Weed*, 75 Wash. 452, 464, 134 Pac. 1070.

[a] **Broad Discretion.**—*Smith v. Weed*, 75 Wash. 452, 464, 134 Pac. 1070.

78. **Mont.**—*Forsell v. Pittsburg & M. C. Co.*, 42 Mont. 412, 113 Pac. 479. **N. Y.**—*Bunn v. Daly*, 24 Hun 526. **N. D.** *Minkler v. United States Sheep Co.*, 4 N. D. 507, 62 N. W. 594, 33 L. R. A. 546.

79. *Minkler v. United States Sheep Co.*, 4 N. D. 507, 62 N. W. 594, 33 L. R. A. 546.

80. *Forsell v. Pittsburg & M. C. Co.*, 42 Mont. 412, 113 Pac. 479; *Minkler v. United States Sheep Co.*, 4 N. D. 507, 62 N. W. 594, 33 L. R. A. 546.

81. See *supra*, III.

82. **Mont.**—*Forsell v. Pittsburg & M. C. Co.*, 42 Mont. 412, 423, 113 Pac. 479. **N. J.**—*Adler v. Turnbull*, 57 N. J. L. 62, 30 Atl. 319. **N. Y.**—*Kelsey v. Webb*, 94 App. Div. 571, 88 N. Y. Supp. 4. *Compare Dease v. Reese*, 39 Misc. 657, 80 N. Y. Supp. 590. **Wis.**—*Holton v. Burton*, 78 Wis. 321, 47 N. W. 624.

[a] **Where property is discovered on the examination** a receiver (1) may be appointed for the purpose of collecting and applying it to the debt. **Ia.**—*Estey v. Fuller Imp. Co.*, 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025. **Minn.**—*Flint v. Webb*, 25 Minn. 263. **Mont.**—*In re Downey*, 31 Mont. 441, 78 Pac. 772. **N. J.**—*Adler v. Turnbull*, 57 N. J. L. 62, 30 Atl. 319. (2) Even though the property is subject to levy on execution. *Dilling, Baker & Co. v. Foster*, 21 S. C. 334. As to actions by receiver see *infra*, XVI, C.

83. *Flint v. Zimmerman*, 70 Minn. 346, 73 N. W. 175.

84. *Harding v. Conlon*, 138 N. Y. Supp. 1014.

85. *Harding v. Conlon*, 138 N. Y. Supp. 1014. See *supra*, XV.

provide that no more than one receiver of the property of a judgment debtor shall be appointed,<sup>86</sup> and authorize an extension of the receivership on institution of supplementary proceedings by other creditors.<sup>87</sup>

**B. APPOINTMENT AND DISCHARGE.**—The receiver must be appointed by an order,<sup>88</sup> made by the court or judge specified in the statute,<sup>89</sup> after notice to the debtor if he can be found,<sup>90</sup> and to other judgment creditors prosecuting pending supplementary proceedings against him,<sup>91</sup> at any time after making an order for the examination of the debtor,<sup>92</sup> or issuing a warrant for his arrest.<sup>93</sup>

**Objections.**—It has been held that the judgment debtor alone may object to irregularities in the appointment.<sup>94</sup>

**Discharge and Removal.**—The receiver may be discharged or removed in a proper case.<sup>95</sup>

86. *Sparks v. Davis*, 25 S. C. 381; *Dilling, Baker & Co. v. Foster*, 21 S. C. 334.

87. *Murphy v. Cram*, 157 App. Div. 609, 142 N. Y. Supp. 972; *Clark v. Shaw*, 91 Misc. 245, 154 N. Y. Supp. 1101; *Harding v. Conlon*, 138 N. Y. Supp. 1014.

[a] **After death of debtor**, order cannot be made. *In re Tribune Assn.*, 13 Misc. 326, 34 N. Y. Supp. 459, 68 N. Y. St. 363.

88. See *Journeay v. Brown*, 26 N. J. L. 111 (requisites of order); *Terry v. Bange*, 9 N. Y. Supp. 311, 18 Civ. Proc. 288, 30 N. Y. St. 285, 25 Jones & S. 546, as to title of order.

[a] **Direction that receiver return the property** not necessary for the payment of the debt, need not be included in order. *Dilling, Baker & Co. v. Foster*, 21 S. C. 334, 341.

[b] **Amendment of Order.**—*Boynton v. Sprague*, 100 App. Div. 443, 91 N. Y. Supp. 839.

[c] **Order Must Be Filed.**—*Bareither v. Brosche*, 13 N. Y. Supp. 561, 19 Civ. Proc. 446. See *Klatzkie v. Kimpel*, 172 N. Y. Supp. 711.

[d] **Order reviewable only by motion to vacate.** *Moschell v. Boor*, 66 Hun (N. Y.) 557, 21 N. Y. Supp. 683, 50 N. Y. St. 238.

89. See *infra*, this note.

[a] **A county court**, though having no independent equity jurisdiction, has jurisdiction to appoint a receiver in supplementary proceedings. *Second Ward Bank v. Upmann*, 12 Wis. 499.

[b] **Judge Making Order of Discovery.**—*Guild v. Meyer*, 59 N. J. Eq. 390, 46 Atl. 202.

[c] **Clerk cannot appoint.** *Parks v. Sprinkle*, 64 N. C. 637.

90. *Seyfert v. Edison*, 47 N. J. L. 428, 1 Atl. 502; *Morgan v. Von Kohnstamm*, 60 How. Pr. (N. Y.) 161; *Wilhelm v. Hayman*, 126 N. Y. Supp. 374.

[a] **Unless application (1) is made on the return day** of the order for examination or on the close of the examination (*Todd v. Crooke*, 4 Sandf. [N. Y.] 694, 1 Code Rep. [N. S.] 324; *Smith v. Cutter*, 64 App. Div. 412, 72 N. Y. Supp. 99), or (2) on the hearing of the referee's report. *Dilling, Baker & Co. v. Foster*, 21 S. C. 334.

[b] **Personal notice** must be given. *Catholic University v. Conrad*, 27 Misc. 326, 57 N. Y. Supp. 820.

[c] **Waiver.**—*Moore v. Empie*, 17 App. Div. 218, 45 N. Y. Supp. 539.

91. *Todd v. Crooke*, 4 Sandf. (N. Y.) 694, 1 Code Rep. (N. S.) 324; *Leggett v. Sloan*, 24 How. Pr. (N. Y.) 479, eight days' notice not required.

[a] **Copy of examination** need not be served. *Todd v. Crooke*, 4 Sandf. (N. Y.) 694, 1 Code Rep. (N. S.) 324.

92. *Flint v. Webb*, 25 Minn. 263 (immediately on making order); *Bank of Port Jefferson v. Darling*, 102 App. Div. 431, 92 N. Y. Supp. 483; *People ex rel. Fitch v. Mead*, 29 How. Pr. (N. Y.) 360.

93. See *Bank of Port Jefferson v. Darling*, 102 App. Div. 431, 92 N. Y. Supp. 483.

94. *Baker v. Brundage*, 79 Hun 382, 29 N. Y. Supp. 792, 61 N. Y. St. 498; *Underwood v. Sutcliffe*, 10 Hun (N. Y.) 453.

[a] **Collateral attack** on the order is permissible only where it is void for lack of jurisdiction. *Guild v. Meyer*, 59 N. J. Eq. 390, 46 Atl. 202.

95. See *People ex rel. Gollubier v.*

**C. ACTIONS BY RECEIVERS.**—A receiver may maintain appropriate actions as to property entrusted to him,<sup>96</sup> as to recover the property or money due where the indebtedness to the judgment debtor is denied,<sup>97</sup> or where an interest in the property adverse to him is claimed,<sup>98</sup> and to set aside fraudulent transfers of the debtor's property.<sup>99</sup>

**Leave of Court.**—The necessity for leave of court to bring suit is governed by the general rules elsewhere treated.<sup>1</sup>

**Jurisdiction and Venue.**—The receiver may sue in courts other than that in which he was appointed.<sup>2</sup>

**Parties.**—The rules regulating parties generally apply to the actions by a receiver.<sup>3</sup>

Lynch, 129 N. Y. Supp. 885, construing statute as to discharge.

[a] **No removal of a disqualified receiver** is permissible without substitution of a qualified receiver. Terry v. Bange, 9 N. Y. Supp. 311, 18 Civ. Proc. 288, 30 N. Y. St. 285, 25 Jones & S. 546.

96. Steinert v. Van Aken, 165 App. Div. 206, 150 N. Y. Supp. 525, action for distributive share of deceased wife of debtor. See generally 22 STANDARD PROC. 420, et seq.

[a] **To Free Discovered Property From Liens.**—Miller v. Mackenzie, 29 N. J. Eq. 291.

[b] **To admeasure dower** of widow debtor assigned to him. Payne v. Becker, 87 N. Y. 153.

[c] **For conversion** of the property by the debtor after appointment of the receiver. Ward v. Petrie, 157 N. Y. 301, 307, 51 N. E. 1002, 68 Am. St. Rep. 790.

[d] **Partition suit** cannot be maintained. Payne v. Becker, 87 N. Y. 153; Steenberge v. Low, 46 Misc. 285, 92 N. Y. Supp. 518.

[e] **Replevin to recover property** fraudulently transferred prior to his appointment or an action for damages therefor cannot be maintained, his remedy being in equity. Stephens v. Meriden Britannia Co., 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678; Ward v. Petrie, 157 N. Y. 301, 51 N. E. 1002, 68 Am. St. Rep. 790.

[f] **A chattel mortgage** which is fraudulent as to creditors is good as to the debtor and the receiver, and therefore the latter cannot maintain an action for conversion against the mortgagee. Berliner v. Kuttner, 147 N. Y. Supp. 308.

97. N. C.—Rice v. Jones, 103 N. C. 226, 9 S. E. 571, 14 Am. St. Rep. 801.

Wis.—Holton v. Burton, 78 Wis. 321, 47 N. W. 624. Wyo.—First Nat. Bank v. Cook, 12 Wyo. 492, 535, 76 Pac. 674, 78 Pac. 1083, 2 L. R. A. (N. S.) 1012.

[a] **To recover a debt not in existence at the time of his appointment**, a receiver cannot sue. Guild v. Meyer, 56 N. J. Eq. 183, 38 Atl. 959.

98. N. Y.—In re Flynn, 80 Misc. 79, 140 N. Y. Supp. 799; Brein v. Light, 36 Misc. 110, 72 N. Y. Supp. 655. Ohio. Edgerton v. Hanna, 11 Ohio St. 323. Wis.—Holton v. Burton, 78 Wis. 321, 47 N. W. 624; Barker v. Dayton, 28 Wis. 367. Wyo.—First Nat. Bank v. Cook, 12 Wyo. 492, 535, 76 Pac. 674, 78 Pac. 1083, 2 L. R. A. (N. S.) 1012. But see Wilson v. Chichestor, 107 N. C. 386, 12 S. E. 139, 10 L. R. A. 572, the claimant may interplead.

99. N. Y.—Mandeville v. Avery, 124 N. Y. 376, 385, 26 N. E. 951, 21 Am. St. Rep. 678; Wright v. Nostrand, 94 N. Y. 31; Lathrop v. Clapp, 40 N. Y. 328, 100 Am. Dec. 493. N. C.—Pender v. Mallett, 123 N. C. 57, 31 S. E. 351. Wash.—Smith v. Weed, 75 Wash. 452, 463, 134 Pac. 1070. Wis.—Wisconsin Trust Co. v. Jenkins, 110 Wis. 531, 86 N. W. 153; Faber v. Matz, 86 Wis. 370, 57 N. W. 39.

1. See 22 STANDARD PROC. 421.

[a] **Where the statute expressly** gives him authority leave is unnecessary. Wisconsin Trust Co. v. Jenkins, 110 Wis. 531, 86 N. W. 153. See also McBryan v. Universal Elev. Co., 130 Mich. 111, 89 N. W. 683, 97 Am. St. Rep. 453.

2. Rockwell v. Merwin, 45 N. Y. 166. See 22 STANDARD PROC. 424, et seq.

[a] **May Sue in Law or Equity.** Miller v. Mackenzie, 29 N. J. Eq. 291.

3. See the title "Parties," and



The pleadings must be appropriate to the sort of action which is begun and to the capacity or right in which he sues.<sup>4</sup> When he sues as receiver his complaint should show such proceedings relating to his appointment as vest in him the judgment debtor's title.<sup>5</sup>

**Issues.**—Questions as to the regularity of the receiver's appointment cannot be raised in the action.<sup>6</sup>

**Costs** of receiver's suits should abide the result of the action.<sup>7</sup>

**XVII. ACTIONS BY CREDITORS.**<sup>8</sup>—Where third persons adversely claim the property sought to be subjected,<sup>9</sup> or deny their indebtedness to the judgment debtor,<sup>10</sup> the execution creditor may resort to a creditor's suit,<sup>11</sup> such as an action to set aside fraudulent transfers of the debtor's property,<sup>12</sup> and to subject to payment of the judg-

titles dealing with particular actions. See also 22 STANDARD PROC. 428, 431.

[a] **Receiver May Sue in Own Name.**—*Miller v. Mackenzie*, 29 N. J. Eq. 291. But see *Garver v. Kent*, 70 Ind. 428, receiver cannot sue in own name unless the court or the statute authorized it.

[b] **Waiver of Question as to Incapacity To Sue.**—*Stiefel v. Berlin*, 20 Misc. 194, 45 N. Y. Supp. 746.

[c] **Parties to suit (1) to set aside fraudulent conveyance**, see generally 10 STANDARD PROC. 140, 142, et seq. (2) **Judgment debtor a necessary party.** *Miller v. Hall*, 70 N. Y. 250; *Shaver v. Brainard*, 29 Barb. (N. Y.) 25. *Compare Fawcett v. New York*, 112 App. Div. 155, 98 N. Y. Supp. 286. (3) **Creditors of partnership are not necessary parties to suit to set aside transfer made when insolvent**, as each creditor may maintain action for his own benefit. *Stiefel v. Berlin*, 20 Misc. 194, 45 N. Y. Supp. 746.

4. See titles dealing with particular actions, and also 22 STANDARD PROC. 429.

**Pleadings in actions to set aside fraudulent conveyances**, see generally 10 STANDARD PROC. 150, et seq.

[a] **Recovery of judgment and return of execution unsatisfied** must be pleaded where it is necessary to set forth the facts showing his due appointment. *Lever v. Bailey*, 56 N. J. L. 54, 27 Atl. 799; *Wegman v. Childs*, 44 Barb. (N. Y.) 403.

[b] **Authority from court to sue in own name** must be alleged. *Garver v. Kent*, 70 Ind. 428. See 22 STANDARD PROC. 428, 430, note 93.

5. *Wright v. Nostrand*, 94 N. Y. 31; *Dubois v. Cassidy*, 75 N. Y. 298 (filing

of judgment roll); *Pendleton v. Friedman*, 135 App. Div. 420, 119 N. Y. Supp. 994. But see *Rockwell v. Merwin*, 45 N. Y. 166, and 22 STANDARD PROC. 429.

[a] **Of whose estate plaintiff was appointed receiver** must be stated. *Tvedt v. Mackel*, 67 Minn. 24, 69 N. W. 475.

6. *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301; *Boynton v. Sprague*, 100 App. Div. 443, 91 N. Y. Supp. 839. See 12 STANDARD PROC. 363, 365.

7. *Smith v. Weed*, 75 Wash. 452, 465, 134 Pac. 1070, suit to set aside fraudulent transfer. See 22 STANDARD PROC. 400, and the title "Costs."

[a] **Attorney's Fees.**—A receiver is not entitled to attorney's fees especially where the creditor could have maintained the action himself. *Small v. Anderson*, 139 Minn. 292, 166 N. W. 340. *Compare* 22 STANDARD PROC. 401, note 82.

[b] **Costs of unsuccessful suit charged to creditors** where they procured its institution. *Gallatin v. Smith*, 48 How. Pr. (N. Y.) 477.

8. **As to creditors' suits**, see the title "Creditors' Suits."

9. *Lewis v. Chamberlain*, 108 Cal. 525, 41 Pac. 413; *McDowell v. Bell*, 86 Cal. 615, 25 Pac. 128; *Spaulding v. Coeur d'Alene R. & N. Co.*, 6 Idaho 638, 59 Pac. 426.

10. *Finch v. Finch*, 12 Cal. App. 274, 284, 107 Pac. 594.

11. See the title "Creditors' Suits," and 6 STANDARD PROC. 185.

12. **Nev.**—*Persing v. Reno S. B. Co.*, 30 Nev. 342, 352, 96 Pac. 1054. *N. Y.* *Wright v. Nostrand*, 94 N. Y. 31; *Gere v. Dibble*, 17 How. Pr. 31, where re-

ment, property held in trust for the debtor.<sup>13</sup> An order of the court or judge in the supplementary proceedings, authorizing such a suit, although provided for by some statutes,<sup>14</sup> is not necessary in such cases.<sup>15</sup>

**XVIII. ENFORCEMENT OF ORDERS.**—In case of a neglect or refusal of the debtor to obey a proper order, the court is authorized to issue a writ of attachment against him,<sup>16</sup> and punish him for contempt,<sup>17</sup> in accordance with the general rules governing contempt proceedings.<sup>18</sup> The enforcement of an order for the delivery by third

ceiver refuses to sue. **Va.**—*Freitas v. Griffith*, 112 Va. 343, 71 S. E. 531.

See the title "**Fraudulent Conveyances.**"

13. *Kelley v. Bell*, 172 Ind. 590, 88 N. E. 58 (complaint held sufficient); *Ullman v. Cameron*, 186 N. Y. 339, 78 N. E. 1074, 116 Am. St. Rep. 553.

[a] **Receiver as party**, see *Ullman v. Cameron*, 186 N. Y. 339, 78 N. E. 1074, 116 Am. St. Rep. 553; *Moore v. Duffy*, 74 Hun 78, 26 N. Y. Supp. 340, 57 N. Y. St. 746; *Gere v. Dibble*, 17 How. Pr. 31.

14. **Cal.**—*Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 100 Pac. 242, 132 Am. St. Rep. 81; *High v. Bank of Commerce*, 95 Cal. 386, 30 Pac. 556, 29 Am. St. Rep. 121; *Union Collection Co. v. Snell*, 5 Cal. App. 130, 89 Pac. 859, 386, this provision was omitted by amendment in 1907. **Idaho.**—*Spaulding v. Coeur d'Alene R. & N. Co.*, 6 Idaho 638, 59 Pac. 426. **Mont.**—See *Wilson v. Harris*, 21 Mont. 374, 410, 54 Pac. 46. **Nev.**—*Persing v. Reno S. B. Co.*, 30 Nev. 342, 351, 96 Pac. 1054.

[a] **Form.**—*Bowlin Liquor Co. v. Fauver*, 43 Mont. 472, 117 Pac. 103.

[b] **Notice** to the debtor of an order of the judge in supplementary proceedings permitting the creditor to sue is not required. *High v. Bank of Commerce*, 95 Cal. 386, 30 Pac. 556, 29 Am. St. Rep. 121, *overruling Bryant v. Bank of California*, 68 Cal. xix, 7 Pac. 128, 8 Pac. 644.

[c] **The regularity of the order** authorizing the suit cannot be questioned in the action. *Bryant v. Bank of California*, 68 Cal. xix, 7 Pac. 128, 8 Pac. 644.

15. *Nordstrom v. Corona City Water Co.*, 155 Cal. 206, 100 Pac. 242, 132 Am. St. Rep. 81. See *Phillips v. Price*, 153 Cal. 146, 94 Pac. 617.

*Contra*, *Bryant v. Bank of California*, 68 Cal. xix, 7 Pac. 128, 8 Pac. 644.

*Compare Wilson v. Harris*, 21 Mont.

374, 411, 54 Pac. 46; *Sweeney v. Schlessinger*, 18 Mont. 326, 45 Pac. 213; and 6 STANDARD PROC. 686.

16. **Ind.**—*Baker v. State*, 109 Ind. 47, 9 N. E. 711. **Mo.**—*In re Koehler*, 174 Mo. App. 297, 312, 156 S. W. 982. **S. C.**—See *Kennesaw Mills Co. v. Walker*, 19 S. C. 104.

**As to form of order for delivery of property**, see *supra*, XV.

17. **Ind.**—*Joyce v. Everson*, 161 Ind. 440, 69 N. E. 135. **Ia.**—*Reardon v. Henry*, 82 Iowa 134, 47 N. W. 1022; *Eikenberry v. Edwards*, 67 Iowa 619, 25 N. W. 832, 56 Am. Rep. 360. See *Bennett v. Valley Min. Co.*, 142 Iowa 53, 120 N. W. 654. **Kan.**—*In re Burrows*, 33 Kan. 675, 7 Pac. 148. **Mich.**—*Shepard v. Kent Circ. Judge*, 109 Mich. 606, 68 N. W. 221. **Minn.**—*Bradley v. Burk*, 81 Minn. 368, 84 N. W. 123. **Mo.**—*In re Knaup*, 144 Mo. 653, 46 S. W. 151, 66 Am. St. Rep. 435. **N. J.**—*Adler v. Turnbull*, 57 N. J. L. 62, 30 Atl. 319. **N. Y.**—See *Stewart v. Smith*, 186 App. Div. 755, 175 N. Y. Supp. 468. **S. D.**—*Aberdeen Clothing Co. v. Just*, 32 S. D. 560, 143 N. W. 900.

[a] **A female debtor** may be imprisoned. *Joyce v. Everson*, 161 Ind. 440, 69 N. E. 135.

[b] **When a corporation and its officers are required to appear and answer**, the order adjudging the president of the corporation guilty of contempt may be against him personally. *Drew v. Superior Court (Cal.)*, 182 Pac. 417.

18. *Kennesaw Mills Co. v. Walker*, 19 S. C. 104, 112. See the title "**Contempt.**"

[a] **These proceedings are regarded as incidental to and as taken in the supplementary proceedings.** *Nichols v. Quinn*, 94 Kan. 742, 147 Pac. 1103; *Steinman v. Conlon*, 208 N. Y. 198, 101 N. E. 863.

[b] **Judge who made order may punish its disobedience.** *Aldrich v. Davis*, 64 Hun 636, 19 N. Y. Supp. 765, 46

persons of property disclosed on the examination, is treated elsewhere in this article.<sup>19</sup>

Witnesses who refuse to answer may be punished as for contempt.<sup>20</sup>

**XIX. OBJECTIONS AND WAIVER.**—Supplementary proceedings may be vacated,<sup>21</sup> on motion,<sup>22</sup> on notice<sup>23</sup> made by the judgment debtor,<sup>24</sup> or a third person having an interest in the property.<sup>25</sup> If

N. Y. St. 587, special surrogate. See *Kearney's Case*, 13 Abb. Pr. (N. Y.) 459, 22 How. Pr. 309.

[c] Referee cannot punish. *Green v. Bullard*, 8 How. Pr. (N. Y.) 313.

[d] No Right To Jury Trial.—*McDonnell v. Henderson*, 74 Iowa 619, 38 N. W. 512.

[e] Order of commitment (1) to be in writing. *In re Burrows*, 33 Kan. 675, 681, 7 Pac. 148. (2) Order must adjudicate specific facts deemed a contempt. *Silberman Dairy Co. v. Econopoly*, 177 App. Div. 97, 163 N. Y. Supp. 824. (3) Order must determine the offense was calculated to impede or prejudice the rights of the parties to the proceeding. *People ex rel. Cowan v. Hamil*, 145 N. Y. Supp. 400.

[f] Modification or amendment of order may be had (*Gumpel v. Gurvitch*, 102 Misc. 536, 169 N. Y. Supp. 135), unless defect is jurisdictional. *People ex rel. Cowan v. Hamil*, 145 N. Y. Supp. 400.

[g] Order for sequestration unnecessary. *West v. Fraser*, 5 Sandf. (N. Y.) 653.

[h] Order Not Appealable.—*Steinman v. Conlon*, 208 N. Y. 198, 101 N. E. 863. Compare *Hanbury v. Benedict*, 160 App. Div. 662, 146 N. Y. Supp. 44.

[i] *Certiorari* does not lie to review conviction. *Hanbury v. Benedict*, 160 App. Div. 662, 146 N. Y. Supp. 44.

[j] Whether order of discharge is appealable, query. *People ex rel. Pease v. King*, 9 How. Pr. (N. Y.) 97.

[k] Costs should be taxed as costs in the action. *Seeley v. Black*, 35 How. Pr. (N. Y.) 369.

19. See *supra*, XV.

20. *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493.

[a] Court in which judgment was obtained should issue subpoena and punish disobedience. *People ex rel. Brunett v. Dutcher*, 3 Abb. Pr. N. S. (N. Y.) 151.

21. *Steinmann v. Hosier*, 139 N. Y. Supp. 863.

[a] Where the Requisite Judgment Has Not Been Rendered.—*Hildreth v. Seeback*, 18 Misc. 387, 41 N. Y. Supp. 653, 75 N. Y. St. 1040.

[b] Where the Affidavit Is Defective.—*Shane Bros. & Wilson Co. v. Henshaw*, 174 App. Div. 606, 161 N. Y. Supp. 115; *Bank of Port Jefferson v. Darling*, 102 App. Div. 431, 92 N. Y. Supp. 483.

[c] Where no notice of the order requiring delivery of the property was given when required. *Shannon v. Steger*, 75 App. Div. 279, 78 N. Y. Supp. 163.

[d] Only judge making order can vacate it. *Ward v. Stoddard*, 70 Misc. 506, 127 N. Y. Supp. 713 (*affirmed* 144 App. Div. 143, 128 N. Y. Supp. 846); *Livingston v. Livingston*, 164 N. Y. Supp. 419; *Bamberger-Stern Co. v. Paris*, 159 N. Y. Supp. 647.

[e] On denial of motion with leave to file a proper affidavit, the examination cannot be proceeded with unless such affidavit is filed. *Stell v. British Union & N. Ins. Co.*, 78 Misc. 40, 137 N. Y. Supp. 703.

[f] Vacation of order of examination does not vacate a warrant of arrest subsequently issued. *Frost v. Craig*, 9 N. Y. Supp. 528, 18 Civ. Proc. 296, 16 Daly 107, 30 N. Y. St. 848.

[g] Motion too late when made after examination on ground of irregular entry of judgment. *Gerhard Menen Chem. Co. v. Dressner*, 53 Misc. 370, 104 N. Y. Supp. 749.

22. *Rupert v. Lee*, 101 App. Div. 492, 92 N. Y. Supp. 75; *Hildreth v. Seeback*, 18 Misc. 387, 41 N. Y. Supp. 653, 75 N. Y. St. 1040.

23. See *infra*, this note.

[a] Notice not pointing out jurisdictional defects is not defective. *Zelie v. Vroman*, 22 Misc. 486, 50 N. Y. Supp. 836.

24. *Rupert v. Lee*, 101 App. Div. 492, 92 N. Y. Supp. 75.

25. *Shannon v. Steger*, 75 App. Div. 279, 78 N. Y. Supp. 163.



the order is void, it may be vacated by the court on its own motion.<sup>26</sup> Some statutes provide the sufficiency of the order and affidavit may be tested by demurrer,<sup>27</sup> motion to dismiss,<sup>28</sup> or motion to strike out.<sup>29</sup> Under such a statute a motion to quash is not proper.<sup>30</sup>

**Waiver.**—Objections to the sufficiency of the affidavit,<sup>31</sup> as well as to the omission to give notice, or other irregularities in the proceedings,<sup>32</sup> may be waived by the appearance and answer of the debtor or garnishee.

**XX. REVIEW.**—An appeal will lie from an order requiring application of the debtor's property to the judgment,<sup>33</sup> and by statute from orders made in the course of the proceedings.<sup>34</sup> But an appeal will not lie from an order of examination,<sup>35</sup> or an order appointing a receiver,<sup>36</sup> or punishing for contempt.<sup>37</sup>

**XXI. COSTS.**<sup>38</sup>—Statutes sometimes require the judge to make an order allowing the judgment debtor or creditor a fixed sum as costs.<sup>39</sup> In a proper case, a third person who is examined may be en-

26. *Persing v. Reno S. B. Co.*, 30 Nev. 342, 352, 96 Pac. 1054.

27. *Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412; *Beckman Supply Co. v. Newell* (Ind. App.), 118 N. E. 962; *First Nat. Bank v. Stanley*, 4 Ind. App. 213, 30 N. E. 799.

28. *Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412.

29. *Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412.

30. *Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412.

31. *Coffee v. Haynes*, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99.

32. *Guild v. Meyer*, 59 N. J. Eq. 390, 46 Atl. 202; *Bingham v. Disbrow*, 37 Barb. (N. Y.) 24, 14 Abb. Pr. 251; *Underwood v. Sutcliffe*, 10 Hun (N. Y.) 453. See *supra*, XIV, and XVI, B.

33. *Cal.*—*McCullough v. Clark*, 41 Cal. 298; *Societa di Mutuo Soccorso v. Mantel*, 1 Cal. App. 107, 81 Pac. 659. *Ind.*—*Baker v. State*, 109 Ind. 47, 59, 9 N. E. 711; *Pounds v. Chatham*, 96 Ind. 342; *Harper v. Behagg*, 14 Ind. App. 427, 42 N. E. 1115. *Mont.*—*In re Downey*, 31 Mont. 441, 78 Pac. 772. *Ore.*—*State v. Downing*, 40 Ore. 309, 324, 58 Pac. 863, 66 Pac. 917.

[a] **Appeal does not stay proceedings** in the absence of an undertaking. *State v. Downing*, 40 Ore. 309, 324, 58 Pac. 863, 66 Pac. 917.

[b] **Whole Case Open To Review.** *Crouse v. Wheeler*, 33 How. Pr. (N. Y.) 337.

[c] **Habeas Corpus.**—The order though erroneously requiring the debtor

to collect a chose in action and pay the debt, is not without jurisdiction and being appealable cannot be collaterally attacked by habeas corpus. *In re Downey*, 31 Mont. 441, 78 Pac. 772.

34. See generally the statutes and *Schenck v. Irwin*, 60 Hun 361, 15 N. Y. Supp. 55, 21 Civ. Proc. 96, 38 N. Y. St. 603; *Turner v. Holden*, 109 N. C. 182, 13 S. E. 731; *Farmers' Nat. Bank v. Burns*, 107 N. C. 465, 12 S. E. 252, appeal to judge from decision of clerk.

[a] **From Order Vacating Order for Examination.**—*Schenck v. Irwin*, 60 Hun 361, 15 N. Y. Supp. 55, 21 Civ. Proc. 96, 38 N. Y. St. 603.

[b] **From an Order Denying a Motion To Set Aside.**—*Robens v. Sweet*, 48 Hun 436, 1 N. Y. Supp. 839, 16 N. Y. St. 334.

35. *Ackerman v. Green*, 201 Mo. 231, 243, 100 S. W. 30.

36. *Moschell v. Boor*, 66 Hun 557, 21 N. Y. Supp. 683, 50 N. Y. St. 238. See 22 STANDARD PROC. 375.

37. *Steinman v. Conlon*, 208 N. Y. 198, 101 N. E. 863. Compare *Hanbury v. Benedict*, 160 App. Div. 662, 146 N. Y. Supp. 44. See 5 STANDARD PROC. 423.

38. **Costs in suits by receivers**, see *supra*, XVI, C, p. 571, catchline "Costs."

**Costs in contempt proceeding**, see *supra*, XVIII.

39. See generally the statutes and *Cheatham v. Seawright*, 30 S. C. 101, 8 S. E. 526; *Dilling, Baker & Co. v. Foster*, 21 S. C. 334.

[a] **Payment of costs into court**

titled to costs.<sup>40</sup> But security for costs cannot be required in these proceedings.<sup>41</sup>

cannot be ordered. *Howard v. Hanson*, 49 Wash. 314, 95 Pac. 265.

[b] **Crediting costs on judgment** unauthorized. *Boelger v. Swivel*, 1 How. Pr. N. S. (N. Y.) 372.

[c] **Order (1) should be enforced** by contempt proceedings, not by entering of judgment and issuance of execution (*Cheatham v. Seawright*, 30 S. C. 101, 8 S. E. 526), except (2) where statute provides otherwise. See *In re Stoddard*, 128 App. Div. 759, 113 N. Y. Supp. 157. Compare *Hulsaver v. Wiles*, 11 How. Pr. (N. Y.) 446, decided before the amendment.

40. *Howe v. Stuart*, 123 N. Y. Supp. 971; *Anonymous*, 11 Abb. Pr. (N. Y.) 108.

[a] **Witness fees** where a mere witness (*Davis v. Turner*, 4 How. Pr. [N. Y.] 190), but not where he is a party, examined as to property of the debtor in his possession. *Howe v. Stuart*, 123 N. Y. Supp. 971.

41. *Estey v. Fuller Imp. Co.*, 82 Iowa 678, 46 N. W. 1098, 47 N. W. 1025. See generally the title "Security for Costs."

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**SUPPORT.**—See Divorce; Husband and Wife; Parent and Child.

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**SUPREME COURT.**—See Appeals; Arguments; Briefs; Courts; Jurisdiction; Law of the Case; Mandate; Remission of Damages; United States Courts; Writ of Error.

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**SURETYSHIP.**—See Principal and Surety.

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**SURETY TO KEEP THE PEACE.**—See Security To Keep the Peace.

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**SURGEONS.**—See Physicians and Surgeons.

# SURPLUSAGE AND SCANDAL

By the Editorial Staff.

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### CROSS-REFERENCES:

Indictment and Information;      Striking Out and Withdrawal.

In admiralty, see 1 STANDARD PROC. 449, 464.

In particular pleadings, see particular titles.

Departure as to surplusage, see 7 STANDARD PROC. 122.

For forms, see 9 STANDARD PROC. 1194, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. IN GENERAL.** — Impertinence and scandal are defects in pleadings in equity, primarily,<sup>1</sup> while surplusage, irrelevancy and redundancy are corresponding terms relating to defects in pleadings at law and under the code.<sup>2</sup>

1. *Stokes v. Farnsworth*, 99 Fed. 836. (N. Y.) 53; *Attorney-General v. Rickards*, 1 Phil. 383, 41 Eng. Reprint 677, holding certain passages are "what



**II. IMPERTINENCE.**—Impertinence in equity pleading consists of any allegations that are irrelevant to the material issues made or tendered.<sup>3</sup> It includes immateriality,<sup>4</sup> irrelevancy,<sup>5</sup> prolixity,<sup>6</sup> and scandalousness.<sup>7</sup> But matters of evidence in the bill, the admission of which by the defendant may be material in establishing the bill, are not impertinent.<sup>8</sup>

**In What Pleadings and Papers.**—Impertinence may be a defect in a would in pleadings at common law be called surplusage.”

[a] Though impertinence in equity pleading not stricken out will be treated as surplusage. *Astrich v. Girard Fire & M. Ins. Co.*, 13 Pa. Dist. 350.

3. **U. S.**—*Kelley v. Boettcher*, 85 Fed. 55, 29 C. C. A. 14. **Fla.**—*Jones v. Hiller*, 65 Fla. 532, 62 So. 583; *Holzen-dorf v. Terrell*, 52 Fla. 525, 42 So. 584. **N. Y.**—*Carpenter v. West*, 5 How. Pr. 53. **Pa.**—*Astrich v. Girard F. & M. Ins. Co.*, 13 Pa. Dist. 350. **Eng.**—*Ex parte Simpson*, 15 Ves. Jr. 476, 33 Eng. Reprint 834.

See 4 STANDARD PROC. 120.

[a] Not Pertinent.—*Chew v. Eagan*, 87 N. J. Eq. 80, 99 Atl. 611.

[b] Impertinence in equity pleading consists (1) in the introduction of any matters into a pleading which are not properly before the court for decision at any particular stage of the suit. *Blanton v. Chalmers*, 158 Fed. 907; *Johnson v. Tucker*, 2 Tenn. Ch. 244. (2) It consists of matter that was not material to the decision of the action, matter upon which no issue could be framed or which could not be given in evidence. *Littlejohn v. Greeley*, 22 How. Pr. (N. Y.) 345, 347, 13 Abb. Pr. 311.

[c] “All matters not material to the suit, or if material which are not in issue, or which, if both material and in issue, are set forth with great and unnecessary prolixity, constitute impertinence.” *Leslie v. Leslie*, 50 N. J. Eq. 155, 24 Atl. 1029; *Camden & A. R. Co. v. Stewart*, 19 N. J. Eq. 343.

[d] No matter is deemed impertinent which is material in establishing the rights of the parties or ascertaining the relief to be granted. **U. S.** *Manhattan Trust Co. v. Chicago Elec. Trac. Co.*, 188 Fed. 1006. **Fla.**—*Holzen-dorf v. Terrell*, 52 Fla. 525, 42 So. 584; *Bush v. Adams*, 22 Fla. 177. **N. J.**

*Leslie v. Leslie*, 50 N. J. Eq. 155, 24 Atl. 1029. **N. Y.**—*Mechanics' Bank v. Levy*, 3 Paige 606. See 4 STANDARD PROC. 168, 159.

[e] A few unnecessary words do not render an answer impertinent except where they put in issue matters foreign to the cause. *Bush v. Adams*, 22 Fla. 177, 187.

[f] The sufficiency of an answer is not put in issue by an exception nor impertinence. *Stokes v. Farnsworth*, 99 Fed. 836.

[g] Impertinence in equity corresponds to surplusage at law. *Stokes v. Farnsworth*, 99 Fed. 836, quoting 1 Daniel Ch. Pr. 356.

4. **Fla.**—*Bush v. Adams*, 22 Fla. 177. **N. J.**—*Leslie v. Leslie*, 50 N. J. Eq. 155, 24 Atl. 1029. **N. Y.**—*Woods v. Morrell*, 1 Johns. Ch. 103.

[a] Any issue tendered which is immaterial is impertinent. *Toler v. East Tennessee V. & G. R. Co.*, 67 Fed. 168.

5. **U. S.**—*Stokes v. Farnsworth*, 99 Fed. 836. **Fla.**—*Bush v. Adams*, 22 Fla. 177. **N. J.**—*Chew v. Eagan*, 87 N. J. Eq. 80, 99 Atl. 611. **N. Y.**—*Stafford v. Brown*, 4 Paige 88. **Tenn.**—*Johnson v. Tucker*, 2 Tenn. Ch. 244.

[a] Relevant matter cannot be impertinent. *Ex parte Simpson*, 15 Ves. Jr. 476, 33 Eng. Reprint 834.

[b] Any irrelevant matter which is immaterial is impertinent. *Toler v. East Tennessee V. & G. Ry. Co.*, 67 Fed. 168.

6. **Fla.**—*Bush v. Adams*, 22 Fla. 177. **N. J.**—*Leslie v. Leslie*, 50 N. J. Eq. 155, 24 Atl. 1029; *Camden & A. R. Co. v. Stewart*, 19 N. J. Eq. 343. **N. Y.** *Carpenter v. West*, 5 How. Pr. 53.

7. See *infra*, III.

8. **Minn.**—*Goodrich v. Parker*, 1 Minn. 195. **N. J.**—*Chew v. Eagan*, 87 N. J. Eq. 80, 99 Atl. 611. **N. Y.**—*Hawley v. Wolverton*, 5 Paige 522.

[a] Otherwise Under Code.—*Vermilye v. Vermilye*, 32 Minn. 499, 18 N. W. 832, 21 N. W. 736.

bill, answer or other pleading,<sup>9</sup> as well as in interrogatories,<sup>10</sup> depositions,<sup>11</sup> and affidavits.<sup>12</sup>

**III. SCANDAL.**—Scandal in pleading is matter which is libelous, indecent or derogatory to the dignity of the court or character of a person,<sup>13</sup> and which is not pertinent.<sup>14</sup> Scandalous matter, though distinct from impertinence, is plainly comprehended within it,<sup>15</sup> and is included within the term irrelevant matter under the code.<sup>16</sup>

**IV. SURPLUSAGE, IRRELEVANCY AND REDUNDANCY.** Surplusage in pleading consists of unnecessary matter which may be stricken out without destroying the cause of action or defense stated.<sup>17</sup> The code uses the terms "irrelevant and redundant matter"<sup>18</sup> which

9. *Camden & A. R. Co. v. Stewart*, 19 N. J. Eq. 343, 21 N. J. Eq. 484.

10. *Camden & A. R. Co. v. Stewart*, 19 N. J. Eq. 343, *affirming* 21 N. J. Eq. 484. See 7 STANDARD PROC. 595.

11. *Camden & A. R. Co. v. Stewart*, 19 N. J. Eq. 343, *affirming* 21 N. J. Eq. 484. See 7 STANDARD PROC. 447.

12. *Camden & A. R. Co. v. Stewart*, 19 N. J. Eq. 343, *affirming* 21 N. J. Eq. 484.

13. **U. S.**—*Manhattan Trust Co. v. Chicago Elec. Trac. Co.*, 188 Fed. 1006. **N. J.**—*Chew v. Eagan*, 87 N. J. Eq. 80, 99 Atl. 611. **Eng.**—*Rubery v. Grant*, L. R. 13 Eq. 443, 42 L. J. Ch. 19, 26 L. T. N. S. 538.

And see 4 STANDARD PROC. 485.

[a] "Scandal in a pleading consists of any unnecessary allegation bearing cruelly on the moral character of an individual, or stating anything contrary to good manners, or anything unbecoming the dignity of the court to hear." *McNulty v. Wiesen*, 130 Fed. 1012; *Kelley v. Boettcher*, 85 Fed. 55, 29 C. C. A. 14; *Ex parte Simpson*, 15 Ves. Jr. 476, 33 Eng. Reprint 834.

[b] Facts which constitute a defense (1) may not be stricken out as scandalous. *Persch v. Wideman*, 106 App. Div. 553, 94 N. Y. Supp. 800. (2) But facts alleged as constituting a complete defense but which are demurrable as being at most only a partial defense or in mitigation of damages, may be stricken out as scandalous. *Persch v. Wideman*, 106 App. Div. 553, 94 N. Y. Supp. 800.

[c] Scandal in briefs, see 4 STANDARD PROC. 588.

14. See 4 STANDARD PROC. 168, 159.

15. **U. S.**—*Manhattan Trust Co. v. Chicago Elec. Trac. Co.*, 188 Fed. 1006. **Minn.**—*Goodrich v. Parker*, 1 Minn.

195. **N. Y.**—*Bowman v. Sheldon*, 5 Sandf. 657.

See 8 STANDARD PROC. 485.

16. *Bowman v. Sheldon*, 5 Sandf. (N. Y.) 657.

17. **Ala.**—*Prestwood v. McGowin*, 148 Ala. 475, 41 So. 779. **Colo.**—*Yarnal v. City Bank & Trust Co.*, 61 Colo. 297, 157 Pac. 198. **Ill.**—*Kackley v. Central Illinois Trac. Co.*, 201 Ill. App. 164. **Ind.**—*Petty v. Trustees of Church of Christ*, 95 Ind. 278. **Mass.**—*Hampshire Mfgs. Bank v. Billings*, 17 Pick. 87. **R. I.**—*De Paola v. National Ins. Co.*, 38 R. I. 126, 94 Atl. 700. **W. Va.**—*Lohr v. Wolfe*, 71 W. Va. 627, 77 S. E. 71.

[a] By a construction of the entire pleading, will it be determined whether matter contained is surplusage. *Consolidated Coal Co. v. Peers*, 205 Ill. 531, 68 N. E. 1065.

[b] An entire defense or cause of action cannot be attacked as surplusage. *Stokes v. Farnsworth*, 99 Fed. 836.

Matters judicially noticed, see 16 STANDARD PROC. 600.

[c] Domestic or federal statute is surplusage and may be stricken. *Gainesville Midland Ry. v. Vandiver*, 141 Ga. 350, 80 S. E. 997.

[d] Where duty is a question of law and not of fact, a statement as to duty is surplusage. *Jensen v. Wetherell*, 79 Ill. App. 33.

[e] A court opinion set out at large in a pleading is surplusage. *Young v. Gower*, 88 Ill. App. 70.

[f] Words merely descriptio personae are surplusage. *Manning v. Yeager* (Ala.), 79 So. 19.

Surplusage in indictments, see 12 STANDARD PROC. 480.

18. See the codes.

correspond to the term "impertinent" under the chancery practice,<sup>19</sup> and the term "surplusage" at common law.<sup>20</sup> While the courts frequently speak of striking out matters as surplusage,<sup>21</sup> generally such matter is termed "surplusage" and is disregarded when no effort is made to have it stricken and either "irrelevant" or "redundant" when it is stricken out.<sup>22</sup> Irrelevancy and redundancy are not synonymous terms.<sup>23</sup> Irrelevant allegations are those which have no substantial relation to the controversy and which cannot affect the result;<sup>24</sup> while redundant matter is matter which is unnecessary or foreign to the cause of action or defense stated.<sup>25</sup> Irrelevant matter is

[a] **A demurrer is a pleading** within the rule against the inclusion of irrelevant and redundant matter in pleading. *Davis v. Honey Lake W. Co.*, 98 Cal. 415, 33 Pac. 270. But see *Smith v. Brown*, 6 How. Pr. (N. Y.) 383.

19. *United States v. Kettenboch*, 175 Fed. 463; *People v. McCumber*, 18 N. Y. 315, 72 Am. Dec. 515; *Blake v. Eldred*, 18 How. Pr. (N. Y.) 240; *Carpenter v. West*, 5 How. Pr. (N. Y.) 53. See *supra*, II.

[a] **With one exception**, that as to matters of evidence which are properly pleaded in chancery but are to be excluded from pleadings under the code. *Rensselaer & Wash. Plank Road Co. v. Wetsel*, 6 How. Pr. (N. Y.) 68. See *supra*, II.

20. *Carpenter v. West*, 5 How. Pr. (N. Y.) 53.

21. See the following cases: **U. S.** *Harrison v. Tampa*, 247 Fed. 569. **Cal.** *Wheeler v. West*, 78 Cal. 95, 20 Pac. 45. **Ky.**—*Illinois Central R. Co. v. Whittaker*, 22 Ky. L. Rep. 395, 57 S. W. 465. **Okla.**—*Long v. McFarlin*, 58 Okla. 321, 159 Pac. 653.

See also 16 STANDARD PROC. 600, note 8.

22. *Specht v. Spangenberg*, 70 Iowa 488, 30 N. W. 875; *Neis v. Whitaker*, 47 Ore. 517, 84 Pac. 699, *quoting* Bliss on Code Pleading (3 ed.) §215.

23. **Mont.**—*Sweetman v. Ramsey*, 22 Mont. 323, 56 Pac. 361. **N. Y.**—*Bowman v. Sheldon*, 5 Sandf. 657. **Wis.** *Spensley v. Janesville Cotton Mfg. Co.*, 62 Wis. 549, 22 N. W. 574; *Carpenter v. Reynolds*, 58 Wis. 666, 17 N. W. 300.

24. *Isaacs v. Salomon*, 159 App. Div. 675, 144 N. Y. Supp. 876; *Kolb v. Mortimer*, 135 App. Div. 542, 120 N. Y. Supp. 543; *John D. Park & Sons v.*

*National W. Druggists' Assn.*, 30 App. Div. 408, 52 N. Y. Supp. 475.

[a] **"Irrelevancy in an answer** may consist in statements which are not material to the decision of the case; such as do not form or tender any material issue." *Hayward v. Grant*, 13 Minn. 165, 97 Am. Dec. 228; *People v. McCumber*, 18 N. Y. 315, 72 Am. Dec. 515.

[b] **A test** (1) is to inquire whether the allegation tends to constitute a cause of action or defence. *Isaacs v. Salomon*, 159 App. Div. 675, 144 N. Y. Supp. 876; *Kolb v. Mortimer*, 135 App. Div. 542, 120 N. Y. Supp. 543. (2) This is to be determined by the cause of action in which they are set forth, and not by the other causes of action. *Berry v. Moore Co.*, 69 S. C. 317, 48 S. E. 249.

[c] **But matter material as to some** defendants cannot be stricken out at the instance of defendants as to whom it is immaterial. *Hoffman v. Wight*, 137 N. Y. 621, 33 N. E. 554.

25. **Mont.**—*Sweetman v. Ramsey*, 22 Mont. 323, 56 Pac. 361. **Okla.**—*Berry v. Geiser Mfg. Co.*, 15 Okla. 364, 85 Pac. 699. **Wis.**—*Carpenter v. Reynolds*, 58 Wis. 666, 17 N. W. 300.

[a] **Redundant** means (1) superfluous, in excess of what is necessary, superabundant. *Brown v. Fish*, 37 Misc. 367, 75 N. Y. Supp. 460. (2) Redundancy consists of irrelevant allegations, unnecessary repetitions or perhaps prolixity of statement of such as are material. *Witherell v. Wiberg*, 4 Sawy. 232, 30 Fed. Cas. No. 17,917.

[b] **Prolixity** may become redundancy and is in itself impertinence. *Carpenter v. West*, 5 How. Pr. (N. Y.) 53.

**Conclusions of law as redundant**, see 5 STANDARD PROC. 226, note 39.



also redundant but the converse is not necessarily true.<sup>26</sup>

**Effect of and Proof.**—Mere surplusage and redundancy in a pleading will not vitiate the pleading,<sup>27</sup> unless it be a dilatory plea,<sup>28</sup> but it will be rejected or disregarded on the trial.<sup>29</sup> Such allegations need not be proved,<sup>30</sup> and cannot be proved as against the objection<sup>31</sup> of the adverse

26. *John D. Park & Sons v. National W. Druggists' Assn.*, 30 App. Div. 508, 52 N. Y. Supp. 475; *Bowman v. Sheldon*, 5 Sandf. (N. Y.) 657.

27. *Ala.*—*Prestwood v. McGowin*, 148 Ala. 475, 41 So. 779. *Ark.*—*Kansas City So. R. Co. v. Leslie*, 112 Ark. 305, 167 S. W. 83, Ann. Cas. 1915B, 834. *Ill.*—*Leshner v. United States Fidelity Co.*, 239 Ill. 502, 88 N. E. 208. *Ind.*—*Petty v. Trustees of Church of Christ*, 95 Ind. 278. *Me.*—*Bean v. Ayers*, 67 Me. 482. *Miss.*—*Simonton v. Bacon*, 49 Miss. 582. *Mont.*—*Kelley v. John R. Daily Co.*, 181 Pac. 326. *Neb.*—*Western Travelers' Acc. Assn. v. Munson*, 73 Neb. 858, 103 N. W. 688, 1 L. R. A. (N. S.) 1068. *N. Y.*—*Federal Adv. Agency v. Rubber & Celluloid H. T. Co.*, 172 N. Y. Supp. 186. *Tex.*—*Croft v. Rains*, 10 Tex. 520; *Tandy v. Fowler* (Tex. Civ. App.), 150 S. W. 481. *W. Va.*—*Lawrence's Admr. v. Hyde*, 77 W. Va. 639, 88 S. E. 45; *Thomas v. Wheeling Elec. Co.*, 54 W. Va. 395, 46 S. E. 217.

**Does Not Make Pleading Double.** See 7 STANDARD PROC. 944.

28. *Cannon v. Lindsey*, 85 Ala. 198, 3 So. 676, 7 Am. St. Rep. 38.

29. *Ala.*—*Prestwood v. McGowin*, 148 Ala. 475, 41 So. 779. *Cal.*—*Bunker v. Osborn*, 132 Cal. 480, 64 Pac. 853; *Bremner v. Leavitt*, 109 Cal. 130, 41 Pac. 809. *Ill.*—*Schlatter v. Triebel*, 208 Ill. App. 504. *Ind.*—*K-W Ignition Co. v. Greenville Metal Prod. Co.* (Ind. App.), 114 N. E. 889. *N. Y.*—*Charles H. Dauchey & Co. v. Farney*, 105 Misc. 470, 173 N. Y. Supp. 530; *Fox v. Held*, 24 Misc. 184, 52 N. Y. Supp. 724. *Ore.*—*Graham v. Coos Bay R. & E. R. & N. Co.*, 71 Ore. 393, 139 Pac. 337. *R. I.*—*De Paola v. National Ins. Co.*, 38 R. I. 126, 94 Atl. 700.

[a] A finding on surplusage may be disregarded. *Bunker v. Osborn*, 132 Cal. 480, 64 Pac. 853. As to necessity of finding on immaterial matters, see 8 STANDARD PROC. 996. Compare 20 STANDARD PROC. 706.

**Unnecessary innuendo in libel complaint**, see 18 STANDARD PROC. 910.

30. *U. S.*—*Board of Comrs. v. Keene*

*Five-Cents Sav. Bank*, 108 Fed. 505, 47 C. C. A. 464. *Ala.*—*Prestwood v. McGowin*, 148 Ala. 475, 41 So. 779. *La.*—*Kennedy v. New York Life Ins. Co.*, 10 La. Ann. 809. *Pa.*—*Astrich v. Girard F. & M. Ins. Co.*, 13 Pa. Dist. 350. *R. I.*—*De Paola v. National Ins. Co.*, 38 R. I. 126, 94 Atl. 700. *W. Va.*—*Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890. *Wis.*—*Grace v. Dempsey*, 75 Wis. 313, 43 N. W. 1127.

*Compare Croft v. Rains*, 10 Tex. 520, holding the alleging of evidence may result in a variance between evidence and proof.

See 18 STANDARD PROC. 944, note 16, and the title "Variance and Failure of Proof."

[a] **Matters Anticipatory of Defenses.**—*U. S.*—*Grand Trunk Ry. Co. v. United States*, 229 Fed. 116, 143 C. C. A. 392. *La.*—*Kennedy v. New York Life Ins. Co.*, 10 La. Ann. 809. *Mo.*—*Guinotte v. Ridge*, 46 Mo. App. 254. *Nev.*—*Gillson v. Price*, 18 Nev. 109, 117, 1 Pac. 459.

[b] **Failure to have evidence in a pleading stricken out** does not render it competent if otherwise incompetent. *Ireton v. Ireton*, 59 Kan. 92, 52 Pac. 74.

[c] **But an allegation as to consideration**, though unnecessary, must be proved. *Louisville & N. R. R. Co. v. Literary Soc.*, 91 Ky. 395, 15 S. W. 1065.

**As to proof of immaterial issues**, see the title "Variance and Failure of Proof." As to enlargement of issues by evidence, see 20 STANDARD PROC. 317, 706; 8 STANDARD PROC. 996.

31. *Specht v. Spangenberg*, 70 Iowa 488, 30 N. W. 875; *Astrich v. Girard F. & M. Ins. Co.*, 13 Pa. Dist. 350.

[a] **Failure to have irrelevant allegations stricken out** does not preclude a party from afterwards insisting upon their irrelevancy by objection to the evidence or otherwise. *Specht v. Spangenberg*, 70 Iowa 488, 30 N. W. 875. But see *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. 562.

party, even though controverted.<sup>32</sup>

**Illustrations.** — Allegations as to a plaintiff's motives in bringing the action are irrelevant.<sup>33</sup> Allegations as to conclusions of law,<sup>34</sup> allegations in a complaint anticipatory of defenses,<sup>35</sup> allegations of facts of which judicial notice is taken,<sup>36</sup> as well as express admissions in an answer,<sup>37</sup> constitute surplusage. Needless repetition constitutes redundancy, and may be stricken out.<sup>38</sup> And allegations pleading matters of evidence are redundant and may be stricken out or treated as surplusage.<sup>39</sup> But an allegation presenting a federal question is not irrelevant.<sup>40</sup>

32. *Neis v. Whitaker*, 47 Ore. 517, 84 Pac. 699. See *infra*, VI.

33. *Persch v. Wideman*, 106 App. Div. 553, 94 N. Y. Supp. 800.

34. See 5 STANDARD PROC. 205.

35. **U. S.**—*De St. Aubin v. Guenther*, 232 Fed. 411. **Colo.**—*Brooks v. Bates*, 7 Colo. 576, 4 Pac. 1069. **Ind.**—*Bailey v. Indianapolis Abattoir Co.* (Ind. App.), 118 N. E. 374. **Kan.**—*Frisk Co. v. Carson*, 3 Kan. App. 478, 43 Pac. 820.

36. See 16 STANDARD PROC. 600.

37. See 2 STANDARD PROC. 19.

38. **U. S.**—*Witherell v. Wiberg*, 4 Sawy. 232, 30 Fed. Cas. No. 17,917. **Colo.**—*Rogers v. Nevada Canal Co.*, 60 Colo. 59, 151 Pac. 923, Ann. Cas. 1917C, 669; *New York L. Ins. Co. v. Holck*, 59 Colo. 416, 151 Pac. 916. **Fla.**—*Williams v. Peninsular Groc. Co.*, 75 So. 517. **Ind.**—*Vandalia Coal Co. v. Coakley*, 184 Ind. 661, 111 N. E. 426; *Weideroder v. Mace*, 184 Ind. 242, 111 N. E. 5. **Ky.**—*Illinois Cent. R. Co. v. Whittaker*, 22 Ky. L. Rep. 395, 57 S. W. 465. **N. Y.**—*John D. Park & Sons Co. v. National W. Druggists' Assn.*, 30 App. Div. 508, 52 N. Y. Supp. 475; *Bowman v. Sheldon*, 5 Sandf. 657.

[a] Where matters alleged are provable under a denial or other defense in the answer. **U. S.**—*Williams v. William B. Scaife & Sons Co.*, 227 Fed. 922. **Ala.**—*Stone v. Goldberg*, 6 Ala. App. 249, 60 So. 744. **Fla.**—*Perkins v. Morgan Lumb. Co.*, 68 Fla. 503, 67 So. 126. **Ill.**—*Cooper v. Lawrence et c.* P. & P. Co., 204 Ill. App. 261. **Ind.**—*Weideroder v. Mace*, 184 Ind. 242, 111 N. E. 5. **Ky.**—*Louisville & N. R. Co. v. Bland*, 171 Ky. 424, 188 S. W. 468; *Burke v. Shannon*, 19 Ky. L. Rep. 1170, 43 S. W. 223. **N. Y.**—*Persch v. Wideman*, 106 App. Div. 553, 94 N. Y. Supp. 800. **Ore.**—*Seibor v. Oregon-Wash. R. & N. Co.*, 70 Ore. 116, 140 Pac. 629.

**Tex.**—*Houston & T. Cent. R. Co. v. Bell* (Tex. Civ. App.), 73 S. W. 56. See *Cate v. Gilman*, 41 Iowa 530, holding it not error to deny motion.

39. **Ala.**—*Singer Sew. Mach. Co. v. Methvin*, 184 Ala. 554, 63 So. 997. **Cal.**—*Larco v. Casanueva*, 30 Cal. 560; *Patterson v. Keystone M. Co.*, 30 Cal. 360. **Conn.**—*Seymour v. Norwalk*, 92 Conn. 293, 102 Atl. 577. **Ia.**—*Weeksman v. Powell*, 178 Iowa 991, 160 N. W. 377; *Roddy v. Gazette Co.*, 163 Iowa 416, 144 N. W. 1009. **Ky.**—*Torian v. Terrell*, 122 Ky. 745, 93 S. W. 10. **Mich.**—*Attorney General v. May*, 97 Mich. 568, 56 N. W. 1035. **Minn.**—*Vermilye v. Vermilye*, 32 Minn. 499, 18 N. W. 832, 21 N. W. 736. **Mont.**—*Sweetman v. Ramsey*, 22 Mont. 323, 56 Pac. 361. **N. Y.**—*Drake v. Hornblower*, 177 App. Div. 905, 163 N. Y. Supp. 1024; *Brown v. Fish*, 37 Misc. 367, 75 N. Y. Supp. 460; *Conner v. Bryce*, 170 N. Y. Supp. 941. **N. C.**—*Farrior v. Houston*, 95 N. C. 578. **Pa.**—*Boyle v. Breakwater Co.*, 239 Pa. 577, 87 Atl. 10. **S. C.**—*Gadsden v. Catawba W. Power Co.*, 71 S. C. 340, 51 S. E. 121. **Wis.**—*Spensley v. Janesville Cotton Mfg. Co.*, 62 Wis. 549, 22 N. W. 574; *Carpenter v. Reynolds*, 58 Wis. 666, 17 N. W. 300.

[a] If the only fault is in pleading evidence, the allegation will not be stricken. *Vogt v. Vogt*, 86 App. Div. 437, 83 N. Y. Supp. 677.

[b] Allegations as to evidence of facts not admissible in evidence may be stricken. *McDowell v. Bowles, Billings & K. Grain Co.*, 177 Iowa 744, 157 N. W. 173.

[c] But facts in aggravation of damages, though evidentiary, should not be stricken. *Gadsden v. Catawba W. Power Co.*, 71 S. C. 340, 51 S. E. 121.

40. *McRoy Clay Wks. v. Naughton*, 84 App. Div. 477, 82 N. Y. Supp. 979.

**V. ADMISSION BY DEMURRER.**—A demurrer to a pleading does not admit scandalous matter<sup>41</sup> or matter which is irrelevant, impertinent or surplusage.<sup>42</sup>

**VI. ANSWERING IMPERTINENT AND IRRELEVANT MATTER.**—The defendant need not answer scandalous or impertinent matter in a bill,<sup>43</sup> or surplusage or irrelevant matter in a complaint,<sup>44</sup> and though controverted by the answer, immaterial allegations in the complaint go for nothing.<sup>45</sup> But the complainant being held to have invited the irrelevant matter in the answer cannot complain thereof,<sup>46</sup> although some courts have sustained exceptions and motions directed thereat.<sup>47</sup>

Matters anticipatory of defenses need not be controverted by the defendant,<sup>48</sup> and are not admitted by a failure to deny them.<sup>49</sup> A denial

41. *W. T. Hanson Co. v. Collier*, 119 App. Div. 794, 104 N. Y. Supp. 787.

42. *Ala.*—*Georgia Home Ins. Co. v. Warten*, 113 Ala. 479, 22 So. 288, 59 Am. St. Rep. 129. *Colo.*—*Kilpatrick v. Miller*, 55 Colo. 419, 135 Pac. 780. *Ind.*—*Platter v. Seymour*, 86 Ind. 323. *N. J.*—*Millville Gas Light Co. v. Sweeten*, 74 N. J. L. 24, 64 Atl. 959. *N. Y.*—*Kittinger v. Buffalo Traction Co.*, 160 N. Y. 377, 54 N. E. 1081.

And see also 6 STANDARD PROC. 952.

43. See 4 STANDARD PROC. 157.

**Impertinent matter not admitted by failure to deny.** See 7 STANDARD PROC. 112.

44. *U. S.*—*McCloskey v. Barr*, 38 Fed. 165. *Cal.*—*Schoonover v. Birnbaum*, 148 Cal. 548, 83 Pac. 999; *Doyle v. Franklin*, 48 Cal. 537; *Jones v. Petaluma*, 36 Cal. 230. *N. Y.*—*Kittinger v. Buffalo Tract. Co.*, 160 N. Y. 377, 54 N. E. 1081. *Ohio.*—*Ridenour v. Mayo*, 29 Ohio St. 138. *S. C.*—*Livingston v. Ruff*, 65 S. C. 284, 43 S. E. 678.

**As to answering immaterial matter generally,** see 2 STANDARD PROC. 10.

**Conclusions Need Not Be Denied.** See 5 STANDARD PROC. 207.

**Surplusage Not Admitted By Failure to Deny.**—See 7 STANDARD PROC. 112.

45. *Cal.*—*Payne v. Commercial Nat. Bank*, 177 Cal. 68, 169 Pac. 1007, L. R. A. 1918C, 328 (denial does not make a material issue of fact); *Doyle v. Franklin*, 48 Cal. 537; *Jones v. Petaluma*, 36 Cal. 230. *Colo.*—*People v. Lothrop*, 3 Colo. 428. *Ia.*—*Specht v. Spangenberg*, 70 Iowa 488, 30 N. W. 875. *Ky.*—*Roush v. Vanceburg*, etc. Tpk. Co., 120 Ky. 163, 85 S. W. 735. *Minn.*—*Catheart v. Peck*, 11 Minn. 45.

*Ore.*—See *Neis v. Whitaker*, 47 Ore. 517, 84 Pac. 699.

See 14 STANDARD PROC. 523.

[a] **An Irrelevant Averment Does Not Become Relevant By Being Denied.**—*Specht v. Spangenberg*, 70 Iowa 488, 30 N. W. 875; *Neis v. Whitaker*, 47 Ore. 517, 84 Pac. 699.

[b] **A general plea or general denial does not put in issue allegations which are surplusage.** *Cal.*—*Cordes v. Harding*, 27 Cal. App. 474, 150 Pac. 650. *Mo.*—*Guinotte v. Ridge*, 46 Mo. App. 254. *Ohio.*—*Brady v. National Supply Co.*, 64 Ohio St. 267, 60 N. E. 218, 83 Am. St. Rep. 753. *Pa.*—*Astrich v. Girard F. & M. Ins. Co.*, 13 Pa. Dist. 350, such as non assumption.

46. *U. S.*—*Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 84 Fed. 379. *Fla.*—*Holzendorf v. Terrell*, 52 Fla. 525, 42 So. 584. *Neb.*—*Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006; *Baldwin v. Burt*, 43 Neb. 245, 61 N. W. 601. *N. J.*—*McGuckin v. Kline*, 31 N. J. Eq. 454. *N. Y.*—*Brennan v. Griffiths*, 18 N. Y. Supp. 145, 46 N. Y. St. 16; *MeIntyre v. Ogden*, 17 Hun 604; *King v. Utica Ins. Co.*, 6 How. Pr. 485. But compare *Voron v. Chait*, 165 App. Div. 963, 150 N. Y. Supp. 433.

47. *Me.*—*Langdon v. Pickering*, 19 Me. 214. *Neb.*—*Larson v. Central Nat. Fire Ins. Co.*, 98 Neb. 845, 154 N. W. 721. *Wis.*—*Grace v. Dempsey*, 75 Wis. 313, 43 N. W. 1127.

48. *Canfield v. Tobias*, 21 Cal. 349. [a] **Will Be Treated as Surplusage.** *Leshner v. United States Fid. Co.*, 259 Ill. 502, 88 N. E. 208; *Scottish Nat. Ins. Co. v. Adams*, 122 Ill. App. 471.

49. *Canfield v. Tobias*, 21 Cal. 349;



of such an allegation is held by some authorities not to raise an issue of fact,<sup>50</sup> but some courts hold otherwise.<sup>51</sup> It has been held that such a traverse should not be stricken out, however.<sup>52</sup>

**VII. REMEDIES.**—A. SCANDAL AND IMPERTINENCE. — Courts of equity have inherent power to strike out scandalous or impertinent matter in pleadings on their own motion,<sup>53</sup> or at the instance of a party.<sup>54</sup> But this is a power which should be sparingly exercised,<sup>55</sup> and will not be exercised except in a clear case,<sup>56</sup> and when the pleading will not be vitiated thereby.<sup>57</sup> The entire pleading should not be stricken out for scandal or impertinence,<sup>58</sup> unless the scandalous matter is so blended with proper matter as to be incapable of separation.<sup>59</sup>

**Persons not parties to the action** may, it has been held, have scandalous matter stricken from pleadings.<sup>60</sup>

**Exception.** — Under the equity practice, in some jurisdictions,<sup>61</sup> objections to pleadings for scandal and impertinence should be taken by

*Gillson v. Price*, 18 Nev. 109, 117, 1 Pac. 459.

50. **Ia.**—*Jones v. United States Mut. Acc. Assn.*, 92 Iowa 652, 61 N. W. 485. **Mo.**—*Hudson v. Wabash Western Ry. Co.*, 101 Mo. 13, 14 S. W. 15. **Nev.** *Gillson v. Price*, 18 Nev. 109, 117, 1 Pac. 459.

[a] **General denial** does not put allegation in issue. *Guinotte v. Ridge*, 46 Mo. App. 254.

[b] **Plaintiff need not prove** the allegation, though denied by the defendant. *Jones v. United States Mut. Acc. Assn.*, 92 Iowa 652, 61 N. W. 485. *Guinotte v. Ridge*, 46 Mo. App. 254.

[c] **Defendant cannot establish the fact** under a denial of an allegation anticipatory of a defense. *Hudson v. Wabash Western R. Co.*, 101 Mo. 13, 14 S. W. 15; *Gillson v. Price*, 18 Nev. 109, 117, 1 Pac. 459.

51. *Watkins v. Southern Pac. R. Co.*, 14 Sawy. (U. S.) 30; *Corrigan v. Rockefeller*, 5 Ohio N. P. 338.

52. *De St. Aubin v. Guenther*, 232 Fed. 411.

53. **U. S.**—*Kelley v. Boettcher*, 85 Fed. 55, 29 C. C. A. 14. **Colo.**—*Haley v. Duquette*, 13 Colo. App. 427, 59 Pac. 227. **N. Y.**—*Carpenter v. West*, 5 How. Pr. 53. **W. Va.**—*Johnson v. Brown*, 13 W. Va. 71. **Eng.**—*Ex parte Simpson*, 15 Ves. Jr. 476, 33 Eng. Reprint 834.

**Injunction not dissolved because of scandal in answer**, see 13 STANDARD PROC. 223, note 7.

54. **U. S.**—*Crim v. Rice*, 232 Fed. 570, 146 C. C. A. 528. **Neb.**—*Van Etten v. Butt*, 32 Neb. 285, 49 N. W. 365. **Pa.**—*Riddle v. Stevens*, 2 Serg. & R.

537; *Astrich v. Girard Fire & M. Ins. Co.*, 13 Pa. Dist. 350.

55. *Astrich v. Girard F. & M. Ins. Co.*, 13 Pa. Dist. 350; *Gleaves v. Morrow*, 2 Tenn. Ch. 592.

56. **U. S.**—*Wells v. Oregon Ry. & N. Co.*, 15 Fed. 561, 8 Sawy. 600. **Fla.** *Bush v. Adams*, 22 Fla. 177, 188. **Minn.** *Goodrich v. Parker*, 1 Minn. 195. **Eng.** *Davis v. Cripps*, 2 Y. & C. Ch. 430, 435, 63 Eng. Reprint 192.

[a] **The answer will be given a liberal construction** when pertinency is being determined. *Stafford v. Brown*, 4 Paige (N. Y.) 88.

57. *Bush v. Adams*, 22 Fla. 177; *Crocker v. Mann*, 3 Mo. 472, 26 Am. Dec. 684.

58. **Fla.**—*Bush v. Adams*, 22 Fla. 177. **N. Y.**—*Persch v. Wideman*, 106 App. Div. 553, 94 N. Y. Supp. 800; *Blake v. Eldred*, 18 How. Pr. 240; *Benedict v. Dake*, 6 How. Pr. 352. **Tex.**—*Herndon v. Campbell*, 86 Tex. 168, 23 S. W. 980.

59. *Huffman v. State*, 183 Ind. 698, 109 N. E. 401, 426; *Van Etten v. Butt*, 32 Neb. 285, 49 N. W. 365.

60. *Wehle v. Loewy*, 2 Misc. 345, 21 N. Y. Supp. 1027, 50 N. Y. St. 760 (where plaintiff's attorney made motion); *Carpenter v. West*, 5 How. Pr. (N. Y.) 53; *Williams v. Douglas*, 5 Beav. 82, 49 Eng. Reprint 508, he cannot except as of course, but must obtain special leave. See *Coffin v. Cooper*, 6 Ves. Jr. 514, 31 Eng. Reprint 1171.

61. See 4 STANDARD PROC. 150, 180; 8 STANDARD PROC. 485.

**Otherwise in the Federal Courts.** See Federal equity rule, No. 21.

exception, which may be determined by the court,<sup>62</sup> or referred to a master for report.<sup>63</sup> If the excepted matter is found to be scandalous or impertinent, it is expunged with costs.<sup>64</sup>

**By Motion To Strike Out.**—In equity, motions to strike sometimes take the place of exceptions, by virtue of statute.<sup>65</sup> Under the code scandal may be stricken out though not specifically mentioned in the code.<sup>66</sup>

**A demurrer** will not lie on the ground of impertinence and scandal.<sup>67</sup>

**B. IRRELEVANCY AND REDUNDANCY.**—Redundant and irrelevant matter may be stricken out on motion,<sup>68</sup> and the code so provides.<sup>69</sup> It

[a] **Exceptions To Be In Writing.** Woods v. Morrell, 1 Johns. Ch. (N. Y.) 103.

[b] **Exceptions must specify that it is taken for impertinence** instead of insufficiency. The Whistler, 13 Fed. 295, 8 Sawy. 232.

[c] **Exception must specify parts** to be expunged. Benedict v. Dake, 6 How. Pr. (N. Y.) 352.

[d] **Exception Must Not Be Too Broad.**—(1) Holzendorf v. Terrell, 52 Fla. 525, 42 So. 584. (2) If any matter excepted to is pertinent, the exception will fail altogether. Stokes v. Farnsworth, 99 Fed. 836; Bush v. Adams, 22 Fla. 177.

[e] **When Made.**—(1) Exceptions for impertinence and for insufficiency may be made at the same time. Woods v. Morrell, 1 Johns. Ch. (N. Y.) 103; Johnson v. Tucker, 2 Tenn. Ch. 244. (2) Otherwise in England. Pellew v. ———, 6 Ves. Jr. 456, 31 Eng. Reprint 1142.

[f] **Notice Is Given.**—Herndon v. Campbell, 86 Tex. 168, 23 S. W. 980.

62. Goodrich v. Parker, 1 Minn. 195; Powell v. Kane, 5 Paige (N. Y.) 265, where matter is obviously objectionable.

63. Powell v. Kane, 5 Paige (N. Y.) 265; Coffin v. Cooper, 6 Ves. Jr. 514, 31 Eng. Reprint 1171. See 8 STANDARD PROC. 485.

[a] **Report may be excepted to.** Woods v. Morrell, 1 Johns. Ch. (N. Y.) 103.

64. See 8 STANDARD PROC. 485.

[a] **Manner of Expunging.**—The scandalous matter is expunged by writing a memorandum in the margin that the matter is expunged pursuant to an order of a certain date. Herndon v. Campbell, 86 Tex. 168, 23 S. W. 980, quoting Daniel Ch. Pr. 354.

[b] **Awarding Costs Against Attor-**

ney.—Burr v. Burton, 18 Ark. 214, 235; McVey v. Cantrell, 8 Hun (N. Y.) 522; Powell v. Kane, 5 Paige (N. Y.) 265.

65. Leslie v. Leslie, 50 N. J. Eq. 155, 24 Atl. 1029; Kirkpatrick v. Corning, 40 N. J. Eq. 241. See 4 STANDARD PROC. 150.

[a] **Motion to be decided on same rules** governing determination of exceptions. Leslie v. Leslie, 50 N. J. Eq. 155, 24 Atl. 1029.

66. Crotty v. Erie R. Co., 153 App. Div. 902, 137 N. Y. Supp. 1102; Wuensch v. Morning Journal Assn., 4 App. Div. 110, 38 N. Y. Supp. 605, 74 N. Y. St. 232; Bowman v. Sheldon, 5 Sandf. (N. Y.) 657; Brachman v. Kuehnmuensch, 64 Wis. 249, 24 N. W. 902.

67. Carpenter v. West, 5 How. Pr. (N. Y.) 53. But see 4 STANDARD PROC. 150.

68. Ala.—Barnett v. Freeman, 197 Ala. 142, 72 So. 395; Prestwood v. McGowin, 148 Ala. 475, 41 So. 779; Davis v. Louisville, etc. R. Co., 108 Ala. 660, 18 So. 687. Fla.—Co-operative Sanitary Baking Co. v. Shields, 71 Fla. 110, 70 So. 934. Me.—Bean v. Ayers, 67 Me. 482.

[a] **Though greater latitude is allowed in equity pleading,** obviously irrelevant matter may be stricken out. Isaacs v. Salomon, 159 App. Div. 675, 144 N. Y. Supp. 876; Kolb v. Mortimer, 135 App. Div. 542, 120 N. Y. Supp. 543.

69. See the codes and the following cases: Cal.—Green v. Palmer, 15 Cal. 411, 76 Am. Dec. 492. Ia.—Bruner v. American Yeoman, 136 Iowa 612, 111 N. W. 977; Frazer v. Andrews, 134 Iowa 621, 112 N. W. 92, 11 L. R. A. (N. S.) 593; Hayden v. Anderson, 17 Iowa 158. N. Y.—Drake v. Hornblower, 177 App. Div. 905, 163 N. Y. Supp. 1024; Metcalfe v. Bill Board Pub. Co.,

seems the court may strike out matter clearly redundant, on its own motion,<sup>70</sup> though it has been held it cannot thus strike out irrelevant matter.<sup>71</sup> To authorize striking out the matter objected to, its irrelevancy and redundancy must clearly appear.<sup>72</sup> The entire pleading will not be stricken out for redundancy,<sup>73</sup> though a sham and irrelevant answer may be stricken out.<sup>74</sup>

**Demurrer.** — Surplusage and irrelevancy in pleading is not ground for demurrer at common law or under the code.<sup>75</sup>

If not stricken out, impertinent matter in pleadings will be disregarded,<sup>76</sup> but costs may be imposed.<sup>77</sup>

176 App. Div. 859, 163 N. Y. Supp. 757; *Blake v. Eldred*, 18 How. Pr. 240. **Ore.**—*Neis v. Whitaker*, 47 Ore. 517, 84 Pac. 699. **S. C.**—*Mikell v. McCreery-Pressley Co.*, 105 S. C. 25, 89 S. E. 467; *Mutual Lumb. Co. v. Southern R. Co.*, 100 S. C. 415, 84 S. E. 994. **S. D.** *McGillivray v. McGillivray*, 9 S. D. 187, 68 N. W. 316.

[a] This motion is a substitute for exceptions in equity for impertinence. *Benedict v. Dake*, 6 How. Pr. (N. Y.) 352.

70. *Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884.

71. *Savage v. Challiss*, 4 Kan. 319.

72. **U. S.**—*Wells v. Oregon Ry. & N. Co.*, 15 Fed. 561, 8 Sawy. 600. **Conn.** *Bitello v. Lipson*, 80 Conn. 497, 69 Atl. 21, 125 Am. St. Rep. 126, 16 L. R. A. (N. S.) 193. **Fla.**—*Bush v. Adams*, 22 Fla. 177, 188. **N. Y.**—*John D. Park & Sons Co. v. National W. Druggists' Assn.*, 30 App. Div. 408, 52 N. Y. Supp. 475; *Bedell v. Stickles*, 4 How. Pr. 432, 3 Code Rep. 105.

73. **U. S.**—*Polk v. Mutual Reserve*

*Fund L. Assn.*, 128 Fed. 524; *Witherell v. Wiberg*, 4 Sawy. 232, 30 Fed. Cas. No. 17,917. **Ia.**—*Bruner v. American Yoeman*, 136 Iowa 612, 111 N. W. 977, amended pleading. **N. J.**—*Karpenski v. South River*, 83 N. J. L. 149, 83 Atl. 639. **N. Y.**—*Howell v. Knickerbocker L. Ins. Co.*, 24 How. Pr. 475; *Blake v. Eldred*, 18 How. Pr. 240; *Benedict v. Dake*, 6 How. Pr. 352.

74. See the title, "Fivolous and Sham Pleadings."

75. See 6 STANDARD PROC. 908.

76. *Toler v. East Tennessee V. & G. Ry. Co.*, 67 Fed. 168; *Astrich v. Girard Fire & M. Ins. Co.*, 13 Pa. Dist. 350.

[a] Evidence In Support Thereof May Be Stricken Out.—*Toler v. East Tennessee V. & G. Ry. Co.*, 67 Fed. 168.

77. *Bush v. Adams*, 22 Fla. 177; *Davis v. Cripps*, 2 Y. & C. Ch. 430, 443, 63 Eng. Reprint 192. See *Vliet v. Wyckoff*, 42 N. J. Eq. 642, 9 Atl. 679, denying costs to a successful complainant who has exorbitantly increased costs by prolixities.

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**SURPRISE.** — See Amendments and Jeofails; Continuances; Mistake; New Trial.

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**SURREJOINDER AND SURREBUTTER.** — See Rejoinder and Subsequent Pleadings.

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**SURROGATE'S COURT.** — See Probate Courts.

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# SURVIVAL

By the Editorial Staff.

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### CROSS-REFERENCES:

Abatement, Pleas of;	Judgments and Decrees,
Appeals;	Revival of;
	Revivor.

Abatement and survival of particular actions or proceedings, see the specific titles.

Abatement of action, by or against a husband and wife, see 11 STANDARD PROC. 743, 842; for death by wrongful act, see 6 STANDARD PROC. 372; on dissolution of corporations, see the title "Winding Up Corporations;" to enforce forfeiture of smuggled goods, see 6 STANDARD PROC. 356.

Abatement of bankruptcy proceedings by death of bankrupt, see 3 STANDARD PROC. 990.

Abatement of election contest by death of contestee, see 8 STANDARD PROC. 89.

Abatement of information in civil cases by death of relator, see 12 STANDARD PROC. 712.

Abatement of proceedings to recover dower by death of wife, see 7 STANDARD PROC. 890.

Abatement of divorce suit by death of party, see 7 STANDARD PROC. 809.

Another action pending as a ground of abatement, see the title "Another Action Pending."

Effect of infant's attainment of majority pending action, as an abatement, see 12 STANDARD PROC. 802.

Issuance of execution after death of party, see 15 STANDARD PROC. 764.

Judgment or decree against dead person, see 6 STANDARD PROC. 788; 14 STANDARD PROC. 782.

Judgment in favor of dead person, see 14 STANDARD PROC. 786.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. AFTER DEATH OF PARTIES.** — A. **SURVIVAL OF ACTION AND OF CAUSE OF ACTION DISTINGUISHED.** — The survival of a cause of action on which a suit is based is to be distinguished from the survival of an action pending at the time of the death of a party,<sup>1</sup> and statutes regulating the latter have no application to the former,<sup>2</sup> which, in the absence of the statutory provision, must necessarily be determined by the common law.<sup>3</sup>

B. **SURVIVAL OF CAUSES OF ACTION GENERALLY.** — 1. **At Common Law.** — At common law, in general, rights of action for the breach of a contract survive upon the death of either party, to and against the personal representative of each.<sup>4</sup> In accordance with the maxim *actio personalis moritur cum persona*, rights of action for torts, did not survive at early common law when the action must be in form *ex delicto* for the recovery of damages and when the plea must be not guilty.<sup>5</sup> But if the tort could be waived, and an action of *assumpsit*

1. **U. S.**—*Warren v. Furstenheim*, 35 Fed. 691, 1 L. R. A. 40, note. **Ohio.** *Alpin v. Morton*, 21 Ohio St. 536. **Ore.** *Robinson v. Scott*, 81 Ore. 20, 158 Pac. 268. **Vt.**—*Benson v. Crain*, 91 Vt. 44, 99 Atl. 255.

[a] The survival of causes of action is a property right, one that depends on the substance of the cause of action, whereas the survival of pending actions is a matter of procedure. *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417, Ann. Cas. 1914C, 176; *Gerling v. Baltimore & O. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 311; *Schreiber v. Sharpless*, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. ed. 65; *Martin v. Wabash R. Co.*, 142 Fed. 650, 73 C. C. A. 646, 6 Ann. Cas. 582; *Warren v. Furstenheim*, 35 Fed. 691, 1 L. R. A. 40.

[b] Where the law declares that a cause of action shall survive, it is equivalent to saying that an executor may sue or be sued upon it. *Rogers v. Windoes*, 48 Mich. 628, 12 N. W. 882.

2. **U. S.**—*Stratton's Independence v. Dines*, 126 Fed. 968, 980. **Ga.**—*Frazier v. Georgia R. & B. Co.*, 101 Ga. 77, 28 S. E. 662; *Leathers v. Raburn*, 17 Ga. App. 437, 87 S. E. 754; *Sewell v. Atkinson*, 14 Ga. App. 386, 80 S. E. 862. **Tenn.**—*Posey v. Posey*, 113 Tenn. 588, 83 S. W. 1, construing §§4569 and 4575 of Shannon's Code. **Wash.**—*Ingersoll v. Gourley*, 72 Wash. 462, 130 Pac. 743; *Jones v. Miller*, 35 Wash. 499, 77 Pac. 811, construing Ball. Code, §5695.

[a] A statute which provides that certain actions survive does not relate to causes of action. *Wynn v. Talla-*

*poosa Co. Bank*, 168 Ala. 469, 493, 53 So. 228.

Survival of cause of action, see *infra*, I, B.

Survival of pending action, see *infra*, I, C.

3. *Warren v. Furstenheim*, 35 Fed. 691, 1 L. R. A. 40, under the Tennessee practice. See *infra*, I, B.

4. See *infra*, this note, and I, D, 1.

[a] The maxim *actio personalis*, does not apply to causes of action on contract. **Ga.**—*King v. Southern R. Co.*, 126 Ga. 794, 55 S. E. 965, 8 L. R. A. (N. S.) 544; *Newsom v. Jackson*, 29 Ga. 61. **Mass.**—*Stebbins v. Palmer*, 1 Pick. 71, 11 Am. Dec. 146. **N. J.**—*Hayden v. Vreeland*, 37 N. J. L. 372, 18 Am. Rep. 723. **N. Y.**—*Zabriskie v. Smith*, 13 N. Y. 322, 333, 64 Am. Dec. 551; *Putnam v. Van Buren*, 7 How. Pr. 31.

5. *Hambly v. Trott*, 1 Cowp. 371, 98 Eng. Reprint 1136. See the following cases: **U. S.**—*United States v. Daniel*, 6 How. 11, 12 L. ed. 323. **Cal.** *Harker v. Clark*, 57 Cal. 245. **Conn.** *Broughel v. Southern N. E. T. Co.*, 72 Conn. 617, 45 Atl. 435, 49 L. R. A. 404. **Mass.**—*Wilbur v. Gilmore*, 21 Pick. 250. **Mo.**—*Baker v. Crandall*, 78 Mo. 564. **N. Y.**—*Hegerich v. Keddle*, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25. **S. C.**—*Huff v. Watkins*, 20 S. C. 477; *Chaplin v. Barrett*, 12 Rich. 284, 75 Am. Dec. 731. **Eng.**—*Finlay v. Chirney*, 20 Q. B. Div. 494, 57 L. J. Q. B. 247, 58 L. T. N. S. 664, 36 Wkly. Rep. 534, 52 J. P. 324.

[a] The word "*actio*" means both the proceeding to enforce the right

brought, the right of action survived.<sup>6</sup> This early rule of the common law was changed by the statutes of 4 and 31, Edward III, giving to executors and administrators an action de bonis asportatis to recover the value of property taken from their decedents. This statute was not limited to injuries to specific articles of personal property, but extended to all wrongs by which the personal estate of the deceased was injured or diminished in value, whether or not it was actually removed or destroyed. However, it related only to personal property and to rights of action in favor of the personal representative of the party injured.<sup>7</sup> Though the cause of action survive, no action would lie against the executor where the plea is, that the testator was not guilty. The action must be maintained in a different form.<sup>8</sup> The law was further changed in England by the statute of 3 and 4 William IV., by which actions of trespass and trespass on the case could be brought by and against executors and administrators for wrongs to the personal or real estate.<sup>9</sup> These statutes made no change in the common law as to cases of injury to the person.<sup>10</sup>

**2. In the United States.**—a. *Generally.*—The tendency of the United States is to limit the application of the rule of "actio personalis."<sup>11</sup> The matter is generally regulated by statutes which vary from a general survival statute,<sup>12</sup> to statutes simply reenacting the old English statutes.<sup>13</sup> Where the statute is silent as to the survivability of a cause of action, resort must be had to the common law to determine its survivability.<sup>14</sup> The statute of Edward III, is generally regarded as part of the common law.<sup>15</sup> The statute of William IV, does not af-

and the right itself. *Wynn v. Tallapoosa Co. Bank*, 168 Ala. 469, 490, 53 So. 228. See generally the title "*Suits and Actions*."

[b] If an action *ex delicto* must have been resorted to, the right of action did not survive. *Kelley v. Union Pac. Ry. Co.*, 16 Colo. 455, 27 Pac. 1058.

6. *Newsom v. Jackson*, 29 Ga. 61; *Stebbins v. Palmer*, 1 Pick. (Mass.) 71, 11 Am. Dec. 146.

7. See the following cases: **U. S.** *United Copper Securities Co. v. Amalgamated Copper Co.*, 232 Fed. 574, 146 C. C. A. 532. **Fla.**—*Jacksonville St. Ry. Co. v. Chappell*, 22 Fla. 616, 1 So. 10. **Ga.**—*Newsom v. Jackson*, 29 Ga. 61. **Mass.**—*Wilbur v. Gilmore*, 21 Pick. 250. **Mo.**—*Baker v. Crandall*, 78 Mo. 564; *Higgins v. Breen*, 9 Mo. 497. **N. J.** *Ten Eyck v. Runk*, 31 N. J. L. 428. **N. Y.**—*Hegerich v. Keddle*, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25. **R. I.** *Aldrich v. Howard*, 8 R. I. 125, 86 Am. Dec. 615. **Va.**—*Beaver's Admx. v. Putnam's Curator*, 110 Va. 713, 67 S. E. 353; *Anderson v. Hygeia Hotel Co.*, 92

Va. 687, 24 S. E. 269. **Eng.**—*Twycross v. Grant*, 4 C. P. Div. 40, 48 L. J. C. P. 1, 39 L. T. N. S. 681, 27 Wkly. Rep. 87; *Oakey v. Dalton*, 35 Ch. Div. 700, 56 L. J. Ch. 823, 57 L. T. N. S. 18, 35 Wkly. Rep. 709.

8. *United States v. Daniel*, 6 How. (U. S.) 11, 12 L. ed. 323. See also 8 STANDARD PROC. 752.

9. 1 Chit. Pl. 79.

10. 1 Chit. Pl. 77.

As to injuries to the person, see *infra*, I, D, 2, f.

11. *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S. W. 584, Ann. Cas. 1914C, 885, 49 L. R. A. (N. S.) 897.

12. See the Montana statute.

13. *Huff v. Watkins*, 20 S. C. 477. Compare the present code.

14. **U. S.**—*Warren v. Furstenheim*, 35 Fed. 691, 1 L. R. A. 40. **Conn.** *Broughel v. Southern N. E. Tel. Co.*, 72 Conn. 617, 45 Atl. 435, 49 L. R. A. 404. **R. I.**—*Moies v. Sprague*, 9 R. I. 541.

15. **Ala.**—*Wynn v. Tallapoosa Co. Bank*, 168 Ala. 469, 493, 53 So. 228. **Ill.**—*Reed v. Peoria & O. R. Co.*, 18 R.



fect the common law as received in this country,<sup>16</sup> but its provisions are generally incorporated in the survival statutes.<sup>17</sup> In some states by statute none of the English statutes are in force.<sup>18</sup>

b. *In Federal Courts.*—Congress has not prescribed what actions survive, and the federal courts will follow the law of the state in which the action arose, or in the absence of some special legislation, the common law.<sup>19</sup> And where the cause of action is created by a federal statute, the common-law rules are applied.<sup>20</sup>

3. **Tests of Survivorship.**—a. *Nature and Form of Action.* The rule as to survival of causes of action is often stated as though the form of action were a test of survivability, the statement being that causes of action *ex contractu* survive whereas those *ex delicto* do not.<sup>21</sup> This rule although true as a general proposition is not absolutely true.<sup>22</sup> The true test is the nature of the cause of action or the nature of the damage sued for, rather than the form of action,<sup>23</sup> the distinction being between those causes of action which affect the estate, and those which affect the person only.<sup>24</sup>

I. 403. **Me.**—*Ahern v. McGlinchy*, 112 Me. 58, 90 Atl. 709, 52 L. R. A. (N. S.) 885. **Mo.**—*Baker v. Crandall*, 78 Mo. 564. **N. Y.**—*Hegerich v. Keddle*, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25. **Ohio.**—*Russell v. Sunbury*, 37 Ohio St. 372, 41 Am. Rep. 523. **Pa.**—*Clarke v. McClelland*, 9 Pa. 128; *Means v. Presbyterian Church*, 3 Pa. 93.

See *supra*, I, B, 1.

16. *Reed v. Peoria & O. R. Co.*, 18 Ill. 403. See *supra*, I, B, 1.

17. See generally the statutes.

18. *Henshaw v. Miller*, 17 How. (U. S.) 212, 219, 15 L. ed. 222, under the Virginia practice.

19. *Patton v. Brady*, 184 U. S. 608, 612, 22 Sup. Ct. 493, 46 L. ed. 713; *Webber v. St. Paul City Ry. Co.*, 97 Fed. 140, 38 C. C. A. 79; *Spring v. Webb*, 227 Fed. 481; *Warren v. Furstenheim*, 35 Fed. 691, 1 L. R. A. 40 (as to power of Congress to enact such statute); *Hatfield v. Bushnell*, 1 Blatchf. 393, 11 Fed. Cas. No. 6,211.

20. *Van Choate v. General Elec. Co.*, 245 Fed. 120; *Imperial Film Exch. v. General Film Co.*, 244 Fed. 985.

21. *Jacksonville St. Ry. Co. v. Chapell*, 22 Fla. 616, 1 So. 10; *Huff v. Watkins*, 20 S. C. 477.

Method of determining whether an action is *ex delicto* or *ex contractu*, see the title "*Suits and Actions.*"

22. *Webber v. St. Paul City Ry. Co.*, 97 Fed. 140, 38 C. C. A. 79.

23. **U. S.**—*Gerling v. Baltimore & O. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533,

38 L. ed. 311; *Schreiber v. Sharpless*, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. ed. 65; *Webber v. St. Paul City Ry. Co.*, 97 Fed. 140, 38 C. C. A. 79. **Cal.**—*Vrag-nizan v. Savings Union B. & T. Co.*, 31 Cal. App. 709, 161 Pac. 507. **Conn.**—*Whittemore v. Hamilton*, 51 Conn. 153; *Booth's Admrs. v. Northrop*, 27 Conn. 325. **Del.**—*State ex rel. Brumley v. Jessup & Moore Paper Co.*, 6 Boyce 118, 80 Atl. 350. **Ind.**—*Feary v. Hamilton*, 140 Ind. 45, 39 N. E. 516; *Boor v. Lowery*, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; *Hedekin v. Gillespie*, 33 Ind. App. 650, 72 N. E. 143. **Mass.**—*Hey v. Prime*, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N. S.) 570. **Tenn.**—*Governor v. McManus' Admrs.*, 11 Humph. 152. **Va.**—*Lee's Admr. v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666.

[a] **Form Immaterial.**—"On the question of survivorship, we consider it immaterial whether the form of the remedy adopted is in tort or in contract, provided the cause of action is founded on a contract." *Booth's Admrs. v. Northrop*, 27 Conn. 325, 332.

[b] **The nature of the damage sued for, not the nature of its cause,** determines whether the action survives. *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429. To same effect, see *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90.

24. **Mass.**—*Stebbins v. Palmer*, 1 Pick. 71, 11 Am. Dec. 146. **Mich.**—*Peo-*

b. *Assignability*.—A test of survivorship of a cause of action is its assignability.<sup>25</sup> But this general rule is not universally or strictly true, because by statute some causes of action are made to survive which are not assignable.<sup>26</sup>

4. *Survival as Affected by Time of Accrual of Cause of Action*. The rule as to abatement and survival of causes of action against a personal representative applies only to causes of action which accrued in the lifetime of the parties.<sup>27</sup> But a contract to pay money survives although it falls due after the decease of the obligor.<sup>28</sup>

5. *Construction of Statutes*.—Statutes providing for the survival of causes of action, are generally given a liberal construction,<sup>29</sup> though

*ple v. Kemppainen*, 163 Mich. 186, 128 N. W. 183, 30 L. R. A. (N. S.) 1166n. **N. J.**—*Hayden v. Vreeland*, 37 N. J. L. 372, 18 Am. Rep. 723. **Eng.**—*Finlay v. Chirney*, 20 Q. B. Div. 494, 57 L. J. Q. B. 247, 58 L. T. N. S. 664, 36 Wkly. Rep. 534, 52 J. P. 324.

[a] The test is whether the cause of action itself is one which affects property, not whether the damages recovered in the action affect the property of the respective parties. *Finley v. Chirney*, 20 Q. B. Div. (Eng.) 494, 498, 57 L. J. Q. B. 247, 58 L. T. N. S. 664, 36 Wkly. Rep. 534, 52 J. P. 324.

25. **U. S.**—*Comegys v. Vasse*, 1 Pet. 193, 213, 7 L. ed. 108; *United Copper Sec. Co. v. Amalgamated Copper Co.*, 232 Fed. 574, 146 C. C. A. 532; *Imperial Film Exch. v. General Film Co.*, 244 Fed. 985. **Colo.**—*Home Ins. Co. v. Atchison, F. & S. F. R. Co.*, 19 Colo. 46, 34 Pac. 281; *Mumford v. Wright*, 12 Colo. App. 214, 55 Pac. 744. **Ill.**—*People ex rel. McPherson v. Western L. I. Co.*, 261 Ill. 513, 104 N. E. 219, Ann. Cas. 1915A, 266; *Selden v. Illinois Tr. & Sav. Bank*, 239 Ill. 67, 78, 87 N. E. 860, 130 Am. St. Rep. 180. **Ind.**—*Crawfordsville Trust Co. v. Ramsey*, 178 Ind. 258, 98 N. E. 177. **Mich.**—*Stebbins v. Dean*, 82 Mich. 385, 46 N. W. 778. **Mo.**—*Snyder v. Wabash, St. L. & P. Ry. Co.*, 86 Mo. 613. **N. H.**—*Stewart v. Lee*, 70 N. H. 181, 46 Atl. 31. **N. Y.**—*Hegerich v. Keddie*, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25; *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; *Tucker v. Western Union Tel. Co.*, 94 Misc. 364, 157 N. Y. Supp. 873. **Va.**—*Winston v. Gordon*, 115 Va. 899, 80 S. E. 756. **Wash.**—*Ingersoll v. Gourley*, 72 Wash. 462, 130 Pac. 743; *Slauson v. Schwabacher*, 4 Wash. 783, 31 Pac. 329, 31

Am. St. Rep. 948. **Wis.**—*John V. Farwell Co. v. Wolf*, 96 Wis. 10, 70 N. W. 289, 71 N. W. 109; *Lehmann v. Farwell*, 95 Wis. 185, 70 N. W. 170.

[a] "As a general rule, assignability and survivability of causes of action are convertible terms." *Selden v. Illinois T. & S. Bank*, 239 Ill. 67, 78, 87 N. E. 860, 130 Am. St. Rep. 180.

26. *Mumford v. Wright*, 12 Colo. App. 214, 55 Pac. 744; *Frohlich v. Deacon*, 181 Mich. 255, 148 N. W. 180, Ann. Cas. 1916C, 722, per McAlvay C. J.

27. **Colo.**—*Letson v. Brown*, 11 Colo. App. 11, 52 Pac. 287. **Ia.**—*In re Oldfield's Est.*, 175 Iowa 118, 156 N. W. 977, Ann. Cas. 1917D, 1067, L. R. A. 1916D, 1260. **Ky.**—*Hansford's Admx. v. Payne & Co.*, 11 Bush 380. **Mass.**—*Hollenbeck v. Berkshire R. Co.*, 9 Cush. (Mass.) 478; *Kearney v. Boston & W. R. Corp.*, 9 Cush. 108. **Mont.**—*Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960. **Ohio.**—*Methodist Episcopal Church v. Rensch's Admr.*, 7 Ohio St. 369. **Tenn.**—See *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S. W. 584, Ann. Cas. 1914C, 885, 49 L. R. A. (N. S.) 897, action for libel contained in will may be brought against executor.

28. *White's Exrs. v. Com.*, 39 Pa. 167.

29. **Ind.**—*Crawfordsville Trust Co. v. Ramsey*, 178 Ind. 258, 98 N. E. 177. **Me.**—*Hooper v. Gorham*, 45 Me. 209. **N. J.**—*Tichenor v. Hayes*, 41 N. J. L. 193, 32 Am. Rep. 186; *Ten Eyck v. Runk*, 31 N. J. L. 428. **S. C.**—*Allen v. Union Oil Co.*, 59 S. C. 571, 38 S. E. 274. **Va.**—*Lee's Admr. v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666.

[a] For cases construing statutes,

some courts construe them strictly.<sup>30</sup> A statute authorizing the bringing of an action "against" the personal representative has been held to authorize the bringing of such action "by" the representative, although the statute did not contain a specific provision to that effect.<sup>31</sup>

**C. SURVIVAL OF PENDING ACTIONS GENERALLY. — 1. On Death of Sole Plaintiff or Defendant. — a. At Common Law. —** In England at one time, all actions abated on the death of either sole party thereto, and could not be revived for or against the personal representative. If the cause of action survived it was necessary to bring a new action.<sup>32</sup> This was changed by statute in those cases where a party died after verdict and after interlocutory judgment.<sup>33</sup> The common law of England as thus changed, forms the common law of some of the American states.<sup>34</sup>

**b. In Equity. —** Suits in equity abate by the death of a party.<sup>35</sup> But the abatement is not, as at common law, a complete overthrow of the action. It is only a suspension of the suit for want of proper parties until it is revived by bringing them in.<sup>36</sup>

see the following: **U. S.**—Gerling v. Baltimore & O. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 311, construing statute of West Virginia. **W. Va.** Cunningham v. Sayre, 21 W. Va. 440. **Wis.**—Lane v. Frawley, 102 Wis. 373, 78 N. W. 593, holding §4253, Rev. St. 1878, provides what actions survive whereas §3252 merely regulates procedure as to actions which survive. **Eng.** Flinn v. Perkins, 32 L. J. Q. B. 10, 8 Jur. N. S. 1177, 7 L. T. N. S. 364, 11 Wkly. Rep. 95.

[b] A statute providing that "causes of action upon which suit has been or may hereafter be brought" survive simply extends the right of survival to suits brought under the section and pending at the time of its enactment and to causes of action upon which suit may be brought thereafter. It does not limit the right of survival to suits pending at the death of a party. Kohnle v. Paxton, 268 Mo. 463, 188 S. W. 155, overruling Showen v. Metropolitan St. R. Co., 164 Mo. App. 41, 148 S. W. 135.

30. Wynn v. Tallapoosa Co. Bank, 168 Ala. 469, 494, 53 So. 228.

31. Valentine v. Norton, 30 Me. 194.

32. See the following cases: Spring v. Webb, 227 Fed. 481; Hoxie v. Carr, 1 Sumn. 173, 12 Fed. Cas. No. 6,802; Elliot v. Teal, 5 Sawy. 188, 8 Fed. Cas. No. 4,389. **Ala.**—Wynn v. Tallapoosa Co. Bank, 168 Ala. 469, 493, 53 So. 228.

**Fla.**—Jacksonville St. Ry. Co. v. Chapell, 22 Fla. 616, 1 So. 10. **Mich.** Brown v. Fletcher's Est., 146 Mich. 401, 418, 109 N. W. 686, 123 Am. St. Rep. 233, 15 L. R. A. (N. S.) 632, quoting Story on Eq. Pl. §354. **N. J.** Hayden v. Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723. **N. Y.**—Wade v. Kalbfleisch, 58 N. Y. 282, 16 Abb. Pr. (N. S.) 104, 17 Am. Rep. 250. **Va.** Lee's Admr. v. Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666. **Wyo.** Smith v. Harrington, 3 Wyo. 503, 27 Pac. 803.

33. See *infra*, I, C, 7, b and c.

34. Wynn v. Tallapoosa Co. Bank, 168 Ala. 469, 493, 53 So. 228.

35. **U. S.**—Spring v. Webb, 227 Fed. 481. **Fla.**—Lukens Gulf Cypress Co. v. Cochran, 65 Fla. 305, 61 So. 630. **Ill.** Kronenberger v. Heinemann, 104 Ill. App. 156. **Md.**—Reek's Exr. v. Reek, 110 Md. 497, 73 Atl. 144. **Mich.**—Brown v. Fletcher's Est., 146 Mich. 401, 418, 109 N. W. 686, 123 Am. St. Rep. 233, 15 L. R. A. (N. S.) 632. **Neb.**—Fox v. Abbott, 12 Neb. 328, 11 N. W. 303. **Wash.**—Overlock v. Shinn, 28 Wash. 205, 68 Pac. 436.

36. **U. S.**—Spring v. Webb, 227 Fed. 481; Miller v. Wattier, 165 Fed. 359; Hoxie v. Carr, 1 Sumn. 73, 12 Fed. Cas. No. 6,802. **Ill.**—Kronenberger v. Heinemann, 104 Ill. App. 156. **Mich.**—Brown v. Fletcher's Est., 146 Mich. 401, 418, 109 N. W. 686, 123 Am. St. Rep. 233, 15 L. R. A. (N. S.) 632; Zoellner v.



c. *Under Statute*.—Statutes generally provide that no action, whether legal or equitable, shall abate by the death of a party if the cause of action survive or continue.<sup>37</sup> Under this and similar statutes, the rule of equity as to suspension of the suit by death of a party has been made the rule of law courts, where the cause of action survives.<sup>38</sup> This suspension has the same temporary effect on the rights of the parties as though the suit were actually abated.<sup>39</sup> When the death of a party is brought to the notice of the court, its duty is to stop, whether or not there is a motion to dismiss.<sup>40</sup> All proceedings in the action are suspended,<sup>41</sup> and nothing can be done in the action until it is revived.<sup>42</sup> Any judicial act after the death of a party and before revivor,<sup>43</sup> ex-

Zoellner, 46 Mich. 511, 9 N. W. 831. **Minn.**—National Council v. Scheiber, 137 Minn. 423, 163 N. W. 781. **Neb.** Fox v. Abbott, 12 Neb. 328, 11 N. W. 303.

See the title, "**Revivor.**"

37. See generally the statutes and the following cases. **U. S.**—Schreiber v. Sharpless, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. ed. 65. **Ill.**—Reed v. Peoria & O. R. Co., 18 Ill. 403; Keep v. Crawford, 92 Ill. App. 587. **Mont.**—Lavell v. Frost, 16 Mont. 93, 40 Pac. 146, where party defendant died after commencement but before service. **N. Y.** Wade v. Kalbfleisch, 58 N. Y. 282, 16 Abb. Pr. (N. S.) 104, 17 Am. Rep. 250; Potter v. Van Vranken, 36 N. Y. 619; Logan v. Greenwich Trust Co., 144 App. Div. 372, 129 N. Y. Supp. 577. **Tenn.** Burnett v. Layman, 130 Tenn. 423, 171 S. W. 76; Posey v. Posey, 113 Tenn. 588, 83 S. W. 1, construing code. **Tex.** Moore v. Rice, 51 Tex. 289. **Wis.** Voss v. Stoll, 141 Wis. 267, 124 N. W. 89.

As to necessity for revivor, see the title, "**Revivor.**"

38. **Mich.**—Brown v. Fletcher's Est., 146 Mich. 401, 418, 109 N. W. 686, 123 Am. St. Rep. 233, 15 L. R. A. (N. S.) 632. **N. Y.**—Reilly v. Hart, 130 N. Y. 625, 29 N. E. 1099, 27 Am. St. Rep. 540. **Ore.**—In re Young's Estate, 59 Ore. 348, 363, 116 Pac. 95, 1060, Ann. Cas. 1913B, 1310. **Tex.**—McC Campbell v. Henderson, 50 Tex. 601. **Wis.**—Voss v. Stoll, 141 Wis. 267, 124 N. W. 89.

On death of a party, the suit remains in abeyance a reasonable time until a representative can be appointed and qualified, after which he will be substituted and the case proceed to judgment. Williams v. Carr, 4 Colo. App. 363, 36 Pac. 644.

39. In re Young's Estate, 59 Ore.

348, 364, 116 Pac. 95, 1060, Ann. Cas. 1913B, 1310; Voss v. Stoll, 141 Wis. 267, 124 N. W. 89.

40. Judson v. Love, 35 Cal. 463.

41. **Ark.**—Ex parte Gilbert, 93 Ark. 307, 124 S. W. 762. **Colo.**—First Nat. Bank v. Hotchkiss, 49 Colo. 593, 114 Pac. 510. **Ill.**—Strauss v. Merchants L. & T. Co., 119 Ill. App. 588. **Neb.** Street v. Smith, 75 Neb. 434, 106 N. W. 472. **Ore.**—In re Young's Estate, 59 Ore. 348, 116 Pac. 95, 1060, Ann. Cas. 1913B, 1310.

[a] The cause remains in the exact position it was at the time of the death. Reilly v. Hart, 130 N. Y. 625, 29 N. E. 1099, 27 Am. St. Rep. 540; Ullman-Einstein Co. v. Crimmins, 166 App. Div. 731, 152 N. Y. Supp. 251.

42. **Ark.**—Ex parte Gilbert, 93 Ark. 307, 124 S. W. 762. **Conn.**—Barton v. New Haven, 74 Conn. 729, 52 Atl. 403. **Md.**—Reck's Exr. v. Reck, 110 Md. 497, 73 Atl. 144. **Neb.**—Hendrix v. Rieman, 6 Neb. 516. **N. Y.**—Kirke La Shelle Co. v. Armstrong, 173 App. Div. 881, 157 N. Y. Supp. 909; Robinson v. Thomas, 123 App. Div. 414, 107 N. Y. Supp. 1109. **Tenn.**—Morrison v. Deadrick, 10 Humph. 342.

[a] The death of a party pending the advertising of property for sale on foreclosure, not being suggested, does not invalidate the order of confirmation. McBride v. Worley, 66 Fla. 564, 61 So. 235.

[b] After Application for Revivor. But where a suit abates by the death of the complainant his successors may apply to the court to punish a breach of an injunction as soon as preliminary steps to revive the suit have been taken without waiting until an order of revivor is obtained. Hawley v. Bennett, 4 Paige (N. Y.) 163.

43. **Cal.**—Judson v. Love, 35 Cal.

cept the entry of judgment, where the death occurs after verdict or interlocutory judgment,<sup>44</sup> is a nullity as regards his personal representative. If the cause of action does not survive, no action can be taken in it after the death of a party.<sup>45</sup>

**Construction of Statutes.** — Statutes as to survival and revival of pending actions, being remedial, are given a liberal construction,<sup>46</sup> but there are authorities to the contrary.<sup>47</sup>

d. *In Admiralty.* — The general rules as to abatement of suits by the death of a party obtain in admiralty.<sup>48</sup>

**2. On Death of Nominal Party.**<sup>49</sup> — Statutes provide that the death of a nominal party shall not abate a suit.<sup>50</sup>

**3. On Death of Beneficial Claimant.** — The death of the beneficial claimant abates an action,<sup>51</sup> unless statute provides otherwise,<sup>52</sup> although the contrary has been held in actions on bonds.<sup>53</sup>

**4. On Death of Person Suing or Sued in a Representative Capacity.** As a general rule the death of a person suing or sued in a representative capacity does not abate the action.<sup>54</sup>

**5. On Death of Next Friend.** — The death of the next friend of an infant plaintiff does not abate the action.<sup>55</sup>

463. **Neb.**—*Street v. Smith*, 75 Neb. 434, 106 N. W. 472. **Wis.**—*Voss v. Stoll*, 141 Wis. 267, 124 N. W. 89.

As to validity of judgment rendered after death of a party, see 14 STANDARD PROC. 782.

**Vacation of judgment rendered after verdict**, see 15 STANDARD PROC. 157.

44. See *infra*, I, C, 7, b and c.

45. *Freeman v. Frank*, 10 Abb. Pr. (N. Y.) 370.

[a] **Any subsequent proceeding may be set aside** on motion of the personal representatives of the decedent where the action does not survive. *Freeman v. Frank*, 10 Abb. Pr. (N. Y.) 370.

46. **Ala.**—*Wynn v. Tallapoosa Co. Bank*, 168 Ala. 469, 494, 53 So. 228. **Ind.**—*Crawfordsville Trust Co. v. Ramsey*, 178 Ind. 258, 98 N. E. 177. **N. Y.** *McNulta v. Huntington*, 62 App. Div. 257, 70 N. Y. Supp. 897.

47. *Sewell v. Atkinson*, 14 Ga. App. 386, 80 S. E. 862; *Showen v. Metropolitan St. R. Co.*, 164 Mo. App. 41, 148 S. W. 135.

48. See 1 STANDARD PROC. 527.

49. **Effect on the right of a transferee pendente lite to continue the action in the name of the original plaintiff or in his name**, see 20 STANDARD PROC. 971, note 55.

50. **Ala.**—*Jenks v. Edwards*, 6 Ala. 143. **Miss.**—*Denton v. Stephens*, 32

*Miss.* 194; *Humphreys v. Irvine*, 6 Smed. & M. (Miss.) 205. **Tenn.**—*Morrison v. Deaderick*, 10 Humph. 342.

[a] **Where an assignment is void**, a suit brought by the assignor for the use of the assignee is the suit of the assignor and abates on his death. *Morrison v. Deaderick*, 10 Humph. (Tenn.) 342.

**Proceedings on death of a nominal party**, see the title, "Revivor."

51. *Johnson v. State*, 2 Houst. (Del.) 378.

52. *Lee v. Gardiner*, 26 Miss. 521.

53. *Logan v. State*, 39 Md. 177; *State v. Dorsey*, 3 Gill. & J. (Md.) 75. But see *Johnson v. State*, 2 Houst. (Del.) 378.

54. **Ala.**—*Reynolds v. Crook*, 95 Ala. 570, 11 So. 412. **Ark.**—*Hemphill v. Hamilton*, 11 Ark. 425. **Ga.**—*Walton v. Gill*, 46 Ga. 600. **Ky.**—*Fletcher's Admr. v. Sanders*, 7 Dana 345, 32 Am. Dec. 96. **N. J.**—*Crane v. Alling*, 14 N. J. L. 593. **S. C.**—*Talvande v. Cripps*, 2 McCord 164.

But see *Portevant v. Pendleton's Admrs.*, 23 Miss. 25.

**Suit by a guardian does not abate on his death**, 10 STANDARD PROC. 864.

**Abatement of suits by and against public officers**, see *infra*, I, D, 26.

55. *Missouri Pac. Ry. Co. v. Moffatt*, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343.

**6. On Death of One of Several Parties.**—At early common law, in all actions where there were two or more plaintiffs or defendants, the death of one, while the action was pending, operated to abate it.<sup>56</sup> But this rule has been changed by statute of William III, in England, which provides that if one of two or more plaintiff's or defendants die and the cause of action survive to or against the survivor, the action shall not abate but go on for or against the surviving party.<sup>57</sup> This statute is part of our common law,<sup>58</sup> and has been generally reenacted in the United States,<sup>59</sup> so that now it is only where the cause of action

56. See *Treat v. Dwinel*, 59 Me. 341; *Haven v. Brown*, 7 Greenl. 421, 22 Am. Dec. 208; *Benson v. Crain*, 91 Vt. 44, 99 Atl. 255.

57. St. 8 & 9 Will. 3, c. 11, §7.

58. *Haven v. Brown*, 7 Greenl. (Me.) 421, 22 Am. Dec. 208.

59. **U. S.**—*In re Connaway*, 178 U. S. 421, 435, 20 Sup. Ct. 951, 44 L. ed. 1134; *Gerling v. Baltimore & O. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 311; *Thomas v. Green Co.*, 159 Fed. 339, 89 C. C. A. 405; *Wilhite v. Skelton*, 149 Fed. 67, 78 C. C. A. 635. **Ala.**—*Hayes v. Miller*, 150 Ala. 621, 43 So. 818, 124 Am. St. Rep. 93, 11 L. R. A. (N. S.) 748; *Burrows v. Pickens*, 129 Ala. 648, 29 So. 694; *Phoenix Ins. Co. v. Moog*, 81 Ala. 335, 1 So. 108. **Ill.**—*Gemmill v. Smith*, 274 Ill. 87, 113 N. E. 27. **Mass.**—*American Sur. Co. v. Vinton*, 224 Mass. 337, 112 N. E. 954; *Tyler v. Mather*, 9 Gray 177. **Mich.**—*Van Kleeck v. McCabe*, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182. **Minn.**—*Northness v. Hillestad*, 87 Minn. 304, 91 N. W. 1112. **Mo.**—*Prior v. Kiso*, 96 Mo. 303, 9 S. W. 898. **Neb.**—*Jameson v. Bartlett*, 63 Neb. 638, 88 N. W. 860. **N. Y.**—*Lyon v. Park*, 111 N. Y. 350, 18 N. E. 863; *Lane v. Fenn*, 76 Misc. 48, 134 N. Y. Supp. 92. **Okla.**—*Gillespie v. First Nat. Bank*, 20 Okla. 768, 95 Pac. 220. **R. I.**—*Baker v. Braslin*, 16 R. I. 635, 18 Atl. 1039, 6 L. R. A. 718. **Tex.**—*Blum v. Goldman*, 66 Tex. 621, 1 S. W. 899; *McAllen v. Crafts* (Tex. Civ. App.), 166 S. W. 3; *House v. Wells* (Tex. Civ. App.), 108 S. W. 196. **Vt.**—*Benson v. Crain*, 91 Vt. 44, 99 Atl. 255. **Va.**—*Clarkson v. Booth*, 17 Gratt. (58 Va.) 490, 501. **W. Va.**—*Rowe v. Shenandoah Pulp Co.*, 42 W. Va. 551, 26 S. E. 320, 57 Am. St. Rep. 870; *Henning v. Farnsworth*, 41 W. Va. 548, 23 S. E. 663.

**Abatement of forcible entry and de-**

**tainer suit by death of a plaintiff**, see 8 STANDARD PROC. 1108.

**In actions by or against a husband and wife**, see 11 STANDARD PROC. 743, et seq.

[a] **Statute Applies to Writs of Error.**—*Gerling v. Baltimore & O. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 544, 38 L. ed. 311; *Moses v. Wooster*, 115 U. S. 285, 6 Sup. Ct. 38, 29 L. ed. 391.

[b] **An action by joint owners of bonds does not abate on the death of a party.** *Thomas v. Green Co.*, 159 Fed. 339, 89 C. C. A. 405.

[c] **An action against two or more in tort**, as in trespass, ejectment, trover, conspiracy, and the like, is not abated by the death of one of the parties but may be prosecuted against the survivor, each being answerable in solido for the wrong. *Baker v. Braslin*, 16 R. I. 635, 18 Atl. 1039, 6 L. R. A. 718. To similar effect, see **U. S.** *Northwestern Consol. Milling Co. v. Callam & Son*, 177 Fed. 786. **Ala.** *Hayes v. Miller*, 150 Ala. 621, 43 So. 818, 124 Am. St. Rep. 93, 11 L. R. A. (N. S.) 748. **Ind.**—*Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90. **Me.** *Haven v. Brown*, 7 Greenl. 421, 22 Am. Dec. 208. **N. J.**—*Hendrickson v. Herbert*, 38 N. J. L. 296, trespass quare clausum. **Vt.**—*Benson v. Crain*, 91 Vt. 44, 99 Atl. 255, under express statute as to torts.

[d] **On the death of one joint tenant party the suit may be prosecuted by or against the survivors.** *Rowe v. Shenandoah Pulp Co.*, 42 W. Va. 551, 26 S. E. 320, 57 Am. St. Rep. 870; *Tompkins v. Vintroux*, 3 W. Va. 148, 100 Am. Dec. 735.

[e] **The death of a tenant in common does not abate an action by them.** **Kan.**—*Crane v. Lowe*, 59 Kan. 600, 54 Pac. 666, an action of ejectment. **Mass.**



does not survive to or against either of the joint plaintiffs or defendants that the death of one abates the whole action.<sup>60</sup>

Under this statute, the fact of the death should be suggested on the record and the action continued in the name of the survivor as such.<sup>61</sup>

*Tyler v. Mather*, 9 Gray 177. *Me.* *Haven v. Brown*, 7 Greenl. 421, 22 Am. Dec. 208. *Tex.*—*Watrous' Heirs v. McGrew*, 16 Tex. 506. See *Shelby v. Guy*, 11 Wheat (U. S.) 361, 6 L. ed. 495, the right of action in a suit for an indivisible thing survives to a tenant in common.

[f] **Where a trustee dies in an action by trustees** regarding the trust property, the right survives to the others and the suit may be carried on in their names. *Nichols v. Campbell*, 10 Gratt. (51 Va.) 560.

[g] **On the death of one of several partners**, (1) the action does not abate and may be prosecuted in the name of the survivors (*Ala.*—*Southern Ry. Co. v. Hayes*, 73 So. 945; *Long v. Kansas City, M. & B. R. Co.*, 170 Ala. 635, 54 So. 62; *Davis v. Davis*, 93 Ala. 173, 9 So. 736; *Phoenix Ins. Co. v. Moog*, 81 Ala. 335, 1 So. 108. *Ga.*—*Watts v. Langston*, 135 Ga. 161, 68 S. E. 1115; *Crapp v. Dodd*, 92 Ga. 405, 17 S. E. 666. *Ind.*—*Newman v. Gates*, 165 Ind. 171, 72 N. E. 638 (law partners); *Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90, an action against doctors, partners, for malpractice. *Mass.*—*Hathaway v. Stone*, 215 Mass. 212, 102 N. E. 461. *Mich.*—*Van Kleeck v. McCabe*, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182. *Neb.*—*Dineen v. Lanning*, 92 Neb. 545, 138 N. W. 759. *N. Y.* *Shale v. Shantz*, 35 Hun 622; *Seligman v. Friedlander*, 138 App. Div. 784, 123 N. Y. Supp. 583. *Tex.*—*Blum v. Goldman*, 66 Tex. 621, 1 S. W. 899. *Utah.*—*Sweetser v. Fox*, 43 Utah 40, 134 Pac. 599, Ann. Cas. 1916C, 620, 47 L. R. A. [N. S.] 145), (2) except where the partnership itself is sole plaintiff or defendant. In such case, the personal representatives of the deceased partner should be substituted. *Phoenix Ins. Co. v. Carnahan*, 63 Ohio St. 258, 58 N. E. 805.

[h] **The death of a plaintiff in an action by two on behalf of a class** does not abate the suit. *Edwards v. Mercantile Trust Co.*, 121 Fed. 203 (this was an action by one on behalf

of a class in which another intervened before the death of the original plaintiff); *Hawkes v. Claffy*, 122 App. Div. 546, 107 N. Y. Supp. 534.

[i] **The death of a defendant in a foreclosure suit** who is not a necessary party does not abate the action as to the others. See *Howe v. Lemon*, 37 Mich. 164, discontinuing suit as to unnecessary party who died after decree, and 19 STANDARD PROC. 915.

**Abatement of creditors' suit**, see *supra*, 1, D, 4, h.

60. *Hess v. Lowrey*, 122 Ind. 225, 230, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90.

61. *U. S.*—*Thomas v. Green Co.*, 159 Fed. 339, 89 C. C. A. 405; *Wilhite v. Skelton*, 149 Fed. 67, 78 C. C. A. 635. *Ala.*—*Long v. Kansas City, M. & B. R. Co.*, 170 Ala. 635, 54 So. 62. *Ga.* *Crapp v. Dodd*, 92 Ga. 405, 17 S. E. 666. *Mich.*—*Seymour v. Bruske*, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691. *Miss.*—*Young v. Pickens & Green*, 45 Miss. 553. *Tex.*—*McAllen v. Crafts* (Tex. Civ. App.), 166 S. W. 3.

See the title "Revivor."

[a] **Service of a copy of the suggestion of the death** need not be made on the remaining parties, especially where the suggestion cannot be denied. *Bates v. Green*, 19 Wend. (N. Y.) 630.

[b] **Suggestion Nunc Pro Tunc.** Suggestion of the death of a party on error may be made after judgment as of the date of death and the judgment may be modified accordingly. *Seymour v. Bruske*, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691.

[c] **Waiver.**—A failure of a party to suggest the death of his co-party is an irregularity which may be waived by the survivor. *Seymour v. Bruske*, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691.

[d] **Order of Court.**—(1) It is usual to suggest the death and obtain an order that the cause proceed in the name of the survivor. But the formal entry of the order may be waived. *Thomas v. Green Co.*, 159 Fed. 339, 343, 89 C. C. A. 405. (2) The death being suggested of record, the case

The action abates as to the deceased,<sup>62</sup> and it is not necessary, to bring in the representative or successor of the deceased party.<sup>63</sup> In fact it is error to do so,<sup>64</sup> except where the statute authorizes it.<sup>65</sup> On the death of one of several defendants jointly and severally liable, statutes sometimes authorize revivor of the action against his representatives as a separate action, a revivor as a joint action against the survivors and the representatives not being allowable.<sup>66</sup>

**7. Effect of Time of Death on Abatement.** — a. *Generally.* — At common law the death of either party to a pending personal action, before verdict,<sup>67</sup> or before judgment<sup>68</sup> abates the suit, except where the death occurs pending a continuance for the purpose of argument

may proceed without further order against the survivors. *Crapp v. Dodd*, 92 Ga. 405, 17 S. E. 666.

[e] **The court of appeals on remanding the cause may direct the entry of judgment on making the proper suggestion of death and striking out of the names of the personal representatives.** *Thomas v. Green Co.*, 159 Fed. 339, 345, 89 C. C. A. 405.

[f] **Waiver.**—The statement of death is a matter of form and may be waived. *Thomas v. Green Co.*, 159 Fed. 339, 344, 89 C. C. A. 405. See *Wilhite v. Skelton*, 149 Fed. 67, 78 C. C. A. 635.

[g] **Where Part of Cause of Action Survives.**—In the case of the death of one of two or more plaintiffs or defendants, if part only the cause of action or part of two or more causes of action survives, the action may proceed under statute without bringing in the successor of the deceased party, but the court may require them to be brought in. *Lyon v. Park*, 111 N. Y. 350, 18 N. E. 863, the section seems to relate to equitable actions.

62. *Ill.*—*Gemmill v. Smith*, 274 Ill. 87, 113 N. E. 27. *Ind.*—*Hess v. Lowrey*, 122 Ind. 225, 23 N. E. 156, 17 Am. St. Rep. 355, 7 L. R. A. 90. *Okla.* *Gillespie v. First Nat. Bank*, 20 Okla. 768, 95 Pac. 220. *Tenn.*—*Heald v. Wallace*, 109 Tenn. 346, 71 S. W. 80. *Va.*—*Clarkson v. Booth*, 17 Gratt. (58 Va.) 490, 501. *W. Va.*—*Rowe v. Shenandoah Pulp Co.*, 42 W. Va. 551, 26 S. E. 320, 57 Am. St. Rep. 870.

63. *Long v. Kansas City M. & B. R. Co.*, 170 Ala. 635, 54 So. 62; *Hayes v. Miller*, 150 Ala. 621, 43 So. 818, 124 Am. St. Rep. 93, 11 L. R. A. (N. S.) 748; *Jameson v. Bartlett*, 63 Neb. 638, 88 N. W. 860.

64. *Hathaway v. Stone*, 215 Mass.

212, 102 N. E. 461; *Rowe v. Shenandoah Pulp Co.*, 42 W. Va. 551, 26 S. E. 320, 57 Am. St. Rep. 870.

[a] **Continuance of action by survivor and by the representative of the deceased partner is erroneous.** *Hathaway v. Stone*, 215 Mass. 212, 102 N. E. 461.

65. *U. S.*—*Moses v. Wooster*, 115 U. S. 285, 6 Sup. Ct. 38, 29 L. ed. 391. *Ill.*—*Ford v. St. Louis L. & I. Co.*, 176 Ill. App. 558. *Ind.*—*Newman v. Gates*, 165 Ind. 171, 72 N. E. 638. *Me.*—See *Treat v. Dwinel*, 59 Me. 341, which was pending at the time the statute was passed and was not affected thereby. *Mo.*—See *O'Rourke v. Kelly The Printer Corp.*, 156 Mo. App. 91, 135 S. W. 1011. *N. Y.*—*Lane v. Fenn*, 76 Misc. 48, 134 N. Y. Supp. 92. *Tex.* *Blum v. Goldman*, 66 Tex. 621, 1 S. W. 899, action against partners.

[a] **An order of court is necessary before issuance of summons against an heir under a statute providing that upon suggestion of the death of a defendant, summons shall by order of court issue against him.** *Ford v. St. Louis L. & I. Co.*, 176 Ill. App. 558.

66. *Union Bank v. Mott*, 27 N. Y. 633; *Mulligan v. O'Brien*, 119 App. Div. 355, 104 N. Y. Supp. 301; *German-American Coffee Co. v. O'Neil*, 102 Misc. 165, 169 N. Y. Supp. 421.

67. *Kan.*—*Green v. McMurry*, 20 Kan. 189, where party died before service of process. *Ohio.*—*Dial v. Holter*, 6 Ohio St. 228, 246. *Va.*—*Harris v. Crenshaw*, 3 Rand. (24 Va.) 14. *W. Va.*—*Henning v. Farnsworth*, 41 W. Va. 548, 23 S. E. 663.

68. *Green v. Watkins*, 6 Wheat. (U. S.) 260, 5 L. ed. 256; *Gould v. Carr*, 33 Fla. 523, 15 So. 250, 24 L. R. A. 130.

or advisement after verdict,<sup>69</sup> default, or motion for nonsuit, or judgment on the pleadings,<sup>70</sup> in which case the judgment is entered *nunc pro tunc* without a revival.<sup>71</sup> The early common-law rule as to abatement was changed by statutes in England where a party to the action died after verdict,<sup>72</sup> or interlocutory judgment,<sup>73</sup> and before final judgment.

b. *Death After Verdict or Decision.*<sup>74</sup> — The early common-law rule as to abatement of pending actions was modified by the statute of 17 Car. II, which provided that in all actions real, personal and mixed, the death of either party between verdict and judgment shall not be alleged for error.<sup>75</sup> Under this statute the judgment is entered for or against the party as though he were alive.<sup>76</sup> This statute has been incorporated in statutes providing<sup>77</sup> that on the death of a party after verdict of a jury or decision or finding of a court and before judgment, judgment shall be entered as if the death had not occurred.<sup>78</sup>

69. **U. S.**—*Mitchell v. Overman*, 103 U. S. 62, 26 L. ed. 369; *Lenoir Car Wks. v. Trinkle*, 228 Fed. 634, 143 C. C. A. 156. **Ga.**—*Skidaway Shell-Road Co. v. Brooks*, 77 Ga. 136. **Ind.**—*Valparaiso v. Chester*, 176 Ind. 636, 96 N. E. 765. **Mass.**—*Reid v. Holmes*, 127 Mass. 326; *Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336. **Mo.**—*Coulter v. Phoenix Brick & Const. Co.*, 131 Mo. App. 230, 110 S. W. 655. **N. H.**—*Blaisdell v. Harris*, 52 N. H. 191. **N. J.**—*Teneick v. Flagg*, 29 N. J. L. 25; *Den v. Tomlin*, 18 N. J. L. 14, 35 Am. Dec. 525. **N. Y.**—*Diefendorf v. House*, 9 How. Pr. 243. **N. C.**—*Beard v. Hall*, 79 N. C. 506. **W. Va.**—*Laidley v. Jasper*, 49 W. Va. 526, 39 S. E. 169. **Eng.**—*Key v. Goodwin*, 1 Moore & S. 620, 28 E. C. L. 493.

[a] In the federal courts in equity, the death of the defendant after submission of the cause does not abate the suit, and a decree may be entered without a revivor. *Childs v. Ferguson*, 181 Fed. 795, 104 C. C. A. 305.

70. **Mass.**—*Reid v. Holmes*, 127 Mass. 326. **N. H.**—*Blaisdell v. Harris*, 52 N. H. 191. **N. Y.**—*Spalding v. Congdon*, 18 Wend. 543. **Ore.**—*Mitchell v. Schoonover*, 16 Ore. 211, 8 Am. St. Rep. 282. **Eng.**—*Bull v. Price*, 7 Bing. 237, 20 E. C. L. 112, 131 Eng. Reprint 91.

[a] But see *Colson's Exrs. v. Wade's Exrs.*, 5 N. C. 43, holding the death of the defendant after entry of default against him and before the rendition of final judgment, or execution of a writ of inquiry causes an abatement, and invalidates a final

judgment subsequently entered. Compare *Sheldon v. Sheldon*, 37 Vt. 152.

71. As to entry of judgment *nunc pro tunc*, see 14 STANDARD PROC. 1025.

72. See *infra*, I, C, 7, b.

73. See *infra*, I, C, 7, c.

74. As to entry of judgment *nunc pro tunc*, see 14 STANDARD PROC. 1017, 1027.

75. *Wood v. Watson*, 107 N. C. 52, 12 S. E. 49, 10 L. R. A. 541; *Kramer v. Waymark*, 12 Jur. N. S. 395, L. R. 1 Exch. 241, 4 H. & C. 427, 35 L. J. Ex. 148, 14 L. T. N. S. 368, 14 Wkly. Rep. 659; *Palmer v. Cohen*, 2 B. & Ad. 966, 22 E. C. L. 404, 109 Eng. Reprint 1402, 17 Car. 2, c. 8, §1, enacts that in all actions, real, personal, and mixed, death of either party between verdict and judgment shall not be alleged for error if the judgment be entered within two terms after verdict. See 14 STANDARD PROC. 785.

76. *Hatch v. Eustis*, 1 Gall. 160, 11 Fed. Cas. No. 6,207.

77. *Millar v. St. Louis Transit Co.*, 216 Mo. 99, 115 S. W. 521, the statute is declaratory of the common law.

78. **U. S.**—*Gerling v. Baltimore & O. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 542, 38 L. ed. 311. **Cal.**—*Judson v. Love*, 35 Cal. 463; *John v. Superior Court*, 5 Cal. App. 262, 90 Pac. 53. **Ill.**—See *Murphy v. McGrath*, 79 Ill. 594. **Me.**—*Lewis v. Soper*, 44 Me. 72. **Minn.**—*Clay v. Chicago, M. & St. P. R. Co.*, 104 Minn. 1, 115 N. W. 949; *Cooper v. St. Paul City Ry. Co.*, 55 Minn. 134, 56 N. W. 588. **Mo.**—*Cole v. Parker-Washington Co.*, 207 S. W. 749; *Millar v. St. Louis Transit Co.*, 216 Mo. 99,



These statutes prevent the abatement of an action which would otherwise abate because of the nature of the cause of action.<sup>79</sup>

c. *Death After Interlocutory Judgment*.—By statute in England which is part of our common law, the death of a party after interlocutory judgment and before final judgment does not abate an action, if the cause of action survive.<sup>80</sup> Under this statute a scire facias to complete the proceedings is necessary,<sup>81</sup> and judgment is entered by or against the executor or administrator,<sup>82</sup> though some modern statutes provide for the entry of judgment in the names of the original parties.<sup>83</sup>

d. *Death After Final Judgment*.<sup>84</sup>—A final judgment of recovery

115 S. W. 521; *State ex rel. Meinhard v. Stratton*, 110 Mo. 426, 19 S. W. 803; *Sterling v. Parker-Washington Co.*, 185 Mo. App. 192, 170 S. W. 1156. **N. Y.** *Robinson v. Govers*, 138 N. Y. 425, 34 N. E. 209; *Corbett v. Twenty-Third St. R. Co.*, 114 N. Y. 579, 21 N. E. 1033; *Long v. Stafford*, 103 N. Y. 274, 8 N. E. 522; *Schramme v. Lewinson*, 123 App. Div. 662, 107 N. Y. Supp. 1075; *Hughes v. Russell*, 113 App. Div. 744, 99 N. Y. Supp. 203.

But see *Fox v. Hopkinson*, 19 R. I. 704, 36 Atl. 824.

[a] The word "decision" in the statute refers to a decision made by a court on a trial of issues without a jury. *Corbett v. Twenty-Third St. Ry. Co.*, 114 Ind. 579, 21 N. E. 1033.

[b] The death of a party after oral announcement of a decision in his favor does not abate the action. *Fulton v. Fulton*, 8 Abb. N. C. (N. Y.) 210. See, however, *Fox v. Hopkinson*, 19 R. I. 704, 36 Atl. 824, *limited* by *Sprague v. Greene*, 20 R. I. 153, 37 Atl. 699. Compare 8 STANDARD PROC. 993; 14 STANDARD PROC. 972.

[c] The word "verdict" refers to a verdict on which no judgment has been entered. *Millar v. St. Louis Transit Co.*, 216 Mo. 99, 115 S. W. 521.

[d] The death of a party after report of the referee will not prevent entry of judgment. The statute authorizing judgment on verdict after death of a party applies to judgment on referee's report. *Seranton v. Baxter*, 3 Sandf. 660, 1 Code R. N. S. (N. Y.) 88.

79. **Conn.**—*Brown v. Wheeler*, 18 Conn. 199. **Ga.**—*Skidaway Shell-Road Co. v. Brooks*, 77 Ga. 136. **Ind.**—*Valparaiso v. Chester*, 176 Ind. 636, 96 N. E. 765; *Hilker v. Kelley*, 130 Ind. 356, 30 N. E. 304, 15 L. R. A. 622.

But see *Indianapolis & St. L. Ry. Co. v. Stout*, 53 Ind. 143. **Mass.**—*Wilkins v. Wainright*, 173 Mass. 212, 53 N. E. 397. **Minn.**—*Clay v. Chicago, M. & St. P. R. Co.*, 104 Minn. 1, 115 N. W. 949; *Cooper v. St. Paul City Ry. Co.*, 55 Minn. 134, 56 N. W. 588. **N. Y.** *Wood v. Phillips*, 11 Abb. Pr. (N. S.) 1. But see *Matter of Crandall*, 196 N. Y. 127, 89 N. E. 578, 134 Am. St. Rep. 830, 17 Ann. Cas. 874, note. **Ohio.**—*Dial v. Holter*, 6 Ohio St. 228. **Eng.**—*Kramer v. Waymark*, 12 Jur. N. S. 395, L. R. 1 Exch. 241, 4 H. & C. 427, 35 L. J. Ex. 148, 14 L. T. N. S. 368, 14 Wkly. Rep. 659 (*overruling* *Ireland v. Champneys*, 4 Taunt. 885, 128 Eng. Reprint 580); *Palmer v. Cohen*, 2 B. & Ad. 966, 22 E. C. L. 404, 109 Eng. Reprint 1402.

80. **U. S.**—*Warren v. Furstenheim*, 35 Fed. 691, 1 L. R. A. 40. **Ga.**—*Skidaway Shell-Road Co. v. Brooks*, 77 Ga. 136. **Tex.**—*Boone v. Roberts*, 1 Tex. 147. **Eng.**—8 & 9 Will. III, c. 11.

81. *Warren v. Furstenheim*, 35 Fed. 691, 1 L. R. A. 40; *Hatch v. Eustis*, 1 Gall. 160, 11 Fed. Cas. No. 6,207; *Boone v. Roberts*, 1 Tex. 147. See the title "Revivor."

82. *Hatch v. Eustis*, 1 Gall. 160, 11 Fed. Cas. No. 6,207.

83. *Matter of Crandall*, 196 N. Y. 127, 89 N. E. 578, 134 Am. St. Rep. 830, 17 Ann. Cas. 874, note.

[a] Such a statute does not cause the survival of an action which would otherwise abate because the cause of action does not survive. *Matter of Crandall*, 196 N. Y. 127, 89 N. E. 578, 134 Am. St. Rep. 830, 17 Ann. Cas. 874, note.

84. Right to issue execution after death of party, see 15 STANDARD PROC. 764.

As to right to levy execution after

on the merits merges the cause of action,<sup>85</sup> and generally there is no abatement of the action on the death of a party after such a judgment,<sup>86</sup> even though the cause of action was one which would not have survived,<sup>87</sup> unless the judgment is in subsequent proceedings finally annulled, set aside, or reversed, in which event the effect of the death would depend upon the rules governing abatement before judgment.<sup>88</sup>

e. *Pending Motion for New Trial*.—A motion for new trial, if made at all, must follow either a verdict or judgment.<sup>89</sup> And, since either a verdict or judgment, if not subsequently set aside or reversed, operates to prevent an abatement in any case,<sup>90</sup> the effect of the death of a party pending such a motion depends upon the final disposition of the motion. If it is overruled there is no abatement.<sup>91</sup> But if the motion is finally granted, the verdict or judgment is annulled and

death of party, see 15 STANDARD PROC. 920.

85. See 15 STANDARD PROC. 485, et seq.

86. **Ark.**—*Chatfield v. Jarratt*, 108 Ark. 523, 158 S. W. 146; *Miller v. Nuckolls*, 76 Ark. 485, 89 S. W. 88, 113 Am. St. Rep. 101, 6 Ann. Cas. 513. **Cal.**—*Sherwin v. Southern Pac. Co.*, 168 Cal. 722, 145 Pac. 92; *Fowden v. Pacific Coast S. S. Co.*, 149 Cal. 151, 86 Pac. 178. **Conn.**—*Coit v. Sistare*, 85 Conn. 573, 84 Atl. 119, Ann. Cas. 1913C, 248. **Idaho.**—*Green v. Kandle*, 20 Idaho 190, 118 Pac. 90. **Ind.**—*Kelly v. Kelly*, 137 Ind. 690, 37 N. E. 545. **Md.**—See *Thomas v. Thomas*, 57 Md. 504. **Mo.**—*Sterling v. Parker-Washington Co.*, 185 Mo. App. 192, 170 S. W. 1156. **Tenn.**—*Heald v. Wallace*, 109 Tenn. 346, 71 S. W. 80; *Kimbrough v. Mitchell*, 1 Head 539. **W. Va.**—*Laidley v. Jasper*, 49 W. Va. 526, 39 S. E. 169.

87. **Ark.**—*Miller v. Nuckolls*, 76 Ark. 485, 89 S. W. 88, 113 Am. St. Rep. 101, 6 Ann. Cas. 513. **Cal.**—*Fowden v. Pacific Coast S. S. Co.*, 149 Cal. 151, 86 Pac. 178. **Ind.**—*Kelly v. Kelly*, 137 Ind. 690, 37 N. E. 545. **Tenn.**—*Akers v. Akers*, 16 Lea 7, 57 Am. Rep. 207; *Kimbrough v. Mitchell*, 1 Head 539. **Tex.**—*White v. Manning*, 46 Tex. Civ. App. 298, 102 S. W. 1160.

88. See *supra*, I, C, 1, a to e, and the following cases: **Ark.**—*Miller v. Nuckolls*, 76 Ark. 485, 89 S. W. 88, 113 Am. St. Rep. 101, 6 Ann. Cas. 513. **Cal.**—*Fowden v. Pacific Coast S. S. Co.*, 149 Cal. 151, 86 Pac. 178. **Ind.**—*Stout v. Indianapolis & St. L. R. Co.*, 41 Ind. 149. **Ky.**—*Shields' Admrs. v. Row-*

*land*, 151 Ky. 136, 151 S. W. 408. **Tenn.**—*Akers v. Akers*, 16 Lea 7, 57 Am. Rep. 207. **Tex.**—*Ellis v. Brooks*, 101 Tex. 591, 102 S. W. 94, 103 S. W. 1196.

[a] But see *Millar v. St. Louis Transit Co.*, 216 Mo. 99, 115 S. W. 521, holding that where judgment for plaintiff is set aside on motion for new trial, death pending appeal from the order abates the action.

[b] Where judgment is affirmed there is no abatement. *Fowden v. Pacific Coast S. S. Co.*, 149 Cal. 151, 86 Pac. 178; *Heald v. Wallace*, 109 Tenn. 346, 71 S. W. 80; *Akers v. Akers*, 16 Lea 7, 57 Am. Rep. 207; *Kimbrough v. Mitchell*, 1 Head (Tenn.) 539.

[c] A reversal by an intermediate appellate court does not destroy the judgment and abate the action, pending further review in a higher court. *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495, 21 Am. Rep. 385.

89. Whether made before or after judgment, see 20 STANDARD PROC. 410, 586.

90. See *supra*, I, C, 7, b to d.

A judgment merges the cause of action, notwithstanding a motion for new trial, in most jurisdictions. See 15 STANDARD PROC. 597.

91. **Cal.**—*Fowden v. Pacific Coast S. S. Co.*, 149 Cal. 151, 86 Pac. 178. **Ind.**—*Valparaiso v. Chester*, 176 Ind. 636, 96 N. E. 765. **Mass.**—*Wilkins v. Wainright*, 173 Mass. 212, 53 N. E. 397. **N. H.**—*Blaisdell v. Harris*, 52 N. H. 191. **N. Y.**—*Spalding v. Congdon*, 18 Wend. 543. **R. I.**—*Martin v. Hutchens*, 21 R. I. 258, 43 Atl. 70.

Entry of judgment *nunc pro tunc*, see 14 STANDARD PROC. 1017, 1028.

the suit abates unless the cause of action is one that survives in any event.<sup>92</sup>

f. *Death on Appeal or Error*.—At common law, the death of a plaintiff in error before errors assigned abates the writ of error but the death after errors assigned does not abate the writ. A writ of error is in no case abated by the death of the defendant in error before or after errors assigned.<sup>93</sup>

Where a party dies pending an appeal in the nature of a writ of error, the effect of the death depends upon whether the judgment is in favor of the plaintiff or defendant, since if it is in favor of the former, the cause of action, though it would otherwise abate by death, is merged in the judgment, which operates to prevent<sup>94</sup> any abate-

92. Cal.—*Sherwin v. Southern Pac. Co.*, 168 Cal. 722, 145 Pac. 92. Mo.—*Millar v. St. Louis Transit Co.*, 216 Mo. 99, 115 S. W. 521. N. Y.—*Benjamin's Exrs. v. Smith*, 17 Wend. 208.

[a] **Where Order Is Reversed on Appeal**.—The death of the plaintiff pending a motion for new trial does not abate the action although the motion is granted if the order is later reversed on appeal. *Sherwin v. Southern Pac. Co.*, 168 Cal. 722, 145 Pac. 92.

**Whether causes of action survive**, see *supra*, I, B, and *infra*, I, D.

93. See 2 STANDARD PROC. 230.

[a] **Criminal Cases**.—The common law rule that a writ of error does not abate by the death of the plaintiff in error after error joined, does not apply to criminal cases. *O'Sullivan v. People*, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143.

94. See *infra*, this note, and *supra*, I, C, 7, d.

[a] **Death of plaintiff after judgment in his favor and pending appeal by defendant**. Ala.—*Anniston v. Hurt*, 140 Ala. 394, 37 So. 220, 103 Am. St. Rep. 45. Conn.—*Barton v. New Haven*, 74 Conn. 729, 52 Atl. 403. Ind.—*Kelly v. Kelly*, 137 Ind. 690, 37 N. E. 545. La.—See *Howard v. Yale*, 27 La. Ann. 621. Mass.—*Rice v. Rice*, 184 Mass. 488, 69 N. E. 319. Mo.—*Crawford v. Chicago, R. I. & P. R. Co.*, 171 Mo. 68, 66 S. W. 350. N. Y.—*Carr v. Risher*, 119 N. Y. 117, 23 N. E. 296; *Blake v. Griswold*, 104 N. Y. 613, 11 N. E. 137. Ohio.—See *Coffman v. Finney*, 65 Ohio St. 61, 61 N. E. 155, 55 L. R. A. 794, both parties died. Tenn.—*Heald v. Wallace*, 109 Tenn. 346, 71 S. W. 80. Tex.—*Ellis v. Brooks*, 101 Tex. 591, 102 S. W. 94, 103 S. W. 1196;

*Brooke v. Clark*, 57 Tex. 105; *Galveston City R. Co. v. Nolan*, 53 Tex. 139; *Gibbs v. Belcher*, 30 Tex. 79. Wash.—*Wright v. Northern Pac. R. Co.*, 45 Wash. 432, 88 Pac. 832. *Contra*, *Miller v. Umbehower*, 10 Serg. & R. (Pa.) 31, holding the death of a plaintiff pending an appeal by the defendant from an award of arbitrators in an assault and battery suit abates the suit, notwithstanding statute provides that such award has the effect of a judgment.

[b] "The authorities are practically unanimous upon the proposition that although the cause of action is such that it would abate by the death of the plaintiff before judgment, the death of the plaintiff after judgment, and pending disposition of a writ of error or appeal in the nature of a writ of error, will not affect the judgment. As some of the cases say, the original wrong or claim is merged in the judgment which has all the attributes of a judgment in actions ex contractu. After the giving of the judgment, the controversy is over the judgment, and not over the original wrong. The judgment is not annulled during the pendency of such controversy, but simply suspended." *Fowden v. Pacific Coast S. S. Co.*, 149 Cal. 151, 154, 86 Pac. 178.

[c] **Where, after a verdict for the plaintiff is set aside and a verdict for the defendant directed, the plaintiff dies pending an appeal by him, the action does not abate, for if on the appeal the action of the trial judge should be reversed, the original verdict in favor of the plaintiff would be reinstated**. *Schramme v. Lewinson*, 123 App. Div. 662, 107 N. Y. Supp.



ment, unless it is subsequently finally set aside or reversed.<sup>95</sup> If, however, the judgment is in favor of the defendant, it has been held that the effect of death pending the appeal would be the same as though it had occurred before judgment; in other words, if the cause of action is one which survives there will be no abatement, but if the cause of action does not survive the proceedings will abate.<sup>96</sup>

Where the effect of an appeal is to vacate and annul the judgment below, as where it results in a trial de novo,<sup>97</sup> the death of a party pending the appeal has the same effect as an abatement as though it had occurred before judgment.<sup>98</sup> And in a divorce suit it has been held that so far as the mere marital status of the parties is concerned the appeal abates, but that so far as the decree may affect property rights the appeal may be continued.<sup>99</sup>

1075. But see *Millar v. St. Louis Transit Co.*, 216 Mo. 99, 115 S. W. 521.

[d] **Death of Defendant.**—*In re First Nat. Bank*, 49 Fed. 120.

95. See *supra*, I, C, 7, d.

[a] **Disposition of Case.**—When judgment by default is taken against a defendant in violation of a stipulation not to take any action in the defendant's absence and the plaintiff dies pending appeal, to set aside the judgment is equivalent to a dismissal of the suit, and therefore the judgment will be affirmed. *Marguard v. Rieter*, 30 Mo. 248.

96. See *infra*, this note.

[a] **Death of appellant**, the plaintiff in the trial. **U. S.**—*Martin's Admr. v. Baltimore & O. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 311. **Ind.**—*Hudson v. Indiana Union Tract Co.*, 50 Ind. App. 292, 98 N. E. 188. **Mo.**—*Woehrlin v. Schaffer*, 17 Mo. App. 442. **N. Y.**—*Matter of Tubbiolo*, 146 App. Div. 323, 130 N. Y. Supp. 776. **Tex.**—*Galveston City R. Co. v. Nolan*, 53 Tex. 139; *Harrison v. Moseley*, 31 Tex. 608. But see present Texas statute.

[b] **On death of respondent**, the defendant below, the action abates if the cause of action does not survive. *Iron Gate Bank v. Brady*, 184 U. S. 665, 22 Sup. Ct. 529, 46 L. ed. 739; *Davis v. Morgan*, 97 Mo. 79, 10 S. W. 881. But see *Schuschar v. Reimer*, 1 Daly (N. Y.) 459, 28 How. Pr. 514, holding that the parties on an appeal occupy the same relative position that was formerly occupied by the parties upon writ of error, and that as the death of the defendant in error does not

cause an abatement in any case, the death of the respondent, the defendant below, on an appeal from a judgment for the defendant for costs does not cause an abatement. To similar effect, see *Long v. Thompson*, 34 Ore. 359, 362, 55 Pac. 978, an action to recover possession of personality.

[c] **Reason of Rule.**—When judgment is for the defendant, the claim in suit is a simple claim and no more, and therefore on the death of a party pending appeal, the claim dies if it is one which would not otherwise survive. *Woehrlin v. Schaffer*, 17 Mo. App. 442. See also *Matter of Tubbiolo*, 146 App. Div. 323, 130 N. Y. Supp. 776.

97. See 2 STANDARD PROC. 325, 435; 18 STANDARD PROC. 265, 269, 308. See also the title "**Supersedeas and Stay of Proceedings.**"

98. **Ark.**—*Ragsdale v. Stuart*, 8 Ark. 268. **Ga.**—*Faith v. Carpenter*, 33 Ga. 79. **Ohio.**—*Long v. Hitchcock*, 3 Ohio 274. **Tenn.**—*Maskall v. Maskall*, 3 Sneed 208.

**Abatement by reversal or setting aside of judgment**, see *supra*, I, C, 7, d.

99. **Ark.**—*Strickland v. Strickland*, 80 Ark. 451, 97 S. W. 659. **Ia.**—See *Wood v. Wood*, 136 Iowa 128, 113 N. W. 492, 125 Am. St. Rep. 223, 12 L. R. A. (N. S.) 891. **Md.**—*Thomas v. Thomas*, 57 Md. 504. **Ore.**—*Nickerson v. Nickerson*, 34 Ore. 1, 48 Pac. 423, 54 Pac. 277. **Wash.**—*Dwyer v. Nolan*, 40 Wash. 459, 82 Pac. 746, 111 Am. St. Rep. 919, 1 L. R. A. (N. S.) 551.

See generally 7 STANDARD PROC. 809. **Substitution of parties in interest**, see 2 STANDARD PROC. 228, 232.

The mere fact that costs have been taxed against a party has been held not to affect the right to continue an appeal, which would otherwise abate by the death of a party.<sup>1</sup>

If the death occurs after submission of the case on appeal, and before decision, judgment may be rendered *nunc pro tunc* as of the date of submission,<sup>2</sup> when the delay in causing judgment to be entered is purely for the convenience of the court or of some of its members,<sup>3</sup> and in certain other cases where injustice would otherwise result to one or both of the parties of record,<sup>4</sup> provided the judgment thus to be entered can be operative and effective, as a judgment, from the day as of which it is entered.<sup>5</sup> It has been held that this may be done also when the respondent dies before argument, and his death is not known to the appellate court or counsel until after argument and decision.<sup>6</sup>

The matter of survival of appeals is oftentimes affected by statute.<sup>7</sup> Thus some statutes provide in effect that no cause shall abate by the death, pending appeal, of any party to the record.<sup>8</sup> These statutes sometimes, but not always, contain a proviso limiting their applica-

[a] But when an order for the payment of alimony is made, the amount due prior to the death of the defendant is recoverable in an independent action although the suit in which the order is made is abated by the death of the defendant. *In re Estate of Bell*, 210 Ill. App. 350.

1. *Posey v. Posey*, 113 Tenn. 588, 83 S. W. 1. See also *Matter of Tubbiolo*, 146 App. Div. 323, 130 N. Y. Supp. 776.

2. **U. S.**—*Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. ed. 804. **Ill.**—*O'Sullivan v. People*, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143. **Ky.**—*Wallace v. Wallace*, 150 Ky. 33, 150 S. W. 13. **N. Y.**—*Vroom v. Ditmas*, 5 Paige 528. **Okla.**—*Boyes v. Masters*, 28 Okla. 409, 114 Pac. 710, 33 L. R. A. (N. S.) 576.

As to judgments *nunc pro tunc* generally, see 14 STANDARD PROC. 1017, 1028.

[a] And if judgment has been rendered, the appellate court will, on a proper showing, set aside the judgment, recall the mandate, and direct the clerk to refile the opinion, and enter judgment *nunc pro tunc* as of the date when the case was submitted. *Boyes v. Masters*, 28 Okla. 409, 114 Pac. 710, 33 L. R. A. (N. S.) 576. But see *Wallace v. Wallace*, 150 Ky. 33, 150 S. W. 13, holding no order directing the judgment to take effect

as of the date of submission is necessary as the judgment will have that effect anyway.

3. *O'Sullivan v. People*, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143.

4. *O'Sullivan v. People*, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143.

5. *O'Sullivan v. People*, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143.

6. *Bank of United States v. Weisiger*, 2 Pet. (U. S.) 481, 7 L. ed. 492; *Vroom v. Ditmas*, 5 Paige (N. Y.) 528.

7. See the statutes, and the following cases: *Producers' Turpentine Co. v. Pringle*, 127 La. 850, 54 So. 124; *Holt v. Rice*, 51 N. H. 370.

[a] A statute, providing that no action, with certain exceptions, "pending in any court shall abate by the death of either party," prevents the abatement of a suit pending in the supreme court on appeal from a judgment in favor of the defendant. *Power v. Sumblor*, 83 Kan. 1, 110 Pac. 97.

8. **Ia.**—*Williams v. Williams*, 115 Iowa 520, 88 N. W. 1057. **Md.**—*Carroll v. Bowie*, 7 Gill. 34. **Tenn.**—*Posey v. Posey*, 113 Tenn. 588, 83 S. W. 1; *Young v. Officer*, 7 Yerg. 137. **Tex.**—*White v. Manning*, 46 Tex. Civ. App. 298, 102 S. W. 1160; *Pullman Palace-Car Co. v. Fowler*, 6 Tex. Civ. App. 755, 27 S. W. 268; *Compton v. Ashley*, 4 Tex. Civ. App. 406, 23 S. W. 487.

tion to suits in which the cause of action survives,<sup>9</sup> and even in the absence of such a proviso, they are sometimes construed to be so limited.<sup>10</sup> But even though the statute may be so limited, and the cause of action does not survive, no abatement takes place, in accordance with the rules already stated, if the judgment is for the plaintiff.<sup>11</sup>

**8. Abatement Where Several Causes of Action Are Joined.**—The abatement of one of several independent counts or causes of action does not affect the remaining counts if they would survive had they been sued on alone.<sup>12</sup>

**9. Stipulation for Survival.**—A stipulation is valid and binding which provides for the survival of an action in the event of death and on the strength of which a continuance is secured.<sup>13</sup>

D. SURVIVAL OF PARTICULAR ACTIONS AND CAUSES OF ACTION.

**1. Ex Contractu.**—a. *Generally.*—It is a general rule that actions and causes of action founded upon contracts may be maintained by and against executors and administrators.<sup>14</sup> This is due rather to the

9. *Billups v. Freeman*, 5 Ariz. 268, 52 Pac. 367.

[a] **An action to enjoin a liquor nuisance**, from its nature as being injunctive and penal, abates on the death of the defendant pending appeal from an order sustaining a demurrer to the bill or complaint. *Babbitt v. Corrigan*, 157 Iowa 382, 138 N. W. 466.

[b] **In Texas**, under the present statute, (1) suits do not abate by the death of a party after appeal perfected, even though the cause of action may be one which does not survive. *White v. Manning*, 46 Tex. Civ. App. 298, 102 S. W. 1160. (2) It was otherwise under an earlier statute, although even under such statute, the action did not abate if the judgment was for the plaintiff. *Brooke v. Clark*, 57 Tex. 105.

10. See *infra*, this note.

[a] **In Tennessee**, a statute providing that no appeal or writ of error in any cause shall abate by the death of either plaintiff or defendant is to be construed in connection with a statute providing that actions do not abate by death of a party if the cause of action survives. If then the cause of action does not survive, an appeal abates. Since a cause of action to have a person declared a lunatic does not survive, an appeal from a judgment against the defendant cannot be revived after his death pending appeal, even though costs are adjudged against him. *Posey v. Posey*, 113 Tenn. 588, 83 S. W. 1.

11. *Brooke v. Clark*, 57 Tex. 105; *Galveston City R. Co. v. Nolan*, 53 Tex. 139.

12. *Reed v. Peoria & O. R. Co.*, 18 Ill. 403.

[a] **As to Matters in Aggravation.** Where plaintiff in an action of trespass to his close sets up by way of aggravation other acts of trespass to personalty, and the action of trespass to the close abates by the death of a party, the whole action falls. *Reed v. Peoria & O. R. Co.*, 18 Ill. 403.

13. *Cox v. New York Central & H. R. R. Co.*, 63 N. Y. 414.

14. **U. S.**—*Bates v. Dresser*, 229 Fed. 772, 798. **Ala.**—*Parker's Admr. v. Abrams*, 50 Ala. 35. **Ark.**—*Hughes v. Kelley*, 95 Ark. 327, 129 S. W. 784. **Conn.**—*Booth's Admr. v. Northrop*, 27 Conn. 325. **Fla.**—*Jacksonville St. Ry. Co. v. Chappell*, 22 Fla. 616, 1 So. 10. **Ill.**—*Stow v. Robinson*, 24 Ill. 532. **Ind.**—*Feary v. Hamilton*, 140 Ind. 45, 39 N. E. 516; *Hedekin v. Gillespie*, 33 Ind. App. 650, 72 N. E. 143. **Minn.**—*Baxter v. Brandenburg*, 137 Minn. 259, 163 N. W. 516. **N. H.**—*Jenkins v. French*, 58 N. H. 532; *Brewster v. Brewster*, 52 N. H. 52. **N. Y.**—*Holsman v. St. John*, 90 N. Y. 461; *German-American Coffee Co. v. Johnston*, 168 App. Div. 31, 153 N. Y. Supp. 866; *Austin, Baldwin & Co. v. Kohler*, 92 Misc. 174, 155 N. Y. Supp. 196; *Wing v. Ketcham*, 3 How. Pr. 385, 2 Code Rep. 3. **N. C.**—*Miller v. Leach*, 95 N. C. 229. **S. C.**—*Lorick v. Palmetto Nat. Bank*, 76 S. C. 500, 57 S. E. 527; *Jenkins v. Bennett*, 40 S. C. 393, 18 S. E. 929. **Tenn.**



substance of the action than its form,<sup>15</sup> and the rule is not absolutely true,<sup>16</sup> the survival being confined to cases where property and property rights are affected.<sup>17</sup> Where a contract is personal and its breach results in an injury purely personal in character, a cause of action thereon does not survive,<sup>18</sup> unless some special damage to the personal estate can be stated on the record,<sup>19</sup> as the cause of action is virtually for injury to the person.<sup>20</sup> But the averment of incidental injury to the estate does not save the action.<sup>21</sup>

**Express and Implied Contracts.**—Whether the contract is express<sup>22</sup> or

Governor *v.* McManus' Admr., 11 Humph. 152. **Va.**—Lee's Admr. *v.* Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666. **Vt.**—Miller *v.* Williams, 30 Vt. 386. **Eng.**—Hambly *v.* Trott, 1 Cowp. 371, 98 Eng. Reprint 1136.

[a] Although the pleading may set up allegations appropriate to an action of tort, the action, if in contract, survives. Lorick *v.* Palmetto Nat. Bank, 76 S. C. 500, 57 S. E. 527.

[b] An action of debt survives. Larned *v.* Wilcox, 4 Mich. 333.

[c] A cause of action arising on covenant survives. Sprague *v.* Greene, 20 R. I. 153, 37 Atl. 699.

[d] An action on a promissory note does not abate on death of a party. Williams *v.* Carr, 4 Colo. App. 363, 36 Pac. 644.

[e] An action on a judgment survives. Miller *v.* Leach, 95 N. C. 229.

[f] An action to set aside a judgment does not abate on death of a party. Burnett *v.* Milnes, 148 Ind. 230, 46 N. E. 464, judgment denying probate of will.

**Contract of carrier**, see *infra*, I, D, 2, f, (II).

**Contract of physician**, see *infra*, I, D, 2, f, (III).

**Contract of attorney**, see *infra*, I, D, 2, i.

15. Feary *v.* Hamilton, 140 Ind. 45, 39 N. E. 516; Hedekin *v.* Gillespie, 33 Ind. App. 650, 72 N. E. 143.

16. Stanley *v.* Vogel, 9 Mo. App. 98; Hayden *v.* Vreeland, 37 N. J. L. 372, 18 Am. Rep. 723.

17. Lattimore *v.* Simmons, 13 Serg. & R. (Pa.) 183. See also cases in following notes.

[a] The true test at common law as to whether an action survives against the executor is whether the action has its basis in a property right and necessarily involved the breach of

a contract obligation. Stanley *v.* Vogel, 9 Mo. App. 98.

18. **Cal.**—Janin *v.* Browne, 59 Cal. 37; Vraghizan *v.* Savings U. B. & T. Co., 31 Cal. App. 709, 161 Pac. 507. **Mass.**—Browne *v.* Fairhall, 218 Mass. 495, 106 N. E. 177; Stebbins *v.* Palmer, 1 Pick. 71, 11 Am. Dec. 146. **N. H.** Vittum *v.* Gilman, 48 N. H. 416. **Pa.** White's Exrs. *v.* Com., 39 Pa. 167. **Va.** Lee's Admr. *v.* Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666; Grubb's Admr. *v.* Sult, 32 Gratt. (73 Va.) 203, 34 Am. Rep. 765. **Eng.** Finlay *v.* Chirney, 20 Q. B. Div. 494, 57 L. J. Q. B. 247, 58 L. T. N. S. 664, 36 Wkly. Rep. 534, 52 J. P. 324.

See *infra*, I, D, 1, c, and I, D, 2, f, (III).

[a] **Executory contracts with artists** to paint a picture, or with an author to write a book do not survive the death of the artist or author. White's Exrs. *v.* Com., 39 Pa. 167.

[b] **Where Damage Is Personal Suffering.**—An executor or administrator cannot maintain an action upon an express or implied promise to the deceased where the damage consists entirely of the personal suffering of the deceased, whether mental or corporeal. Zabriskie *v.* Smith, 13 N. Y. 322, 333, 64 Am. Dec. 551.

19. Lee's Admr. *v.* Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666; Grubb's Admr. *v.* Sult, 32 Gratt. (73 Va.) 203, 34 Am. Rep. 765. See *infra*, I, D, 1, c.

20. Zabriskie *v.* Smith, 13 N. Y. 322, 333, 64 Am. Dec. 551.

21. See *infra*, I, D, 2, b.

22. **U. S.**—Philadelphia, H. & P. R. Co. *v.* Lederer, 239 Fed. 184. **Mass.** Stebbins *v.* Palmer, 1 Pick. 71, 11 Am. Dec. 146. **N. Y.**—German-American Coffee Co. *v.* Johnston, 168 App. Div. 31, 153 N. Y. Supp. 866. **Tenn.** Governor *v.* McManus' Admr., 11

implied, or whether the debt is certain or uncertain,<sup>23</sup> is immaterial on the question of survival.

b. *Bonds*.—A cause of action on a bond survives,<sup>24</sup> although the act which causes a breach may be tortious.<sup>25</sup>

c. *Breach of Promise of Marriage*.—Causes of action for breach of promise of marriage do not survive to or against the personal representatives, at common law, and in the absence of statute to the contrary,<sup>26</sup> unless, at least special damage is proved, or there is some immediate injury to property,<sup>27</sup> for otherwise, the cause of action is

Humph. 152. **Eng.**—*Knights v. Quarles*, 2 Brod. & B. 102, 6 E. C. L. 55, 129 Eng. Reprint 896.

[a] A cause of action in *assumpsit* upon an implied contract to return money wrongfully received survives. *Philadelphia, H. & P. R. Co. v. Lederer*, 239 Fed. 184.

[b] A cause of action for recovery of taxes wrongfully collected survives. *Philadelphia, H. & P. R. Co. v. Lederer*, 239 Fed. 184; *Tamble v. Pullman Co.*, 207 Fed. 30, 124 C. C. A. 590.

23. *Stebbins v. Palmer*, 1 Pick. (Mass.) 71, 11 Am. Dec. 146.

24. **Ind.**—*State ex rel. Niece v. Soale*, 36 Ind. App. 73, 74 N. E. 1111. **Minn.**—*Koski v. Pakkala*, 121 Minn. 450, 141 N. W. 793, 47 L. R. A. (N. S.) 183. **N. C.**—*Martin v. Martin*, 162 N. C. 41, 77 S. E. 1104; *Davenport v. McKee*, 98 N. C. 500, 4 S. E. 545. **Okl.** *Zahn v. Obert*, 159 Pac. 298. **Tex.** *Jordan v. David*, 20 Tex. 712.

25. See *infra*, this note.

[a] But see *Melvin v. Evans*, 48 Mo. App. 421, holding that an action against an officer and his sureties on his bond, abates as to all when the cause of action against the principal abates, because the bond, though a contract, only obligates the sureties to respond to a legal cause of action so long as it remains; if the cause of action ceases to exist against the wrong-doing principal, there is nothing to which a liability on the part of the surety can attach.

[b] An action on a liquor dealer's bond based on injury to the means of support of a widow by unlawful sale of liquor to the husband, survives the death of the principal. **Ind.**—*American Surety Co. v. State*, 46 Ind. App. 126, 90 N. E. 99, 91 N. E. 624, *citing cases*. **Minn.**—*Koski v. Pakkala*, 121 Minn. 450, 141 N. W. 793, 47 L. R. A. (N. S.) 183. **S. D.**—*Garrigan v. Hun-*

*timer*, 20 S. D. 182, 105 N. W. 278. But see *Ellis v. Brooks*, 101 Tex. 591, 102 S. W. 94, 103 S. W. 1196; *White v. Manning*, 46 Tex. Civ. App. 298, 102 S. W. 1160, where there was a sale of liquor to a minor.

26. **Cal.**—*Vraghizan v. Savings Union B. & T. Co.*, 31 Cal. App. 709, 161 Pac. 507. **Mass.**—*Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336; *Smith v. Sherman*, 4 Cush. 408; *Stebbins v. Palmer*, 1 Pick. 71, 11 Am. Dec. 146. **Mo.** *Melvin v. Evans*, 48 Mo. App. 421; *Stanley v. Vogel*, 9 Mo. App. 98. **N. J.** *Hayden v. Vreeland*, 37 N. J. L. 372, 377, 18 Am. Rep. 723. **N. Y.**—*Wade v. Kalbfleisch*, 58 N. Y. 282, 16 Abb. Pr. (N. S.) 104, 17 Am. Rep. 250; *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; *Larocque v. Conheim*, 42 Misc. 613, 87 N. Y. Supp. 625. **Ohio.** *Cardington v. Fredericks' Admr.*, 46 Ohio St. 442, 21 N. E. 766. **Pa.**—*Lattimore v. Simmons*, 13 Serg. & R. 183. **Tenn.**—*Weeks v. Mays*, 87 Tenn. 442, 10 S. W. 771, 3 L. R. A. 212. **Va.** *Grubb's Admr. v. Sult*, 32 Gratt. (73 Va.) 203, 34 Am. Rep. 765. **Eng.**—*Finlay v. Chirney*, 20 Q. B. Div. 494, 57 L. J. Q. B. 247, 58 L. T. N. S. 664, 36 Wkly. Rep. 534, 52 J. P. 324; *Hambly v. Trott*, 1 Cowp. 371, 98 Eng. Reprint 1136.

27. **Mass.**—*Kelley v. Riley*, 106 Mass. 339, 8 Am. Rep. 336. **Mo.**—*Stanley v. Vogel*, 9 Mo. App. 98. **Pa.** See *Lattimore v. Simmons*, 13 Serg. & R. 183, query. **Va.**—*Grubb's Admr. v. Sult*, 32 Gratt. (73 Va.) 203, 34 Am. Rep. 765, query.

[a] Special damage within the rule can exist only where beside the promise to marry, there is at the time of the making of the contract another promise affecting the personal property of one party or the other. *Finlay v. Chirney*, 20 Q. B. Div. (Eng.) 494,

virtually for injury to the person.<sup>28</sup> And when special damage results, the cause would survive only as to the special damage.<sup>29</sup> Statutes have sometimes provided for the survival of causes of action and pending actions for breach of promise, however.<sup>30</sup>

**2. Ex Delicto.**—a. *Generally.*—As a general rule, causes of actions of tort abate upon the death of either party.<sup>31</sup> Since the statutes of Edward III, as we have already seen, an executor or administrator may maintain an action de bonis asportatis to recover the value of property taken from his decedent.<sup>32</sup> On the other hand, if by means of the tort, property is acquired which benefits<sup>33</sup> the de-

500, 57 L. J. Q. B. 247, 58 L. T. N. S. 664, 36 Wkly. Rep. 534, 52 J. P. 324.

[b] **Providing herself with a trossseau is not special damage** within the rule when not made under circumstances bringing the expenditure under the head of damages flowing directly from the breach or within the contemplation of the parties. *Finlay v. Chirney*, 20 Q. B. Div. (Eng.) 494, 57 L. J. Q. B. 247, 58 L. T. N. S. 664, 36 Wkly. Rep. 534, 52 J. P. 324.

[c] **The giving up of a position may be special damage** if brought to the knowledge of the other party at the time of the contract, but not afterwards. *Finlay v. Chirney*, 20 Q. B. Div. (Eng.) 494, 57 L. J. Q. B. 247, 58 L. T. N. S. 664, 36 Wkly. Rep. 534, 52 J. P. 324.

[d] **Seduction and subsequent birth of a child at the time of the promise of marriage is not special damage** within the rule. *Finlay v. Chirney*, 20 Q. B. Div. (Eng.) 494, 57 L. J. Q. B. 247, 58 L. T. N. S. 664, 36 Wkly. Rep. 534, 52 J. P. 324.

28. *Zabriskie v. Smith*, 13 N. Y. 322, 333, 64 Am. Dec. 551.

29. *Finlay v. Chirney*, 20 Q. B. Div. (Eng.) 494, 500, 57 L. J. Q. B. 247, 58 L. T. N. S. 664, 36 Wkly. Rep. 534, 52 J. P. 324.

30. **La.**—*Johnson v. Levy*, 122 La. 118, 47 So. 422; *Johnson v. Levy*, 118 La. 447, 43 So. 46, 118 Am. St. Rep. 378, 9 L. R. A. (N. S.) 1020, under statute that heirs may be sued for injuries caused by crimes and misdemeanors of deceased, a claim for compensatory damages for breach of promise survives. **Mont.**—*Kennedy v. Rogan*, 52 Mont. 242, 156 Pac. 1078, under general survival law. **N. H.**—*Stewart v. Lee*, 70 N. H. 181, 46 Atl. 31, under statute providing all causes of action survive except actions to recover pen-

alties. **N. C.**—*Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444; *Shuler v. Mill-sap's Exr.*, 71 N. C. 297.

[a] **Application of Statutes.**—(1) A cause of action for breach of promise of marriage is not an action on contract within a statute providing for survival of such actions. *Wade v. Kalbfleisch*, 58 N. Y. 282, 16 Abb. Pr. (N. S.) 104, 17 Am. Rep. 250. (2) Nor is it an action for damage to the person. *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Smith v. Sherman*, 4 Cush. (Mass.) 408. (3) Under statute providing no action shall abate except actions for wrongs affecting the character of the plaintiff, an action for breach of contract of marriage abates on death of a party. *Hullett v. Baker*, 101 Tenn. 689, 49 S. W. 757; *Weeks v. Mays*, 87 Tenn. 442, 10 S. W. 771, 3 L. R. A. 212.

31. *Bates v. Sylvester*, 205 Mo. 493, 498, 104 S. W. 73, 120 Am. St. Rep. 761, 11 L. R. A. (N. S.) 1157; *Willard v. Mohr*, 24 N. D. 386, 139 N. W. 981, statute has not changed the common law rule. See *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 18, 70 N. W. 289, 71 N. W. 109.

[a] **An action for enticing away a servant, being in tort, does not survive.** *Huff v. Watkins*, 20 S. C. 477.

[b] **A cause of action for damages for mutilation of a corpse does not survive.** *Jones v. Miller*, 35 Wash. 499, 77 Pac. 811.

[c] **A cause of action under the Sherman Anti-Trust Act for the recovery of triple damages sounds in tort, and abates on the death of the party.** *Caillouet v. American Sugar Ref. Co.*, 250 Fed. 639.

32. See *supra*, I, B, 1.

33. **U. S.**—*United States v. Daniel*, 6 How. 11, 12 L. ed. 323. **Ala.**—*Wynn v. Tallapoosa Co. Bank*, 168 Ala. 469,



ceased, then the cause of action survives against the personal representative. However, a recovery cannot be had in an action *ex delicto*;<sup>34</sup> the tort must be waived and *assumpsit* brought.<sup>35</sup> But in the absence of statute there is no remedy for an injury to person or property not benefiting the estate of the wrongdoer.<sup>36</sup> Statutes, however, generally correct this defect of the common law,<sup>37</sup> and sometimes provide for a survival of actions by or against a personal representative for the wasting, destruction or removal of goods and chattels of and by his decedent,<sup>38</sup> or for wrongs to property, rights or interests of another,<sup>39</sup> or for damage to real and personal estate,<sup>40</sup>

495, 53 So. 228. **Cal.**—*Fox v. Hale & Norcross S. M. Co.*, 108 Cal. 478, 41 Pac. 328. **Colo.**—*Mumford v. Wright*, 12 Colo. App. 214, 55 Pac. 744. **Ga.** *Petts v. Ison*, 11 Ga. 151, 56 Am. Dec. 419. **Mass.**—*Wilbur v. Gilmore*, 21 Pick. 250. **Mo.**—*Melvin v. Evans*, 48 Mo. App. 421. **N. H.**—*Vittum v. Gilman*, 48 N. H. 416. **N. Y.**—*Hegerich v. Keddle*, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25. **R. I.**—*Moies v. Sprague*, 9 R. I. 541.

[a] If a man take a horse from another and bring him back again, trespass will not lie against the executor but an action for use and hire will. *Hambly v. Trott*, 1 Cowp. 371, 98 Eng. Reprint 1136.

34. **U. S.**—*United States v. Daniel*, 6 How. 11, 12 L. ed. 323. **R. I.**—*Moies v. Sprague*, 9 R. I. 541. **Eng.**—*Hambly v. Trott*, 1 Cowp. 371, 98 Eng. Reprint 1136.

35. **Ala.**—*Wynn v. Tallapoosa Co. Bank*, 168 Ala. 469, 495, 53 So. 228. **Cal.**—*Vragnizan v. Savings Union B. & T. Co.*, 31 Cal. App. 709, 161 Pac. 507. **R. I.**—*Moies v. Sprague*, 9 R. I. 541. **Eng.**—*Hambly v. Trott*, 1 Cowp. 371, 98 Eng. Reprint 1136.

See generally the title "*Assumpsit*."

36. **U. S.**—*United States v. Daniel*, 6 How. 11, 12 L. ed. 323. **R. I.**—*Moies v. General Elec. Co.*, 245 Fed. 120. **Conn.** *Payne's Appeal*, 65 Conn. 397, 32 Atl. 948, 48 Am. St. Rep. 215, 33 L. R. A. 418. **Mass.**—*Cravath v. Plympton*, 13 Mass. 454. **Mo.**—*Melvin v. Evans*, 48 Mo. App. 421.

37. See generally the statutes and *Johnson v. Levy*, 118 La. 447, 43 So. 46, 118 Am. St. Rep. 378, 9 L. R. A. (N. S.) 1020; *Hegerich v. Keddle*, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25.

38. *Harker v. Clark*, 57 Cal. 245; *Coleman v. Woodworth*, 28 Cal. 567.

[a] **The Term "Goods" Includes Money.**—*Patton v. Brady*, 184 U. S. 608, 22 Sup. Ct. 493, 46 L. ed. 713.

[b] **An action for damages for wrongful appointment of a receiver survives under a statute providing for maintenance of actions against executors for waste, destruction or conversion of goods of a person.** *Thornton-Thomas Merc. Co. v. Bretherton*, 32 Mont. 80, 80 Pac. 10.

39. *Bates v. Sylvester*, 205 Mo. 493, 498, 104 S. W. 73, 120 Am. St. Rep. 761, 11 L. R. A. (N. S.) 1157; *Snyder v. Wabash, St. L. & P. Ry. Co.*, 86 Mo. 613; *Stanley v. Vogel*, 9 Mo. App. 98; *Hegerich v. Keddle*, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25; *Cregin v. Brooklyn Crosstown R. R. Co.*, 75 N. Y. 192, 31 Am. Rep. 459; *Bank of California v. Collins*, 5 Hun 209.

[a] **Statute Construed.**—"The rights and interests, for tortious injuries to which this statute preserves the right of action . . . must be pecuniary rights or interests, by injuries to which the estate of the deceased is diminished." This language is not confined to direct injuries to property but includes all injuries to the rights or interests of a deceased person except those specifically excepted, even though the wrong may be effected by means of an injury to the person of some party other than the plaintiff. *Cregin v. Brooklyn Crosstown R. Co.*, 75 N. Y. 192, 31 Am. Rep. 459. The statute is confined to injuries to property rights only and such as were enforceable by the deceased. *Hegerich v. Keddle*, 99 N. Y. 258, 1 N. E. 787, 52 Am. Rep. 25.

[b] **Whether the wrongdoer profited by the wrong is immaterial on the question of survival.** *Mayer v. Ertheimer*, 144 App. Div. 158, 128 N. Y. Supp. 807.

40. See *infra*, this section.

for injury to real or personal property,<sup>41</sup> or for trespass to property real or personal.<sup>42</sup> Some statutes provide for survival of pending actions only.<sup>43</sup>

**Damage to Estate.**—There is some diversity of opinion as to what is meant by "damage to estate" within the meaning of the survival statute.<sup>44</sup> Generally it is held that the damage must be confined to damage done to some specific property of which one may be the owner.<sup>45</sup>

41. See generally the statutes.

[a] **Actions for injury to personal property apply only** to actions for damage to tangible articles and things movable,—to chattels as distinguished from actions for damage to one's business. *Jones v. Barmm*, 217 Ill. 381, 75 N. E. 505; *Dempster v. Lansingh*, 166 Ill. App. 261.

[b] **Malicious interference with business is not** "injury to personal property." *Jones v. Barmm*, 217 Ill. 381, 75 N. E. 505.

42. *Tichenor v. Hayes*, 41 N. J. L. 193, 32 Am. Rep. 186; *Ten Eyck v. Runk*, 31 N. J. L. 428.

[a] **The word "trespass" means** "tort" or "wrong" and embraces consequential injuries as well as injuries upon specific property remedial by trespass vi et armis. *Pushcart v. New York Shipbuilding Co.*, 86 N. J. L. 444, 92 Atl. 81; *Tichenor v. Hayes*, 41 N. J. L. 193, 32 Am. Rep. 186; *Ten Eyck v. Runk*, 31 N. J. L. 428.

43. *Smith v. Jones*, 138 Ga. 716, 76 S. E. 40, construing Code, 1910, §442.

44. See *infra*, this section.

[a] **The word "estate" is broad enough** to cover every description of vested right and interest attached to and growing out of property. *Lee's Admr. v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666.

[b] **A contract whereby a man secures employment** for wages is property and its violation is damage to his estate. *Lee's Admr. v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666.

[c] **Where Damage Is Natural Consequence.**—The statute "provides not only for cases of trespass, where the injury is not only the direct but the immediate effect of a wrongful act forcibly done, but for actions of the case, where the damages are not immediate, but, to be recoverable, must be the natural and proximate consequence of the wrongful act alleged." *Aldrich v. Howard*, 8 R. I. 125, followed

in *Aylsworth v. Curtis*, 19 R. I. 517, 34 Atl. 1109, 61 Am. St. Rep. 785, 33 L. R. A. 110.

45. **Mass.**—*Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833; *Keating v. Boston Elev. R. Co.*, 209 Mass. 278, 95 N. E. 840; *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; *Leggate v. Moulton*, 115 Mass. 552; *Read v. Hatch*, 19 Pick. 47. **Ohio.**—*Wolf v. Wall*, 40 Ohio St. 111. **R. I.**—*Young v. Aylesworth*, 35 R. I. 259, 86 Atl. 555. **Vt.**—*Davis v. Carpenter*, 72 Vt. 259, 47 Atl. 778. **Wis.**—*Lane v. Frawley*, 102 Wis. 373, 78 N. W. 593; *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 19, 70 N. W. 289, 71 N. W. 109.

But see *Bellows v. Allen's Admr.*, 22 Vt. 108; *Dana v. Lull*, 21 Vt. 383 (holding the statute is to be construed liberally and includes a case where a sheriff having attached property failed to apply it to plaintiff's execution); *Great Western Min. & Mfg. Co. v. Harris*, 96 Fed. 503, under the Vermont practice the survival depends on whether property or assets are affected or a mere personal liability is created.

[a] **The statute includes** (1) "only those cases where injury is occasioned to property by the direct wrongful act of a party" upon the property. *Cutting v. Tower*, 14 Gray (Mass.) 183; *Frohlich v. Deacon*, 181 Mich. 255, 148 N. W. 180, Ann. Cas. 1916C, 722; *Stebbins v. Dean*, 82 Mich. 385, 46 N. W. 778. (2) It relates only to "injuries of a specific character to real or personal estate." *Rockwell v. Furness*, 215 Mass. 557, 102 N. E. 914.

[b] **Causes of action for damage to personal estate include** those for damages to every species of property not of a freehold character, to goods and chattels as well as to rights and credits. *Bellows v. Allen's Admr.*, 22 Vt. 108.

[c] **An action for malicious interference with contractual rights** does not survive not being damage to personal

Whether the wrong is caused by force or fraud is immaterial.<sup>46</sup> But the statute does not embrace injuries by which one is subjected indirectly to pecuniary loss.<sup>47</sup> Nor does it embrace damages to property which are merely consequent upon a wrongful act upon the person only.<sup>48</sup>

b. *Distinction Between Torts Affecting the Person and Property.* The line of demarcation separating the causes of actions in tort which survive from those which do not is that in the first case the wrong complained of affects primarily and principally property rights and the injuries to the person are merely incidental, while in the latter, the injury complained of is to the person, and the property and property rights are only incidentally affected.<sup>49</sup> Where the injury to

estate. *Lee v. Fisk*, 222 Mass. 418, 109 N. E. 833.

[d] **A suit by a receiver to recover money** wrongfully paid by a corporation while insolvent is an action for damage to personal estate. *Great Western Min. & Mfg. Co. v. Harris*, 96 Fed. 503.

**Services of child as "personal estate,"** see *infra*, I, D, 2, k.

46. *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429.

47. **U. S.**—*Iron Gate Bank v. Brady*, 134 U. S. 665, 22 Sup. Ct. 529, 46 L. ed. 739; *Henshaw v. Miller*, 17 How. 212, 224, 15 L. ed. 222. **Mass.**—*Keating v. Boston Elev. R. Co.*, 209 Mass. 278, 95 N. E. 840; *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; *Read v. Hatch*, 19 Pick. 47. **Ohio.**—*Wolf v. Wall*, 40 Ohio St. 111. **R. I.**—*Aylsworth v. Curtis*, 19 R. I. 517, 34 Atl. 1109, 61 Am. St. Rep. 785, 33 L. R. A. 110; *Reynolds v. Hennessy*, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639, the difficulty generally is in drawing the line between tortious acts which must be held to damage one's personal estate and those which do not. **Va.**—*Lee's Admr. v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666. But see *Dana v. Lull*, 21 Vt. 383.

[a] **Mere fraud or cheat by which one sustains pecuniary loss** cannot be regarded as a damage to personal estate. **Mass.**—*Rockwell v. Furness*, 215 Mass. 557, 102 N. E. 914; *Jenks v. Hoag*, 179 Mass. 583, 61 N. E. 221, *Leggate v. Moulton*, 115 Mass. 552. **Vt.** *Jones v. Estate of Ellis*, 68 Vt. 544, 35 Atl. 488. **Wis.**—*Lane v. Frawley*, 102 Wis. 373, 78 N. W. 593; *John V. Farwell Co. v. Wolf*, 96 Wis. 10, 70 N. W. 289, 71 N. W. 109.

[b] **An action on the case for false representation as to the credit of another's** whereby the plaintiff was induced to part with property is not within a statute allowing case to be maintained for any damage to the estate. **U. S.**—*Henshaw v. Miller*, 17 How. 212, 15 L. ed. 222. **Mass.**—*Rockwell v. Furness*, 215 Mass. 557, 102 N. E. 914; *Read v. Hatch*, 19 Pick. 47. **Va.**—*Lee's Admr. v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666.

**Cause of action in a parent for injury to child** as one for damage to the estate, see *infra*, I, D, 2, k.

48. *Mumpower v. Bristol*, 94 Va. 737, 27 S. E. 581.

49. **U. S.**—*Webber v. St. Paul City Ry. Co.*, 97 Fed. 140, 33 C. C. A. 79. **Conn.**—*Payne's Appeal*, 65 Conn. 397, 32 Atl. 948, 48 Am. St. Rep. 215, 33 L. R. A. 418. **Ind.**—*Feary v. Hamilton*, 140 Ind. 45, 39 N. E. 516; *Boor v. Lowery*, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; *Hedekin v. Gillespie*, 33 Ind. App. 650, 72 N. E. 143. **N. H.** *Jenkins v. French*, 58 N. H. 532. **N. J.** See *Hayden v. Vreeland*, 37 N. J. L. 372, 18 Am. Rep. 723. **Ohio.**—See *Cardington v. Frederick's Admr.*, 46 Ohio St. 442, 21 N. E. 766. **W. Va.**—*Kinney v. West Union*, 79 W. Va. 463, 91 S. E. 260; *Porter v. Mack*, 50 W. Va. 581, 40 S. E. 459.

[a] **If the proximate moving cause of the damages claimed is the personal injury**, (1) and the breach of contract and damages therefrom are mere incidents to the injury, the cause of action dies. But if the primary and moving cause of the damages sought is the breach of contract and injuries to the person are mere incidents to that breach, the action survives. *Webber v.*



property is caused by a personal injury and would not have been sustained but for the personal injury, the injury to property is incidental merely and the right of action abates.<sup>50</sup> This distinction is not observed in some cases, however, particularly in actions against carriers.<sup>51</sup>

c. *Where Tort May Be Waived.*—Though the cause of action be fundamentally tortious, if the tort may be waived and action on contract maintained, the right of action survives.<sup>52</sup>

d. *Tort Actions Founded on Contract.*—Where an action is founded on a contract, it is virtually ex contractu although nominally in tort, and will survive.<sup>53</sup> But an action for injury to person by malpractice of a surgeon does not survive although based on contract.<sup>54</sup>

e. *Injuries to Property.*—(I.) *Injuries to Real Property.*—Causes of action for injuries or trespass to realty generally survive under statute,<sup>55</sup> although it is otherwise at common law and was otherwise

St. Paul City Ry. Co., 97 Fed. 140, 38 C. C. A. 79. (2) And where an action is brought primarily to recover for injury to the person, and injury to property is a mere incident, as loss of time and expenses incurred while sick, the action does not survive. *Ind.* Feary v. Hamilton, 140 Ind. 45, 39 N. E. 516. *Mo.*—Stanley v. Vogel, 9 Mo. App. 98. *N. H.*—Vittum v. Gilman, 48 N. H. 416. See also *Cregin v. Brooklyn Crosstown R. Co.*, 75 N. Y. 192, 31 Am. Rep. 459.

50. *Hedekin v. Gillespie*, 33 Ind. App. 650, 72 N. E. 143.

As to injuries to person, see *infra*, I, D, 2, f.

51. See *infra*, I, D, 2, f, (II).

52. *U. S.*—Van Choate v. General Elec. Co., 245 Fed. 120. *Colo.*—Kelley v. Union Pac. Ry. Co., 16 Colo. 455, 27 Pac. 1058. *Fla.*—Jacksonville St. Ry. Co. v. Chappell, 22 Fla. 616, 1 So. 10. *N. Y.*—Bank of Orange v. Brown, 3 Wend. 158. *E. I.*—Moies v. Sprague, 9 R. I. 541. *S. C.*—Huff v. Watkins, 20 S. C. 477; *Chaplin v. Barrett*, 12 Rich. 284, 75 Am. Dec. 731.

See *infra*, I, D, 2, f, (II); I, D, 2, e.

Survival where decedent's estate is benefited, see *supra*, I, D, 2, a.

When tort may be waived, see 5 STANDARD PROC. 103; 10 STANDARD PROC. 219; 13 STANDARD PROC. 414 et seq; 21 STANDARD PROC. 117, and the title "Trover and Conversion."

53. *Cal.*—Vraghizian v. Savings Union B. & T. Co., 31 Cal. App. 709, 161

Pac. 507. *Conn.*—Booth's Admrs. v. Northrop, 27 Conn. 325. *Nev.*—Forrester v. Southern Pac. Co., 36 Nev. 247, 134 Pac. 753, 136 Pac. 705, 48 L. R. A. (N. S.) 1. *Va.*—Lee's Admr. v. Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666.

[a] "On the question of survivorship, we consider it immaterial whether the form of the remedy adopted is in tort or in contract, provided the cause of action is founded on a contract. The form of action brought to redress a wrong, sometimes, and indeed usually, indicates its nature, whether as arising independently of contract or not; but this is far from being invariably so, there being many cases where the action, the cause of which grows out of a breach of contract, may be in form either ex delicto, as in case, or ex contractu, as in assumption. In determining whether a cause of action survives to the personal representative, the real nature of the injury or claim ought to be regarded, and not the form of the remedy by which it is sought to be redressed or enforced." *Booth's Admr. v. Northrop*, 27 Conn. 325.

54. See *infra*, I, D, 2, f, (III).

55. *Cal.*—Haight v. Green, 19 Cal. 113. *Ind.*—Seymour v. Cummins, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126; *Pittsburgh, Ft. W. & C. Ry. Co. v. Swinney*, 97 Ind. 586. *Md.*—Baltimore Belt R. Co. v. Sattler, 105 Md. 264, 65 Atl. 752. *Mass.*—Wilbur v. Gilmore, 21 Pick. 250. *Mich.*—Savre v. Detroit, G. H. & M. Ry. Co., 171 N.

in England before the statute of William IV.<sup>56</sup>

(II.) **Trover and Conversion.**—Since the statute of Edward III, the action of trover and conversion survives in favor of the personal representative.<sup>57</sup> But such action could not be brought against the personal representative of a wrongdoer at common law,<sup>58</sup> unless the circumstances are such that assumpsit may be maintained.<sup>59</sup> Statutes generally provide for the survival of actions of trover and conversion for and against personal representatives,<sup>60</sup> however.

(III.) **Detinue and Replevin.**—A personal representative may, at common law, bring detinue or replevin for the recovery of goods taken or

W. 502. **Miss.**—Conklin *v.* Alabama & V. Ry. Co., 81 Miss. 152, 32 So. 920, the executor may maintain the action but the heir cannot. **Mo.**—Musick *v.* Kansas City, S. & M. Ry. Co., 114 Mo. 309, 21 S. W. 491. **N. J.**—Ten Eyck *v.* Runk, 31 N. J. L. 428. **N. C.**—Howcott's Exrs. *v.* Warren, 29 N. C. 20. **Ohio.**—Union Sav. B. & T. Co. *v.* Western Union Tel. Co., 79 Ohio St. 89, 86 N. E. 478, 128 Am. St. Rep. 675. **Pa.** See Mountz *v.* Philadelphia, H. & P. R. Co., 203 Pa. 128, 52 Atl. 15, heirs of landowner may maintain trespass against railroad company taking land without consent. **S. C.**—Voyles *v.* Postal Tel. Cable Co., 78 S. C. 430, 59 S. E. 68; Duke *v.* Postal Tel. Cable Co., 71 S. C. 95, 50 S. E. 675; Allen *v.* Union Oil & Mfg. Co., 59 S. C. 571, 38 S. E. 274. **Tex.**—Texas & N. O. R. Co. *v.* Smith, 35 Tex. Civ. App. 351, 80 S. W. 247. **Wash.**—Seward *v.* Spokane, P. & S. Ry. Co., 64 Wash. 516, 117 Pac. 263. **W. Va.**—Kinney *v.* West Union, 79 W. Va. 463, 91 S. E. 260. **Wis.**—Cotter *v.* Plummer, 72 Wis. 476, 40 N. W. 379.

[a] **Cause of action for flowage** survives by statute. Geyer *v.* Cook, 111 Me. 341, 89 Atl. 147.

[b] **Nuisance.**—An action for damages to real property caused by a nuisance survives under statute. **Ind.**—Seymour *v.* Cummins, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126. **R. I.**—Aldrich *v.* Howard, 8 R. I. 125, 86 Am. Dec. 615. **S. C.**—Allen *v.* Union Oil Co., 59 S. C. 571, 38 S. E. 274, under a statute providing for survival of actions for injuries and trespass to real estate. (2) But it is otherwise at commonlaw. Upper Appomattox Co. *v.* Hardings, 11 Gratt. (52 Va.) 1.

[c] **An action on the case for erecting a stable** so near a hotel as to be a nuisance is within a statute providing for survival of actions for damage to

real estate. Aldrich *v.* Howard, 8 R. I. 125, 86 Am. Dec. 615.

[d] **An action of damages for cutting timber** survives. Cotter *v.* Plumer, 72 Wis. 476, 40 N. W. 379.

56. **U. S.**—Withers *v.* Burkett, 16 Fed. 86, 4 Woods 335. **Ill.**—Reed *v.* Peoria & O. R. Co., 18 Ill. 403. **Mass.** Holmes *v.* Moore, 5 Pick. 257, for present law, see statute. **Tenn.**—Rhodes *v.* Crutchfield, 7 Lea 518, 532. **Va.**—See Harris *v.* Crenshaw, 3 Rand. (24 Va.) 14. For present law see statute.

[a] **Trespass quare clausum is not converted to trespass de bonis asportatis** and taken out of the rule actio personalis, by an allegation that the trees were cut and carried away. Harris *v.* Crenshaw, 3 Rand. (24 Va.) 14.

57. **Mass.**—Devlin *v.* Houghton, 202 Mass. 75, 88 N. E. 580. **Mo.**—Buller *v.* Woods, 43 Mo. App. 494. **N. Y.**—Potter *v.* Van Vranken, 36 N. Y. 619.

58. **U. S.**—United States *v.* Daniel, 6 How. 11, 12 L. ed. 323. **Tenn.**—Cherry *v.* Hardin, 4 Heisk. 199. **Eng.**—Hambly *v.* Trott, 1 Cowp. 371, 98 Eng. Reprint 1136.

59. United States *v.* Daniel, 6 How. 11, 12 L. ed. 323. See Robinson *v.* Tower, 95 Neb. 198, 145 N. W. 348, the cause of action survives but the remedy is by filing a claim against the estate.

**As to when the tort may be waived,** see 5 STANDARD PROC. 108.

60. **U. S.**—Portland Gold Min. Co. *v.* Stratton's Independence, 196 Fed. 714, under Colorado practice. **Ala.**—Jenkins *v.* McConico, 26 Ala. 213. **Cal.**—Coleman *v.* Woodworth, 28 Cal. 567. **Mich.**—Rogers *v.* Windoes, 48 Mich. 628, 12 N. W. 882. **N. J.**—Terhune *v.* Bray's Exrs., 16 N. J. L. 53. **N. C.**—Weare *v.* Burge, 32 N. C. 169. **Wis.**—Voss *v.* Stoll, 141 Wis. 267, 124 N. W. 89.

detained from the testator or intestate,<sup>61</sup> or may be substituted in an action commenced by the latter.<sup>62</sup> But detinue and replevin cannot be maintained against personal representatives at common law,<sup>63</sup> unless the property came into their possession and they refused to restore it.<sup>64</sup> But under statute replevin survives in favor of or against a personal representative.<sup>65</sup>

(IV.) **Fraud and Deceit.**—At early common law, causes of action for fraud and deceit did not survive, but this rule has been changed by later statutes.<sup>66</sup>

(V.) **Slander of Title.**—A cause of action for slander of title survives.<sup>67</sup>

(VI.) **Waste.**—At common law, waste does not lie against an executor or administrator of the deceased wrongdoer,<sup>68</sup> although under statute, a cause of action for active or permissive waste survives.<sup>69</sup>

(VII.) **Conspiracy in Restraint of Trade.**—A cause of action for conspiracy to monopolize in restraint of trade and to destroy plaintiff's business, does not survive at common law.<sup>70</sup>

f. *Injuries to the Person.*—(I.) **Generally.**—A cause of action for damages for an injury to the person dies with the person of either

61. *Ill.*—*Strauss v. Merchants L. & T. Co.*, 119 Ill. App. 588. *Mass.*—*Mellen v. Baldwin*, 4 Mass. 480. *N. Y.* *Potter v. Van Vranken*, 36 N. Y. 619; *Webbers' Exrs. v. Underhill*, 19 Wend. 447.

*Compare* 7 STANDARD PROC. 480, note 79; 8 STANDARD PROC. 729, and 22 STANDARD PROC. 893, note 91.

62. *Strauss v. Merchants Loan & T. Co.*, 119 Ill. App. 588.

63. *Mellen v. Baldwin*, 4 Mass. 480. *See Kingsbury's Exrs. v. Lane's Exr.*, 21 Mo. 115.

64. *Potter v. Van Vranken*, 36 N. Y. 619; *Roberts v. Marsen*, 23 Hun (N. Y.) 486; *Catlett's Exr. v. Russell*, 6 Leigh (33 Va.) 344; *Allen's Exr. v. Harlan's Admr.*, 6 Leigh (33 Va.) 42, 29 Am. Dec. 205. *See McDermott v. Doyle*, 17 Mo. 362.

*See* 7 STANDARD PROC. 480; 8 STANDARD PROC. 754, note 12; 22 STANDARD PROC. 895, notes 7 and 8.

[a] If there are several executors and one only has possession of the goods, the action can be brought against him alone. *Catlett's Exr. v. Russell*, 6 Leigh (33 Va.) 344.

[b] As the action against the executor is founded on his own wrong, it follows that it cannot be revived against his personal representatives on his death. *Daniel v. Cobb's Exr.*, 3 N. C. 35; *Jones v. Littlefield*, 3 Yerg. (Tenn.) 133.

65. *Ill.*—*McCrory v. Hamilton*, 39 Ill. App. 490. *Mo.*—*Kingsbury's Exr. v. Lane's Exr.*, 21 Mo. 115, 120. *N. Y.* *Roberts v. Marsen*, 23 Hun 486, query.

[a] An action in claim and delivery survives in favor of and against personal representatives, under statute. *Billups v. Freeman*, 5 Ariz. 268, 52 Pac. 367.

66. *See* 10 STANDARD PROC. 43.

67. *Hatchard v. Mege*, 18 Q. B. Div. (Eng.) 771, 56 L. J. Q. B. 397, 56 L. T. N. S. 662, 35 Wkly. Rep. 576, 51 J. P. 277.

68. *United States v. Daniel*, 6 How. 11, 12 L. ed. 323.

69. *See generally* the statutes, and *Newman v. Sanders*, 89 N. J. L. 120, 97 Atl. 782; *Shields v. Lawrence*, 72 N. C. 43, but the action abates as to vindictive damages.

70. *Frohlich v. Deacon*, 181 Mich. 255, 148 N. W. 180, Ann. Cas. 1916C, 722.

[a] The cause of action (1) is not one for damage to real or personal estate (*Frohlich v. Deacon*, 181 Mich. 255, 148 N. W. 180, Ann. Cas. 1916C, 722), or (2) for damage to the person. *Murray v. Buell*, 76 Wis. 657, 45 N. W. 667, 20 Am. St. Rep. 92.

[b] The cause of action is not one for fraud and deceit within the survival statute. *Frohlich v. Deacon*, 181 Mich. 255, 148 N. W. 180, Ann. Cas.



party at common law and in the absence of statute providing otherwise.<sup>71</sup> Some statutes have express provisions to this effect.<sup>72</sup> The action abates whatever the form of action,<sup>73</sup> although there are some authorities to the contrary.<sup>74</sup> The general rule has been applied to such torts as false imprisonment,<sup>75</sup> assault and battery,<sup>76</sup> malicious

1916C, 722, the court was equally divided on the question.

**71. U. S.**—Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417, Ann. Cas. 1914C, 176; United States v. Daniel, 6 How. 11, 12 L. ed. 323. **Ala.**—Wynn v. Tallapoosa Co. Bank, 168 Ala. 469, 490, 53 So. 228. **Cal.**—Fowden v. Pacific Coast S. S. Co., 149 Cal. 151, 86 Pac. 178. **Colo.**—Mumford v. Wright, 12 Colo. App. 214, 55 Pac. 744; Letson v. Brown, 11 Colo. App. 11, 52 Pac. 287. **D. C.**—Roche v. Carroll, 6 D. C. 79. **Fla.**—Jacksonville St. Ry. Co. v. Chappell, 22 Fla. 616, 1 So. 10. **Ga.**—Smith v. Jones, 138 Ga. 716, 76 S. E. 40, but a pending action survives. See King v. Southern R. Co., 126 Ga. 794, 55 S. E. 965, 8 L. R. A. (N. S.) 544. **Ind.**—Hilliker v. Citizens' St. R. Co., 152 Ind. 86, 52 N. E. 607; Boor v. Lowery, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; Indianapolis & St. L. Ry. Co. v. Stout, 53 Ind. 143. **Md.**—Baltimore & O. R. Co. v. Ritchie, 31 Md. 191. **Minn.**—Cooper v. St. Paul City Ry. Co., 55 Minn. 134, 56 N. W. 588; Green v. Thompson, 26 Minn. 500, 5 N. W. 376. **N. Y.**—Gorden v. Strong, 158 N. Y. 407, 53 N. E. 33; Corbett v. Twenty-Third St. R. Co., 114 N. Y. 579, 21 N. E. 1033. **N. C.**—Watts v. Vanderbilt, 167 N. C. 567, 83 S. E. 813; Bolick v. Southern R. Co., 138 N. C. 370, 50 S. E. 689; Harper v. Comrs. of Nash Co., 123 N. C. 118, 31 S. E. 384; Howcott's Exrs. v. Warren, 29 N. C. 20. **Va.**—Beavers' Admx. v. Putnam's Curator, 110 Va. 713, 67 S. E. 303; Anderson v. Hygeia Hotel Co., 92 Va. 687, 24 S. E. 269. **W. Va.**—Curry v. Mannington, 23 W. Va. 14.

**Survival of actions for injuries through defects or obstructions in highways**, see 11 STANDARD PROC. 198.

[a] Where a cause of action is a tort unconnected with contract, which affects the person only and not the estate, the rule actio personalis applies. Lee's Admr. v. Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666.

[b] An action for injuries to person caused by a public nuisance abates.

Knox v. Sterling, 73 N. C. 214; Cardington v. Fredericks' Admr., 46 Ohio St. 442, 21 N. E. 766. Where nuisance causes injury to real property, see *supra*, I, D, 2, e, (I).

**The right of action for libel and slander** does not survive except by virtue of statute. See 18 STANDARD PROC. 891. As to damage to the person, under statute, see *infra* this section.

**72.** See generally the statutes.

[a] **The use of the word "trespass"** in the statute providing that actions for trespass for injuries to person shall not survive is not limited to actions of trespass *vi et armis* but includes actions for trespass on the case. Letson v. Brown, 11 Colo. App. 11, 52 Pac. 287. The statute embraces all actions for personal torts as distinguished from property torts. Mumford v. Wright, 12 Colo. App. 214, 55 Pac. 744. See also Kelley v. Union Pac. Ry. Co., 16 Colo. 455, 27 Pac. 1058.

[b] **A statute providing that "actions on the case for injury to the person of the plaintiff" shall not survive**, prevents the survival of such actions however seriously such injury may have affected the plaintiff's property or estate. It does not apply to wrongs to his interests by the injury of another. Cregin v. Brooklyn Crosstown R. Co., 75 N. Y. 192, 31 Am. Rep. 459.

**73.** Webber v. St. Paul City Ry. Co., 97 Fed. 140, 38 C. C. A. 79; Feary v. Hamilton, 140 Ind. 45, 39 N. E. 516; Boor v. Lowery, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519.

[a] **A cause of action against an innkeeper for injuries to a guest** does not survive although a contract is alleged. Stanley v. Bircher's Exr., 78 Mo. 245.

**74.** See *infra*, I D, 2, f, (II). Compare *supra*, I, D, 2, e.

**75. U. S.**—Henshaw v. Miller, 17 How. 212, 15 L. ed. 222. **Cal.**—Harker v. Clark, 57 Cal. 245. **Tenn.**—Governor v. McManus' Admr., 11 Humph. 152. **W. Va.**—Curry v. Mannington, 23 W. Va. 14.

**76. Ala.**—Hadley v. Bryars' Admr.,

prosecution,<sup>77</sup> negligent failure to deliver a telegram, resulting in personal suffering,<sup>78</sup> criminal conversation,<sup>79</sup> violation of the right of privacy,<sup>80</sup> and other torts hereinafter discussed.

**Under Statute.**—Some statutes have changed the common law as to survival of causes of action for injuries to the person, with exceptions as to particular actions.<sup>81</sup> Thus it is provided that rights of action for injuries, trespasses or wrong to the person,<sup>82</sup> for damage to the

58 Ala. 185. **Cal.**—Vragnizan v. Savings Union B. & T. Co., 31 Cal. App. 709, 161 Pac. 507. **Ga.**—Brawner v. Sterdevant, 9 Ga. 69. **Ky.**—Shields' Admr. v. Rowland, 151 Ky. 136, 151 S. W. 408; Perkins v. Stein, 94 Ky. 433, 22 S. W. 649, 20 L. R. A. 861 (defining assault and battery under the Kentucky statute); Winnegar's Admr. v. Central Pass. Ry. Co., 85 Ky. 547, 4 S. W. 237. **Mo.**—Melvin v. Evans, 48 Mo. App. 421. **N. Y.**—Mulligan v. O'Brien, 119 App. Div. 355, 104 N. Y. Supp. 301; Wood v. Phillips, 11 Abb. Pr. N. S. 1. **N. C.**—Hannah v. Richmond & D. R. Co., 87 N. C. 351. **Tenn.**—Governor v. McManus' Admsrs., 11 Humph. 152. **Tex.**—Harrison v. Moseley, 31 Tex. 608. **W. Va.**—Curry v. Mannington, 23 W. Va. 14.

77. **U. S.**—Spaeth v. Sells, 176 Fed. 797. **Ark.**—Ward v. Blackwood, 41 Ark. 295, 48 Am. Rep. 41. **Cal.**—Vragnizan v. Savings Union B. & T. Co., 31 Cal. App. 709, 161 Pac. 507. **Ill.**—Denslow v. Hutchinson, 152 Ill. App. 502. **Md.**—Clark v. Carroll, 59 Md. 180. **Mass.**—Lee v. Fisk, 222 Mass. 418, 109 N. E. 833. **Pa.**—Boyd v. Snyder, 207 Pa. 330, 56 Atl. 924. **W. Va.**—Porter v. Mack, 50 W. Va. 581, 40 S. E. 459.

[a] **Although damages to business and property are asserted in an action of malicious prosecution, the action does not survive.** Porter v. Mack, 50 W. Va. 581, 592, 40 S. E. 459. See *supra*, I, D, 2, b.

[b] **Whether the plaintiff was arrested and imprisoned is immaterial on the question of survival.** Denslow v. Hutchinson, 152 Ill. App. 502.

78. Fitzgerald v. Western Union Tel. Co., 15 Tex. Civ. App. 143, 40 S. W. 421, for present law in Texas, see the statute. See Morton v. Western Union Tel. Co., 130 N. C. 299, 41 S. E. 484.

79. Garrison v. Burden, 40 Ala. 513; Sunanday v. McKently, 244 Pa. 533, 90 Atl. 799; Clarke v. McClelland, 9 Pa. 128.

**Abatement of action of criminal conversation on death of defendant, or wife.** See 6 STANDARD PROC. 253.

[a] **Criminal Conversation Is Not Damage to the Person.**—Dixon v. Amerman, 181 Mass. 430, 63 N. E. 1057. 80. Wyatt v. Hall's Portrait Studio, 71 Misc. 199, 128 N. Y. Supp. 247. See also Schuyler v. Curtis, 147 N. Y. 434, 42 N. E. 22, 49 Am. St. Rep. 671, 31 L. R. A. 286.

81. See the statutes and Hooper v. Gorham, 45 Me. 209 (actions of trespass and trespass on the case survive); Melzner v. Northern P. Ry. Co., 46 Mont. 162, 127 Pac. 146.

82. **U. S.**—McLaughlin v. Hebron Mfg. Co., 171 Fed. 269 (under Rhode Island practice); Martin v. Wabash R. Co., 142 Fed. 650, 73 C. C. A. 646, 6 Ann. Cas. 582. **Ark.**—Billingsley v. St. Louis I. M. & S. Ry. Co., 84 Ark. 617, 107 S. W. 173, 120 Am. St. Rep. 95; Davis v. Nichols, 54 Ark. 358, 15 S. W. 880. **Conn.**—Barton v. New Haven, 74 Conn. 729, 52 Atl. 403. **Del.**—Reed v. Shallcross, 6 Boyce 447, 100 Atl. 474. **Ill.**—Pease v. Rockford City Traction Co., 279 Ill. 513, 117 N. E. 83 (where the death does not result from the injuries sued for); Gemmill v. Smith, 274 Ill. 87, 113 N. E. 27; Prouty v. Chicago, 250 Ill. 222, 95 N. E. 147; Harkin v. Ferro Concrete Const. Co., 185 Ill. App. 239. **Kan.**—Martin v. Missouri P. Ry. Co., 58 Kan. 475, 49 Pac. 605. **Ky.**—Austin's Admr. v. Pittsburg C. C. & S. L. Ry. Co., 122 Ky. 304, 91 S. W. 742, 5 L. R. A. (N. S.) 756; Perkins v. Stein, 94 Ky. 433, 22 S. W. 649, 20 L. R. A. 861; Neal v. Simmon's Admr., 4 Ky. L. Rep. 450. **Miss.**—Illinois Cent. R. Co. v. Pendergrass, 69 Miss. 425, 12 So. 954; Hewlett v. George, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682. **Mo.**—Kohnle v. Paxton, 268 Mo. 463, 188 S. W. 155, *overruling* Showen v. Metropolitan St. R. Co., 164 Mo. App. 41, 148 S. W. 135. See Bates v. Sylvester, 205 Mo. 493, 498, 104 S. W. 73, 120 Am. St. Rep. 761, 11 L. R. A. (N.

person,<sup>83</sup> or for negligent injuries to the person,<sup>84</sup> shall survive in favor of and against the personal representative. Only pending actions for injury to person survive the death of parties, in some states.<sup>85</sup> The words "injury to the person,"<sup>86</sup> and "damage to person,"<sup>87</sup> include damage that results from bodily injury only, and excludes consequential damages suffered by those who are injured by a wrongful interference with their rights by the negligence of the defendant.<sup>88</sup> Torts affecting only the feelings and reputation are not within the statute,<sup>89</sup> although it has been held that torts causing mental suffering are included.<sup>90</sup> Whether the connection between the cause and effect

S.) 1157; *Vawter v. Missouri Pac. R. Co.*, 84 Mo. 679, 685, 54 Am. Rep. 105; *Stanley v. Bircher's Exr.*, 78 Mo. 245; *Stanley v. Vogel*, 9 Mo. App. 98. **Mont.** *Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960. **Pa.**—*Lhota v. Oppenheimer & Co.*, 247 Pa. 280, 93 Atl. 476, L. R. A. 1915E, 1102; *McCafferty v. Pennsylvania R. Co.*, 193 Pa. 339, 44 Atl. 435, 74 Am. St. Rep. 690. **Tex.**—*Gulf, C. & S. F. Ry. Co. v. Sullivan* (Tex. Civ. App.), 190 S. W. 739; *Houston & T. C. R. Co. v. Maxwell*, 61 Tex. Civ. App. 80, 128 S. W. 160; *International & G. N. R. Co. v. Ellyson*, 43 Tex. Civ. App. 45, 94 S. W. 910 (causes of action for injuries to person survive unless they result in death); *Houston & T. C. R. Co. v. Rogers*, 15 Tex. Civ. App. 680, 39 S. W. 1112.

**83. Mass.**—*Hey v. Prime*, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N. S.) 570; *Kearney v. Boston & W. R. Corp.*, 9 Cush. 108. **Vt.**—*Benson v. Crain*, 91 Vt. 44, 99 Atl. 255. **Wis.**—*Lehmann v. Farwell*, 95 Wis. 185, 70 N. W. 170.

**84. Rouse v. Michigan United Rys. Co., 164 Mich. 475, 129 N. W. 719; *Norris v. Grove*, 100 Mich. 256, 58 N. W. 1006.**

**85. U. S.**—*Baltimore & O. R. Co. v. Joy*, 173 U. S. 226, 19 Sup. Ct. 387, 43 L. ed. 677, under Ohio practice. **Ga.** *Smith v. Jones*, 138 Ga. 716, 76 S. E. 40; *Pritchard v. Savannah St. & R. R. Co.*, 87 Ga. 294, 13 S. E. 493, 14 L. R. A. 721; *Stevens v. Wood*, 17 Ga. App. 756, 88 S. E. 413. **Ohio.**—*Mahoning Valley Ry. Co. v. Van Alstine*, 77 Ohio St. 395, 83 N. E. 601, 14 L. R. A. (N. S.) 893; *Ohio & P. Coal Co. v. Smith*, 53 Ohio St. 313, 41 N. E. 254. **Tenn.**—*Daniel v. East Tennessee Coal Co.*, 105 Tenn. 476, 58 S. W. 859; *Compare Posey v. Posey*, 113 Tenn. 588, 83 S. W. 1.

**86. Ark.**—*Davis v. Nichols*, 54 Ark. 358, 15 S. W. 880; *Ward v. Blackwood*, 41 Ark. 295, 48 Am. Rep. 41. **Ill.** *Denslow v. Hutchinson*, 152 Ill. App. 502. **Kan.**—*Powers v. Sumbler*, 83 Kan. 1, 110 Pac. 97.

**87. Keating v. Boston Elev. R. Co., 209 Mass. 278, 95 N. E. 840; *Hey v. Prime*, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N. S.) 570; *Wilkins v. Wainwright*, 173 Mass. 212, 53 N. E. 397; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Smith v. Sherman*, 4 Cush. 408.**

**88. Hey v. Prime, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N. S.) 570.**

**89. Ark.**—*Ward v. Blackwood*, 41 Ark. 295, 48 Am. Rep. 41. **Mass.**—*Wilkins v. Wainwright*, 173 Mass. 212, 53 N. E. 397; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298, such as breach of promise, slander or malicious prosecution. **R. I.**—*Young v. Aylesworth*, 35 R. I. 259, 86 Atl. 555.

[a] Libel and slander are not "damage to the person" within the statute. *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Young v. Aylesworth*, 35 R. I. 259, 86 Atl. 555. *Contra*, *Johnson v. Bradstreet Co.*, 87 Ga. 79, 13 S. E. 250. See *Swift Specific Co. v. Davis*, 76 Ga. 787, *quaere*. As to libel and slander generally, see 18 STANDARD PROC. 891.

[b] A cause of action for alienation of affections is not one for injury to the person within the meaning of survival statutes. *Powers v. Sumbler*, 83 Kan. 1, 110 Pac. 97; *Dixon v. Amerman*, 181 Mass. 430, 63 N. E. 1057. Under other statutes see *infra* this section.

**90. Morton v. Western Union Tel. Co., 130 N. C. 299, 41 S. E. 484; *Western Union Tel. Co. v. Kauffman* (Tex. Civ. App.), 107 S. W. 630.**



is direct so that trespass may be brought, or indirect so that case will lie is immaterial.<sup>91</sup> The statute supposes the deceased to have been once entitled to bring an action for damages for the injury and does not apply where the casualty and the death were simultaneous.<sup>92</sup>

Some statutes operate to prevent the abatement of such torts as assault and battery,<sup>93</sup> false imprisonment,<sup>94</sup> malicious prosecution,<sup>95</sup> negligent failure to deliver a telegram, resulting in personal suffering,<sup>96</sup> negligence of a druggist in selling poison for harmless medicine,<sup>97</sup> and alienation of affections.<sup>98</sup>

(II.) **Negligence of Carrier.**—A right of action for injuries inflicted by a carrier may survive under statute,<sup>99</sup> but in the absence of statute, a personal representative cannot maintain a tort action against a carrier as such for injuries to the person of the decedent.<sup>1</sup> However,

91. *Cutter v. Hamlen*, 147 Mass. 471, 18 N. E. 397, 1 L. R. A. 429; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298.

92. *Hollenbeck v. Berkshire R. Co.*, 9 Cush. (Mass.) 478; *Kearney v. Boston & W. R. Corp.*, 9 Cush. (Mass.) 108.

As to actions for wrongful death, see the title, "Death by Wrongful Act."

93. Mass.—*Wilkins v. Wainwright*, 173 Mass. 212, 53 N. E. 397. Mich.—*Miller v. Sadowsky*, 138 Mich. 502, 101 N. W. 621. Wis.—*Lehmann v. Farwell*, 95 Wis. 185, 70 N. W. 170.

**Statutory survival in case of injury to the person**, see *supra*, I, D, 2, f, (I).

[a] **Punitive Damages.**—An administrator may maintain an action for punitive damages for assault upon his intestate, under statute authorizing a personal representative to bring any action which the deceased might have brought. *Wagner v. Gibbs*, 80 Miss. 53, 62, 31 So. 434, 92 Am. St. Rep. 598.

94. Ind.—*Hilliker v. Citizens' St. R. Co.*, 152 Ind. 86, 52 N. E. 607. Miss.—*Hewlett v. George*, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682. Wis.—*Lehmann v. Farwell*, 95 Wis. 185, 70 N. W. 170.

95. *Hilliker v. Citizens' St. R. Co.*, 152 Ind. 86, 52 N. E. 607; *Missouri K. & T. Ry. Co. v. Groseclose* (Tex. Civ. App.), 134 S. W. 736.

[a] **Application of Statute.**—A cause of action for malicious prosecution is not one for injury or damage to the person within the meaning of the survival statute. *Denslow v. Hutchinson*, 152 Ill. App. 502; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep.

298; *Nettleton v. Dinehart*, 5 Cush. 543.

96. *Western Union Tel. Co. v. Kauffman* (Tex. Civ. App.), 107 S. W. 630, under statute providing for survival of actions for personal injuries.

97. Ky.—*Hansford's Admx. v. Payne & Co.*, 11 Bush 380, statute providing no action for personal injury shall die. Mass.—*Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298. Tenn.—*Bream v. Brown*, 5 Coldw. 168.

98. *Powers v. Sumbler*, 83 Kan. 1, 110 Pac. 97, under statute providing no pending action shall abate. Under statute as injuries to the person, see *supra* this section.

99. Ill.—*Wetherell v. Chicago City R. Co.*, 104 Ill. App. 357, executor may sue for damages, pain, suffering, etc. Ky.—*Chesapeake & O. Ry. Co. v. Perkins*, 127 Ky. 110, 105 S. W. 148; *Austin's Admr. v. Pittsburg C. C. & St. L. R. Co.*, 122 Ky. 304, 91 S. W. 742, 5 L. R. A. (N. S.) 756; *Winnegar's Admr. v. Central Pass. Ry. Co.*, 85 Ky. 547, 4 S. W. 237. Mich.—*Rouse v. Michigan United Rys. Co.*, 164 Mich. 475, 129 N. W. 719. N. C.—*Peebles v. North Carolina R. Co.*, 63 N. C. 238, pending actions for compensatory damages do not abate. Tex.—*Galveston, H. & S. A. R. Co. v. Ginther*, 96 Tex. 295, 72 S. W. 166; *Houston & T. C. R. Co. v. Maxwell*, 61 Tex. Civ. App. 80, 128 S. W. 160; *Ft. Worth & R. G. R. Co. v. Robertson*, 55 Tex. Civ. App. 309, 121 S. W. 202.

1. U. S.—*Gerling v. Baltimore & O. R. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 311. Fla.—*Jacksonville St. Ry. Co. v. Chappell*, 22 Fla. 616, 1 So. 10. Ind.—*Stout v. Indianapolis &*

when the injury results in an impairment of the passenger's estate and is treated as a breach of the contract of carriage so that the action is *ex contractu*, the personal representative may maintain the action,<sup>2</sup> although there is authority to the contrary.<sup>3</sup>

(III.) **Malpractice of Physician.**—Unless the survival statutes are such as to include them,<sup>4</sup> actions for injury to the person caused by want of skill or negligence of a physician or surgeon, although based on contract, do not survive the death of either party,<sup>5</sup> unless some

St. L. R. Co., 41 Ind. 149. **Eng.**—Pulling *v.* Great Eastern Ry., 9 Q. B. Div. 110, 51 L. J. Q. B. 453, 30 Wkly. Rep. 798, 46 J. P. 617.

2. **U. S.**—See *City of Brussels*, 6 Ben. 370, 5 Fed. Cas. No. 2,745. **Colo.** Kelley *v.* Union Pac. Ry. Co., 16 Colo. 455, 27 Pac. 1058. **Fla.**—Jacksonville St. Ry. Co. *v.* Chappell, 22 Fla. 616, 1 So. 10, query. **Ky.**—See Winnegar's Admr. *v.* Central Passenger Ry. Co., 85 Ky. 547, 4 S. W. 237. **N. Y.**—Daniel *v.* Brooklyn Heights R. Co., 135 N. Y. Supp. 698, where passenger was assaulted. **Eng.**—Bradshaw *v.* Lancashire & Y. Ry., L. R. 10 C. P. 189, 44 L. J. C. P. 148, 31 L. T. N. S. 847, 23 Wkly. Rep. 310; Knights *v.* Quarles, 2 Brod. & B. 102, 6 E. C. L. 55, 129 Eng. Reprint 896.

See *supra*, I, D, 2, b.

[a] **If a man contracts for safe conveyance** by coach and sustains an injury whereby his means of improving his personal property is destroyed and that property in consequence is injured, his executor may maintain *assumpsit*. Knights *v.* Quarles, 2 Brod. & B. 102, 6 E. C. L. 55, 129 Eng. Reprint 896.

[b] **A right of action for wrongful ejection** from a train of a person with a proper ticket is a cause of action on contract within the survival statute, but a right of action for wrongful ejection of a person without a ticket is not. Forrester *v.* Southern Pac. Co., 36 Nev. 247, 134 Pac. 753, 136 Pac. 705, 48 L. R. A. (N. S.) 1.

[c] **An action for insult or other tortious act** of a train agent not connected with the breach of contract, where the passenger is given passage in compliance with his contract is not an action on contract within the statute. Forrester *v.* Southern Pac. Co., 36 Nev. 247, 134 Pac. 753, 136 Pac. 705, 48 L. R. A. (N. S.) 1.

[d] **Assault.**—Notwithstanding a

statute providing that no right of action for injury to person shall die except actions for assault and battery, an executor of a passenger who was assaulted by trainmen may maintain an action on the case for injuries from breach of contract with the carrier. Winnegar's Admr. *v.* Central Passenger Ry. Co., 85 Ky. 547, 4 S. W. 237.

As to what is damage to estate, see *supra*, I, D, 2, a and b.

Where tort is waived, see *supra*, I, D, 2, c.

**Survival of torts founded on contract**, see *supra*, I, D, 2, d.

3. Webber *v.* St. Paul City Ry. Co., 97 Fed. 140, 38 C. C. A. 79, holding damages for nursing and medical attendance are incidents to the injury.

4. **Mich.**—Norris *v.* Grove, 100 Mich. 256, 58 N. W. 1006, under statute providing for survival of actions for negligent injuries to person, an action for negligent malpractice survives. Whether action for wilful or ignorant malpractice survives, query. **N. J.**—Tichenor *v.* Hayes, 41 N. J. L. 193, 32 Am. Rep. 186, under statute as to trespass to person. **Tenn.**—Burnett *v.* Layman, 130 Tenn. 423, 171 S. W. 76.

5. **Ind.**—Boor *v.* Lowery, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519. **N. H.**—Jenkins *v.* French, 58 N. H. 532; Vittum *v.* Gilman, 48 N. H. 416. **N. Y.**—Zabriskie *v.* Smith, 13 N. Y. 322, 333, 64 Am. Dec. 551; Best *v.* Veder, 58 How. Pr. 187. **Ohio.**—Wolf *v.* Wall, 40 Ohio St. 111. **Pa.**—Lattimore *v.* Simmons, 13 Serg. & R. 183. **Va.** Lee's Admr. *v.* Hill, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666.

See *supra*, I, D, 1, a.

[a] **Assumpsit to recover damages arising from unskilful treatment of a patient** by a physician cannot be maintained against the representatives of the physician. Jenkins *v.* French, 58 N. H. 532; Vittum *v.* Gilman, 48 N. H. 416.

special damage to personal estate can be stated,<sup>6</sup> for whatever the form of action, the action is considered virtually one for injuries to the person.<sup>7</sup>

(IV.) **Action for Death by Wrongful Act.**—An action for death by wrongful act abates on the death of the sole beneficiary unless statute provides otherwise.<sup>8</sup>

(V.) **Seduction.**—A cause of action for seduction survives under some statutes,<sup>9</sup> but it is otherwise at common law.<sup>10</sup> An action by a father for seduction of the daughter does not survive his death,<sup>11</sup> or the death of the defendant,<sup>12</sup> unless statute so provides.<sup>13</sup>

g. **Abuse of Process.**—Causes of action for malicious use or abuse of process do not survive,<sup>14</sup> unless saved by statute.<sup>15</sup> A cause of action on an injunction bond for malicious or wrongful suing out of the injunction survives, however.<sup>16</sup>

h. **Fraudulent Marriage.**—Where one person induces another to marry him by fraudulently misrepresenting himself as unmarried, the right of action for the resulting injury to the person does not survive the death of either,<sup>17</sup> unless saved by statute.<sup>18</sup> And a claim for the value of shelter, or work and labor performed, being inci-

6. *Lee's Admr. v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666.

[a] But a recital of incidental injuries for loss of time and medical expenses will not save the right of action from abatement. *Boor v. Lowery*, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519; *Jenkins v. French*, 58 N. H. 532; *Vittum v. Gilman*, 48 N. H. 416. *Compare supra*, I, D, 2, b.

7. *Zabriskie v. Smith*, 13 N. Y. 322, 333, 64 Am. Dec. 551. But see 21 STANDARD PROC. 370.

[a] **Reason of Rule.**—An action against a physician for malpractice is an injury to the person, and not to the estate of the plaintiff whether the complaint is considered as charging a breach of contract or a breach of duty; and whether it is in form *ex contractu* or *ex delicto*. The form of action is not controlling, the controlling consideration is whether or not the cause of action relates to property interests or to personal injuries. It is well settled that a personal representative cannot maintain an action upon a promise, when the damage consists entirely of the personal suffering of the deceased, whether mental or corporal. *Best v. Vedder*, 58 How. Pr. (N. Y.) 187.

8. See 6 STANDARD PROC. 372.

9. *Ind.*—*Hilliker v. Citizens' St. R. Co.*, 152 Ind. 86, 52 N. E. 607; *Gimbel v. Smidth*, 7 Ind. 627. *Ia.*—*Shafer v.*

*Grimes*, 23 Iowa 550. *Mont.*—*Kennedy v. Rogan*, 52 Mont. 242, 156 Pac. 1078.

10. *Larocque v. Conheim*, 42 Misc. 613, 87 N. Y. Supp. 625.

11. *McClure's Exrs. v. Miller*, 11 N. C. 133; *Davis v. Carpenter*, 72 Vt. 259, 47 Atl. 778.

12. *Brawner v. Sterdevant*, 9 Ga. 69; *Holliday v. Parker*, 23 Hun (N. Y.) 71.

13. See the statutes and *Neal v. Simmon's Admr.*, 4 Ky. L. Rep. 450.

14. *Slauson v. Schwabacher*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948, malicious levy of attachment.

[a] A tort action for damages resulting from maliciously collecting illegal tax by a distress warrant does not survive. *Iron Gate Bank v. Brady*, 184 U. S. 665, 22 Sup. Ct. 529, 46 L. ed. 739.

15. *Union Mill Co. v. Prenzler*, 100 Iowa 540, 69 N. W. 876, an action for wrongful attachment.

[a] A cause of action for maliciously suing out an injunction without probable cause whereby the operation of plaintiff's mill is suspended is not damage to estate within the statute. *Mumpower v. Bristol*, 94 Va. 737, 27 S. E. 581.

16. *Jordan v. David*, 20 Tex. 712.

As to survival of actions on bonds, see I, D. 1, b.

17. *Higgins v. Breen*, 9 Mo. 497.

18. See generally the statutes.



dental to the injury also abates,<sup>19</sup> except where assumpsit may be maintained against the executor.<sup>20</sup>

i. *Negligence of Attorney*.—A cause of action for breach of an implied contract of an attorney to exercise skill in his profession does not survive,<sup>21</sup> unless some special damage to personal estate is stated on the record.<sup>22</sup>

j. *Injuries to Wife*.—Causes of action for pain and suffering arising from injuries to the wife abate on her decease, but the husband's right of action for loss of services does not.<sup>23</sup>

k. *Parent's Right of Action for Injury to Child*.—A right of action in the father for damages resulting from an injury to a child does not survive the father's death,<sup>24</sup> or the death of the wrongdoer,<sup>25</sup> but it is otherwise under some statutes.<sup>26</sup>

3. *Actions Relating to Real Estate*.<sup>27</sup>—a. *Actions for Recovery of Real Property*.—Real actions at common law abate on the death of a party before judgment,<sup>28</sup> but statutes generally provide for the sur-

19. *Payne's Appeal*, 65 Conn. 397, 32 Atl. 948, 48 Am. St. Rep. 215, 33 L. R. A. 418; *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721.

20. *Higgins v. Breen*, 9 Mo. 497. *Contra*, *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721.

21. *Zabriskie v. Smith*, 13 N. Y. 322, 333, 64 Am. Dec. 551 (action for imprisonment of a party on account of neglect of his attorney does not survive); *Lee's Admr. v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666.

22. *Ind.*—*Newman v. Gates*, 165 Ind. 171, 72 N. E. 638. *N. J.*—*Tichenor v. Hayes*, 41 N. J. L. 193, 32 Am. Rep. 186, under statute as to survival of actions for trespass to property. *Eng.*—*Knights v. Quarles*, 2 Brod. & B. 102, 6 E. C. L. 55, 129 Eng. Reprint 896.

[a] **An administrator may maintain assumpsit where an attorney undertook but failed to investigate a title whereby plaintiff's intestate took a bad title.** *Knights v. Quarles*, 2 Brod. & B. 102, 6 E. C. L. 55, 129 Eng. Reprint 896.

23. See 11 STANDARD PROC. 743.

[a] **Applicability of Statutes.**—(1) A cause of action in the husband for damage resulting from injury to the wife is not an injury to person within the statute. *Billingsley v. St. Louis I. M. & S. Ry. Co.*, 84 Ark. 617, 107 S. W. 173, 120 Am. St. Rep. 95; *Hey v. Prime*, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N. S.) 570. (2) Nor is it an injury to property. *Billingsley*

*v. St. Louis I. M. & S. Ry. Co.*, 84 Ark. 617, 107 S. W. 173, 120 Am. St. Rep. 95.

24. *King v. Southern R. Co.*, 126 Ga. 794, 55 S. E. 965, 8 L. R. A. (N. S.) 544; *Frazier v. Georgia R. & B. Co.*, 101 Ga. 77, 28 S. E. 662; *Keating v. Boston Elev. R. Co.*, 209 Mass. 278, 95 N. E. 840.

As to seduction of daughter, see *supra*, I, D, 2, f, (V).

[a] **Application of Statute.**—A cause of action for loss of services and for doctors' bills resulting from injuries to a minor son is not damage to person or to personal estate. *Keating v. Boston Elev. R. Co.*, 209 Mass. 278, 95 N. E. 840; *Davis v. Carpenter*, 72 Vt. 259, 47 Atl. 778.

25. See *Holliday v. Parker*, 23 Hun (N. Y.) 71.

26. *James v. Christy*, 18 Mo. 162; *Stephen v. Woodruff*, 18 App. Div. 625, 45 N. Y. Supp. 712, under statute as to survival of actions for injury done to property, rights or interests of another.

27. **Abatement of action by landlord to recover leased premises**, see 18 STANDARD PROC. 567.

As to actions concerning a wife's property, see 11 STANDARD PROC. 744.

28. *U. S.*—*Macker's Heirs v. Thomas*, 7 Wheat. 530, 5 L. ed. 515. *Fla.*—See *Gould v. Carr*, 33 Fla. 523, 537, 15 So. 259, 24 L. R. A. 130. *Mich.* *People ex rel. Hoffman v. Judge*, 40 Mich. 351. *N. Y.*—*Putnam v. Van Buren*, 7 How. Pr. 31. *Wis.*—*Illinois*

vival of actions for the recovery of real property.<sup>29</sup> Only pending actions of ejectment survive under some statutes.<sup>30</sup>

**Mesne Profits.**—A claim for mesne profits being incidental to an action of ejectment abates if the action of ejectment does not survive the death of the party,<sup>31</sup> but it has been held that a right of action for mesne profits survives when the plaintiff dies after recovery in ejectment.<sup>32</sup> And under some statutes trespass for mesne profits does not abate by the death of the defendant in ejectment.<sup>33</sup>

b. *Quieting Title and Trespass To Try Title.*—An action to quiet title,<sup>34</sup> or of trespass to try title<sup>35</sup> to real property may be brought by or against the personal representatives of a decedent under statute.

c. *Partition.*—A personal representative cannot maintain parti-

Steel Co. v. Rogall, 159 Wis. 214, 149 N. W. 394 (ejectment); Farrall v. Shea, 66 Wis. 561, 29 N. W. 634.

[a] **Reason of Rule.**—On the death of the ancestor the legal title descends to the heir at law and thereupon a new cause of action arises in his favor to recover the realty. Gould v. Carr, 33 Fla. 523, 537, 15 So. 259, 24 L. R. A. 130; People ex rel. Hoffman v. Judge, 40 Mich. 351.

[b] **A suit by a life tenant to recover property abates at his death.** Brown v. Kendall, 13 Gray (Mass.) 272.

[c] **A suit by a tenant at will against a person holding the premises without right abates at his death.** Ferrin v. Kenney, 10 Mete. (Mass.) 294.

29. **U. S.**—Hatfield v. Bushnell, 1 Blatchf. 393, 11 Fed. Cas. No. 6,211, under Vermont practice. **Cal.**—Monterey v. Cushing, 83 Cal. 507, 23 Pac. 700; Barrett v. Birge, 50 Cal. 655. **Fla.**—Gould v. Carr, 33 Fla. 523, 538, 15 So. 259, 24 L. R. A. 130. **Ky.**—Burchett v. Clarke, 33 Ky. L. Rep. 240, 109 S. W. 888, where defendant dies. **Me.**—Burleigh v. Prentiss, 95 Me. 192, 49 Atl. 919; Trask v. Trask, 78 Me. 103, 3 Atl. 37; Dwinal v. Holmes, 37 Me. 97. **Mass.**—Sacket v. Wheaton, 17 Pick. 103. **Mich.**—Conley v. Sinclair, 163 Mich. 306, 128 N. W. 182; McKenzie v. A. P. Cook Co., 113 Mich. 452, 71 N. W. 868, the death of the plaintiff does not abate an ejectment suit but the death of the defendant does. See People ex rel. Hoffman v. Judge, 40 Mich. 351. **Mo.**—Minton v. Steinhauer, 243 Mo. 51, 147 S. W. 1014. **N. H.**—Pierce v. Jaquith, 48 N. H. 231, "real actions and actions of ejectment" shall not abate. **N. C.**—Moore v. Moore, 151 N. C. 555, 66 S.

E. 598. **Pa.**—Ballantine v. Negley, 158 Pa. 475, 27 Atl. 1051 (ejectment); Means v. Presbyterian Church, 3 Pa. 93. **Tex.**—Jones v. Robb, 35 Tex. Civ. App. 263, 80 S. W. 395. **Vt.**—Bellows v. Allen's Admr., 22 Vt. 108.

[a] **The word "recovery" in a statute providing for survival of actions for recovery of real property does not imply that the plaintiff had at some previous time owned or been in possession of the property.** Monterey v. Cushing, 83 Cal. 507, 23 Pac. 700.

30. **Ala.**—Southern Ry. Co. v. Hayes, 73 So. 945 (an action by several plaintiffs); Wilson v. Kirkland, 172 Ala. 72, 55 So. 174; Evans v. Welch, 63 Ala. 250. **Conn.**—Merwin v. Merwin, 75 Conn. 8, 52 Atl. 614, the action survives on death of plaintiff but abates on death of defendant. **Ga.**—Dean v. Feeley, 66 Ga. 273; O'Bryne v. Feeley, 61 Ga. 77.

31. Farrall v. Shea, 66 Wis. 561, 29 N. W. 634.

32. Means v. Presbyterian Church, 3 Pa. 93. Compare Rhodes v. Crutchfield, 7 Lea (Tenn.) 518, holding that the right of action being contractual does not abate. See also Roberts v. Nelson, 86 Mo. 21.

33. Arundel v. Springer, 71 Pa. 398.

[a] **An agreement or undertaking of an appellant to pay the value of the use and occupation pending appeal survives the death of the defendant to be collected as a claim against his estate.** Shepperd v. Tyler, 92 Cal. 552, 28 Pac. 601.

34. Monterey v. Cushing, 83 Cal. 507, 23 Pac. 700; Barrett v. Birge, 50 Cal. 655.

35. Rowland v. Ladiga's Heirs, 21

tion,<sup>36</sup> but statutes sometimes provide that partition suits shall not abate by the death of any party thereto.<sup>37</sup>

d. *Forcible Entry and Unlawful Detainer*.—An action of forcible entry and unlawful detainer abates on the death of a party at common law,<sup>38</sup> but it is otherwise under some statutes.<sup>39</sup>

e. *Eminent Domain*.—Eminent domain proceedings abate on the death of the land owner,<sup>40</sup> unless the survival statutes are broad enough to cover them.<sup>41</sup>

4. **Equitable Actions and Causes of Action**.—a. *Generally*.—The maxim *actio personalis moritur cum persona* does not as a rule apply to cases of which courts of equity take cognizance,<sup>42</sup> and though a pending action abates, it may be revived.<sup>43</sup> But as equity follows the law, a bill filed to enforce a legal right cannot be revived if the death of the party terminated the legal right sought to be enforced.<sup>44</sup> Some survival statutes are held to apply to suits in equity although they do not specifically refer to them.<sup>45</sup>

Ala. 9; Jones v. Robb, 35 Tex. Civ. App. 263, 269, 80 S. W. 395.

36. Greeley v. Hendricks, 23 Fla. 366, 2 So. 620; Whitlock v. Williard, 18 Fla. 156, not being an owner, joint tenant, tenant in common or co-parcener. See 20 STANDARD PROC. 1019.

[a] **A partition suit is not an action for possession of land within the meaning of the survival statute.** Dwinal v. Holmes, 37 Me. 97.

[b] **The death of a plaintiff after judgment quod partitio fiat in a partition suit, does not abate the writ.** Frohock v. Gustine, 8 Watts (Pa.) 121.

37. Ill.—Speck v. Pullman Palace Car Co., 121 Ill. 33, 12 N. E. 213. Me. See Dwinal v. Holmes, 37 Me. 97, decided before the statute. Mass.—Brown v. Wells, 12 Mete. 501; Mitchell v. Starbuck, 10 Mass. 5. N. H.—Osgood v. Taggard, 18 N. H. 318. N. Y.—Cheney v. Rankin, 27 Misc. 609, 58 N. Y. Supp. 263, 29 Civ. Proc. 285. See Hoffman v. Tredwell, 6 Paige 308, where the heir revived the suit so far as it related to real estate.

38. Mulligan v. O'Brien, 119 App. Div. 355, 104 N. Y. Supp. 301. See Cunningham v. Sayre, 21 W. Va. 440.

39. Ala.—Ridgeway's Admr. v. Waugh, 51 Ala. 423, under statute as to survival of actions for possession of lands. Ill.—Rutter v. Maher, 147 Ill. App. 622. Mo.—Brewington v. Stephen's Admrs., 31 Mo. 38. Tenn. Tucker v. Burns, 2 Swan 35. W. Va. Cunningham v. Sayre, 21 W. Va. 440.

40. Peirce v. Bangor, 105 Me. 413, 74 Atl. 1039.

41. See *infra*, this note.

[a] **Proceedings for condemnation of land are actions for the recovery of real property within the survival statute.** Monterey v. Cushing, 83 Cal. 507, 23 Pac. 700, they may be brought against an executor.

[b] **A petition for a jury to assess the damages of the landowner does not abate under statute.** Phillips v. County Commrs., 122 Mass. 258.

42. Wynn v. Tallapoosa Co. Bank, 168 Ala. 469, 496, 53 So. 228; Schley v. Dixon, 24 Ga. 273, 71 Am. Dec. 121.

[a] **Equitable remedies exist to the same extent against personal representatives as they did against the decedent.** Reed v. Copeland, 50 Conn. 472, 488, 47 Am. Rep. 663.

43. See *infra*, I, C, 1, b, and the title "Revival."

44. Spring v. Webb, 227 Fed. 481; Houghton v. Butler, 166 Mass. 547, 44 N. E. 624.

[a] **A bill asking no relief peculiar to equity but merely damages for fraudulent representations of defendant's testator cannot be maintained as the cause of action abates unless the estate was benefited or the testate occupied a fiduciary relation toward the plaintiff.** Houghton v. Butler, 166 Mass. 547, 44 N. E. 624.

45. Pierson v. Morgan, 52 Hun 611, 4 N. Y. Supp. 898, 17 Civ. Proc. 124, 23 N. Y. St. 382.

[a] **Whether a statute providing for survival of action on contracts and all personal actions applies to suits in equity is doubtful.** Wynn v. Talla-



b. *Specific Performance*.—A cause of action for specific performance survives.<sup>46</sup>

c. *Rescission, Cancellation and Reformation*.—Causes of action for reformation of contracts,<sup>47</sup> and for cancellation of contracts which would lessen the value of a party's estate if carried out,<sup>48</sup> and for rescission of contracts and for recovery of specific property obtained thereunder or the proceeds thereof,<sup>49</sup> survive.

d. *Injunction*.—An injunction suit to prevent acts injurious to the property rights of the plaintiff survives his death.<sup>50</sup> But an injunction suit to prevent acts purely personal do not.<sup>51</sup> Nor does a proceeding for assessment of damages on dissolution of an injunction.<sup>52</sup>

e. *Accounting*.—A cause of action for an accounting of money received survives.<sup>53</sup>

poosa Co. Bank, 168 Ala. 469, 493, 53 So. 228.

46. Robinson v. Appleton, 124 Ill. 276, 281, 15 N. E. 761; Webster v. Kings Co. Trust Co., 145 N. Y. 275, 39 N. E. 964.

47. Hogg v. Maxwell, 218 Fed. 356, 134 C. C. A. 164.

48. Sharon v. Terry, 36 Fed. 337, 13 Sawy. 387, 1 L. R. A. 572, a suit to cancel a forged marriage contract.

[a] Causes of action for cancellation of deeds of conveyance, survive. Ga.—Thompson v. Lanfair, 127 Ga. 557, 56 S. E. 770. Ind.—Kamman v. D'Heur & Swain Lumb. Co., 43 Ind. App. 672, 88 N. E. 348. Mass.—Busiere v. Reilly, 189 Mass. 518, 75 N. E. 958. W. Va. White v. Bailey, 65 W. Va. 573, 64 S. E. 1019, 23 L. R. A. (N. S.) 232.

[b] An executor may sue to rescind a deed to real estate where the will authorizes him to sell it. White v. Bailey, 65 W. Va. 573, 64 S. E. 1019, 23 L. R. A. (N. S.) 232.

[c] A cause of action for cancellation of insurance policy survives. National Council v. Scheiber, 137 Minn. 423, 163 N. W. 781; Weisler v. National Council, 132 Minn. 478, 157 N. W. 648; Kanevsky v. National Council, 132 Minn. 422, 157 N. W. 646; National Council v. Weisler, 131 Minn. 365, 155 N. W. 396.

49. Mass.—Lufkin v. Cutting, 225 Mass. 599, 607, 114 N. E. 822. Mich. Coon v. Dennis, 111 Mich. 450, 69 N. W. 666. Wis.—Borchert v. Borchert, 132 Wis. 593, 113 N. W. 35.

[a] Fraud.—A right to sue for rescission of a contract secured through fraud and recover property obtained,

survives although a mere fraud or cheat causing pecuniary loss does not give rise to a cause of action which survives. Borchert v. Borchert, 132 Wis. 593, 113 N. W. 35.

50. U. S.—Wasserman v. United States, 161 Fed. 722, 88 C. C. A. 582. La.—Gurley v. New Orleans, 124 La. 390, 50 So. 411. Mass.—Peabody v. Norfolk, 98 Mass. 452, 96 Am. Dec. 664, to prevent divulging trade secret.

[a] A suit by an abutting owner to enjoin a city from entering into a contract for street work, survives the plaintiff's death. Gurley v. New Orleans, 124 La. 390, 50 So. 411.

[b] Injunction and Damages.—In an injunction suit to prevent interference with an easement, the executor of the plaintiff may revive the suit as to the damages claimed though he has no right to the injunction. Matthews v. Delaware & H. Canal Co., 20 Hun (N. Y.) 427, 435.

Injunction against infringement of patents, see *infra*, I, D, 15.

51. Johnson v. Elwood, 82 N. Y. 362, where defendant dies.

[a] A cause of action against a public service corporation for an injunction against discontinuance of service abates on death of the plaintiff. Tucker v. Western Union Tel. Co., 157 N. Y. Supp. 873.

52. Dempster v. Lansingh, 166 Ill. App. 261.

53. Conn.—Whittemore v. Hamilton, 51 Conn. 153. N. Y.—Robinson v. Thomas, 123 App. Div. 411, 107 N. Y. Supp. 1110; Pierson v. Morgan, 52 Hun 611, 4 N. Y. Supp. 898, 17 Civ. Proc. 124, 23 N. Y. St. 382. N. C.—Grant

f. *Discovery*.—A suit brought merely for discovery cannot be revived where the plaintiff dies after answer and discovery, its object being obtained.<sup>54</sup>

g. *Foreclosure of Liens*.—The death of the owner of real property in an action to foreclose liens thereon, does not abate the action as a general rule.<sup>55</sup>

**Mechanics' Lien**.—The right to file a mechanic's lien is not lost by the death of the contractor,<sup>56</sup> and a suit to foreclose a mechanic's lien survives under statute.<sup>57</sup>

h. *Creditor's Suits*.—A creditor's suit survives the death of the debtor if a lien on his assets has been acquired, but not otherwise.<sup>58</sup> But the death of a plaintiff or any creditor who may have come in, does not abate a creditor's suit if there be then a plaintiff or creditor competent to prosecute the action.<sup>59</sup>

**5. Statutory Action**.—Whether the right to maintain a statutory action survives cannot, it has been held, be determined by the common law.<sup>60</sup> Such a cause of action does not survive unless it is so declared by the statute creating it,<sup>61</sup> or unless provision is made therefor

*v. Bell*, 91 N. C. 495. **Wis.**—Harrigan *v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

But see *Harvey v. Harvey*, 87 Ill. 54.

[a] **A proceeding to compel an administrator to account survives the death of the plaintiff.** *In re Hemphill's Est.*, 157 Wis. 331, 147 N. W. 1089.

**54. Horsburg v. Baker**, 1 Pet. (U. S.) 232, 7 L. ed. 125, dismissing the bill of revivor.

**55. Ky.**—*Louisville v. Hexagon Tile Walk Co.*, 103 Ky. 552, 45 S. W. 667. **Mo.**—*State ex rel. Bauer v. Edwards*, 136 Mo. 360, 38 S. W. 73. **N. Y.**—*McGregor v. McGregor*, 35 N. Y. 218. **Wash.**—*Hawley v. Bonanza Queen Min. Co.*, 61 Wash. 90, 111 Pac. 1073.

**Survival of suits to foreclose mortgages**, see the title, "Mortgages."

[a] **The right to enforce a vendor's lien is not lost by the death of the vendee unless statute provides otherwise.** **Cal.**—*Cahoon v. Robinson*, 6 Cal. 225. **Ga.**—*Reese v. Burts*, 39 Ga. 565. **N. J.**—*Hubbard's Admr. v. Clark* (N. J. Eq.), 7 Atl. 26. **Wis.**—*Berger v. Berger*, 104 Wis. 282, 80 N. W. 585, 76 Am. St. Rep. 877, holding right is lost as to homestead.

**56. Telfer v. Kiersted**, 9 Abb. Pr. (N. Y.) 418, 2 Hilt. 577.

**57. Kan.**—*Rice v. Hodge*, 26 Kan. 164. **N. J.**—*Robins v. Bunn*, 34 N. J.

L. 322. **N. Y.**—*Perry v. Levenson*, 82 App. Div. 94, 81 N. Y. Supp. 586, *distinguishing* *Leavy v. Gardner*, 63 N. Y. 624.

**58. Saginaw Co. Sav. Bank v. Duffield**, 157 Mich. 522, 122 N. W. 186, 133 Am. St. Rep. 354; *German American Seminary v. Saenger*, 66 Mich. 249, 33 N. W. 301; *Jones v. Smith*, Walk. Ch. (Mich.) 115; *United Elevator & Grain Co. v. Collier* (Mo. App.), 188 S. W. 1127.

[a] **The filing of a bill without answer or appointment of a receiver creates no lien and the action abates on death of defendant.** *Jones v. Smith*, Walk. Ch. (Mich.) 115.

**59. Duff v. Combs**, 132 Ky. 710, 117 S. W. 259; *Spedden v. Baltimore Ref. & H. Co.*, 117 Md. 443, 84 Atl. 150, citing local cases.

[a] **A failure to revive the suit in the name of the representatives of the deceased creditor does not prejudice the rights of the remaining creditors.** *Duff v. Combs*, 132 Ky. 710, 117 S. W. 259.

**Where one of several parties die**, see *supra*, I, C, 6.

**60. Selden v. Illinois Tr. & Sav. Bank**, 239 Ill. 67, 77, 87 N. E. 860, 130 Am. St. Rep. 180.

**61. Selden v. Illinois Tr. & Sav. Bank**, 239 Ill. 67, 77, 87 N. E. 860, 130 Am. St. Rep. 180; *Dempster v. Lansingh*, 166 Ill. App. 261.

by some other survival statute.<sup>62</sup>

**6. Penalties.**—Actions to recover penalties,<sup>63</sup> although in form *ex contractu*,<sup>64</sup> do not survive, unless statute provides otherwise.<sup>65</sup>

**7. Nuisances.**<sup>66</sup>—A cause of action for abatement of a nuisance affecting real property survives under statute.<sup>67</sup> But a suit to abate a liquor nuisance being penal, abates on the death of the defendant.<sup>68</sup>

**8. Mandamus.**<sup>69</sup>—Unless statute otherwise provides,<sup>70</sup> a mandamus proceeding abates on the death of the respondent,<sup>71</sup> or the relator,<sup>72</sup> unless it is brought by a public officer in his official capacity.<sup>73</sup>

**9. Quo Warranto.**—The survival of quo warranto proceedings is determined by the general principles and statutes already discussed.<sup>74</sup>

**62.** *Selden v. Illinois Tr. & Sav. Bank*, 239 Ill. 67, 77, 87 N. E. 860, 130 Am. St. Rep. 180; *Dempster v. Lanskings*, 166 Ill. App. 261.

**63. U. S.**—*Schreiber v. Sharpless*, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. ed. 65; *Waterford v. Elson*, 149 Fed. 91, 78 C. C. A. 675; *Van Choate v. General Elec. Co.*, 245 Fed. 120; *Curtis v. Phelps*, 208 Fed. 577; *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486; *Jones v. Van Zandt*, 4 McLean 604, 13 Fed. Cas. No. 7,504. **Conn.**—*Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146. **Ill.**—*Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14. **Mass.**—*Griffiths v. Powers*, 216 Mass. 169, 103 N. E. 468; *Yarter v. Flagg*, 143 Mass. 280, 9 N. E. 649. **N. H.**—*Coulombe v. Eastman*, 77 N. H. 368, 92 Atl. 168; *Jaffrey v. Smith*, 76 N. H. 168, 80 Atl. 504. **N. Y.**—*People v. Newcomb*, 75 Misc. 258, 135 N. Y. Supp. 151; *Bank of California v. Collins*, 5 Hun 209; *Reynolds v. Mason*, 54 How. Pr. 213. **N. C.**—*Wallace v. McPherson*, 139 N. C. 297, 51 S. E. 897, pending action. **N. D.**—*State v. McMaster*, 13 N. D. 58, 99 N. W. 58. **R. I.**—*Aylsworth v. Curtis*, 19 R. I. 517, 34 Atl. 1109, 61 Am. St. Rep. 785, 33 L. R. A. 110. **Tenn.**—*Governor v. McManus' Admr.*, 11 Humph. 152.

See 21 STANDARD PROC. 289.

[a] A cause of action for damages for discrimination in railroad rates in violation of the interstate commerce act is not one for a penalty and survives. *Langdon v. Pennsylvania R. Co.*, 194 Fed. 486, 495.

**64.** *Governor v. McManus' Admr.*, 11 Humph. (Tenn.) 152.

**65.** *Davis v. State ex rel. Long*, 119 Ind. 555, 22 N. E. 9; *Western Union Tel. Co. v. Scirelle*, 103 Ind. 227, 2 N. E. 604. See 21 STANDARD PROC. 289.

**66. Injuries to person caused by a nuisance**, see *supra*, I, D, 2, f, (I).

**Injuries to realty caused by a nuisance**, see *supra*, I, D, 2, e, (I).

**67.** *Warsaw Tp. v. Bakken*, 133 Minn. 128, 156 N. W. 7, 157 N. W. 1089, it affects an "interest in lands."

**68.** *Babbitt v. Corrigan*, 157 Iowa 382, 138 N. W. 466; *State v. McMaster*, 13 N. D. 58, 99 N. W. 58.

**69.** See generally the title, "Mandamus."

**70.** See generally the statutes.

[a] **Mandamus is a personal action** within a statute providing for survival of personal actions. *State ex rel. Brumley v. Jessup & Moore Paper Co.*, 6 Boyce (Del.) 118, 80 Atl. 350.

**71.** *Florida ex rel. Wailes v. Croom*, 226 U. S. 309, 33 Sup. Ct. 109, 57 L. ed. 235; *United States ex rel. Bernardin v. Butterworth*, 169 U. S. 600, 18 Sup. Ct. 441, 42 L. ed. 873; *United States v. Boutwell*, 17 Wall. 604, 21 L. ed. 721.

[a] **Consent of the respondent's successor** to be brought in does not authorize a revivor of the mandamus proceeding against him. *United States ex rel. Bernardin v. Butterworth*, 169 U. S. 600, 18 Sup. Ct. 441, 42 L. ed. 873.

**72.** *People ex rel. McPherson v. Western Life I. Co.*, 261 Ill. 513, 104 N. E. 219, Ann. Cas. 1915A, 266; *Booze v. Humbird*, 27 Md. 1.

[a] **Death of a copartner** among relators does not abate the writ. *People ex rel. Witherbee v. Board of Suprs.*, 70 N. Y. 228.

**73.** *Felts v. Memphis*, 2 Head (Tenn.) 650.

**74.** See *infra*, this note.

[a] A quo warranto proceeding to test the validity of a tax does not sur-



10. **Audita Querela.**—When the basis of an audita querela is personal, it will die with the person.<sup>75</sup>

11. **Habeas Corpus.**—A habeas corpus proceeding to secure custody of children abates on the death of the respondent.<sup>76</sup>

12. **Attachment and Garnishment.**<sup>77</sup>—An action commenced by attachment cannot be originally prosecuted against an executor unless authorized by statute.<sup>78</sup> In some jurisdictions, the death of a defendant after levy of an attachment on his property and before judgment dissolves the attachment,<sup>79</sup> but in other jurisdictions the contrary rule prevails,<sup>80</sup> unless he should die insolvent.<sup>81</sup> If the death of a party defendant occurs after judgment the attachment lien is not dissolved,<sup>82</sup> even though he may die insolvent,<sup>83</sup> but the rule is

vive the death of the taxpayer instituting it, as the relation between the taxpayer and the municipality is not contractual. *Noyes v. Hyde Park*, 73 Vt. 261, 50 Atl. 1068.

75. *Connecticut & P. Rivers R. Co. v. Bliss' Admr.*, 24 Vt. 411.

76. *Brown v. Rainor*, 108 N. C. 204, 12 S. E. 1028.

77. **Effect upon garnishment of death of defendant or garnishee**, see 10 STANDARD PROC. 487.

78. See 3 STANDARD PROC. 265.

79. *Cal.*—*Ham v. Henderson*, 50 Cal. 367; *Ham v. Cunningham*, 50 Cal. 365. *Mass.*—*Institution For Savings v. Puffer*, 201 Mass. 41, 87 N. E. 562, attachment of realty is dissolved under statute. *Pa.*—*Reynolds v. Nesbitt*, 196 Pa. 636, 46 Atl. 841, 79 Am. St. Rep. 736; *Farmers' & Merchants Bank v. Little*, 8 Watts & S. 207, 42 Am. Dec. 293. *S. D.*—*Yankton Sav. Bank v. Gutterson*, 15 S. D. 486, 90 N. W. 144.

80. *Ala.*—*Phillips v. Ash's Heirs*, 63 Ala. 414, where the lien is on personality. *Ariz.*—*Wartman v. Pecka*, 8 Ariz. 8, 68 Pac. 534. *Conn.*—*Craig v. Wagner*, 88 Conn. 100, 89 Atl. 916, Ann. Cas. 1917A, 160. *Ill.*—*Dow v. Blake*, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156. *Miss.*—*Lowenberg v. Tironi*, 62 Miss. 19. *Mo.*—See *Shea v. Shea*, 154 Mo. 599, 55 S. W. 869, 77 Am. St. Rep. 779; *Abernathy v. Moore*, 83 Mo. 65. *N. H.*—*Fairfield v. Day*, 72 N. H. 160, 55 Atl. 219, under express statute. *Ore.*—*White v. Ladd*, 34 Ore. 422, 56 Pac. 515; *Mitchell v. Schoonover*, 16 Ore. 211, 17 Pac. 867, 8 Am. St. Rep. 282. See also *White v. Ladd*, 41 Ore. 324, 68 Pac. 739, 93 Am. St. Rep. 732. *W. Va.*—*White v. Heavner*, 7 W. Va. 324.

[a] Where the survival statute ap-

plies only to actions which might originally be brought against the executor, the death of the defendant abates the attachment, but where the statute is unqualified, the attachment is not dissolved. *Craig v. Wagner*, 88 Conn. 100, 89 Atl. 916, Ann. Cas. 1917A, 160. See *Coit v. Sistare*, 85 Conn. 573, 84 Atl. 119, Ann. Cas. 1913C, 248.

[b] **An attachment lien on personality** is not dissolved by the death of the defendant, but it is otherwise as to a lien on realty. *Phillips v. Ash's Heirs*, 63 Ala. 414. *Contra*, as to lien on realty. *Craig v. Wagner*, 88 Conn. 100, 89 Atl. 916, Ann. Cas. 1917A, 160.

[c] **Under a statute providing that the death of a defendant after service of an attachment shall not abate the suit but it shall be carried on to judgment as if the death had not occurred**, the suit may be continued against the property without regard to the death, or he may revive the suit against the defendant's representative. *Lowenberg v. Tironi*, 62 Miss. 19.

81. *Ala.*—*Phillips v. Ash's Heirs*, 63 Ala. 414, if where the estate had been judicially declared insolvent. *Conn.*—*Contra Craig v. Wagner*, 88 Conn. 100, 89 Atl. 916, Ann. Cas. 1917A, 160. *N. H.*—*Fairfield v. Day*, 72 N. H. 160, 55 Atl. 219, under statute.

82. *Ark.*—*Cunningham v. Burk*, 45 Ark. 267. *Conn.*—*Coit v. Sistare*, 85 Conn. 573, 84 Atl. 119, Ann. Cas. 1913C, 248. *Mass.*—*Grosvenor v. Gold*, 9 Mass. 209. *Compare present statutes.* *N. H.*—*Waitt v. Thompson*, 43 N. H. 161, 80 Am. Dec. 136; *Bowman v. Stark*, 6 N. H. 459. *Tenn.*—*Look-out Bank v. Susong*, 90 Tenn. 590, 18 S. W. 389. *Vt.*—*Miller v. Williams*, 30 Vt. 386.

83. *Bowman v. Stark*, 6 N. H. 459;

otherwise under some statutes.<sup>84</sup>

The death of an attachment creditor does not dissolve the attachment lien unless the action abates.<sup>85</sup>

**13. Contempt.**—After an order adjudging one in contempt and imposing a fine, his death does not abate the proceedings.<sup>86</sup>

**14. Actions by and Against Corporations, Directors and Stockholders.**—A cause of action against directors of a corporation or bank for loss sustained through misconduct or negligence ordinarily survives.<sup>87</sup> A cause of action, however, under a statute making directors liable for all debts of a corporation on failure to file reports and the like does not survive where it is regarded as a penalty,<sup>88</sup> except by virtue of statute;<sup>89</sup> but where the liability is considered contractual rather than penal, it survives.<sup>90</sup> And the same is true in case of a stockholder's liability, which survives where contractual,<sup>91</sup> but does not survive if the liability is regarded as penal.<sup>92</sup> A suit by

*Lookout Bank v. Susong*, 90 Tenn. 590, 18 S. W. 389.

**84.** *Yankton Sav. Bank v. Gutterson*, 15 S. D. 486, 90 N. W. 144.

**85.** *Buller v. Woods*, 43 Mo. App. 494; *Boyd v. Roberts*, 10 Heisk. 474, where creditors' estate was insolvent. But see *In the Matter of Vargas*, 19 Wend. (N. Y.) 154.

**86.** *Wasserman v. United States*, 161 Fed. 722, 88 C. C. A. 582.

[a] **Nor is a writ of error** sued out by him, in case of a civil contempt, abated by his death. *Wasserman v. United States*, 161 Fed. 722, 88 C. C. A. 582.

**87. U. S.**—*Boyd v. Schneider*, 131 Fed. 223, 65 C. C. A. 209; *Bates v. Dresser*, 229 Fed. 772, 798 (where directors of bank through negligence in management failed to discover defalcations of employe in time to prevent loss); *Curtis v. Phelps*, 208 Fed. 577; *Allen v. Luke*, 163 Fed. 1018 (where loans were made when the reserve was too low); *Allen v. Luke*, 141 Fed. 694. But see *Witters v. Foster*, 26 Fed. 737, 23 Blatchf. 457, a cause of action against a director for neglect of duty in not requiring a bond of the cashier and in allowing persons to become indebted to an amount exceeding one-tenth of the capital does not survive. **Cal.**—*Major v. Walker*, 23 Cal. App. 465, 138 Pac. 360. **Mass.**—*Wineburgh v. United States S. & S. R. Adv. Co.*, 173 Mass. 60, 53 N. E. 145, 73 Am. St. Rep. 261; *Warren v. Para Rubber Shoe Co.*, 166 Mass. 97, 44 N. E. 112. **Va.**—*Winston v. Gordon*, 115 Va. 899, 80 S. E. 766.

[a] **Where a director wrongfully misappropriates funds** of the company, a cause of action therefor survives. *Wineburgh v. United States S. & S. R. Adv. Co.*, 173 Mass. 60, 53 N. E. 145, 73 Am. St. Rep. 261.

[b] **An action for damages resulting from an illegal declaration of dividends** survives. If regarded as a tort, it is a wrong to property rights or interests of another. *German-American Coffee Co. v. Johnston*, 168 App. Div. 31, 153 N. Y. Supp. 866.

**88. Conn.**—*Mitchell v. Hotchkiss*, 48 Conn. 9, 40 Am. Rep. 146. **N. Y.** *Bank of California v. Collins*, 5 Hun 209; *Reynolds v. Mason*, 54 How. Pr. 213. See *Cochran v. Wiechers*, 119 N. Y. 399, 23 N. E. 803, 7 L. R. A. 553. **R. I.**—*Moies v. Sprague*, 9 R. I. 541.

**89.** *First Nat. Bank v. Cottonwood Land Co.*, 51 Mont. 544, 154 Pac. 582, under a general survival statute.

**90.** *Hughes v. Kelley*, 95 Ark. 327, 129 S. W. 784.

**91. U. S.**—*Matteson v. Dent*, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. ed. 571, *Allen v. Fairbanks*, 40 Fed. 188. **Cal.** *Damiano v. Bunting* (Cal. App.), 181 Pac. 232. **Colo.**—*First Nat. Bank v. Hotchkiss*, 49 Colo. 593, 114 Pac. 310. **Minn.**—*Willoughby v. St. Paul German Ins. Co.*, 80 Minn. 432, 83 N. W. 377. **N. Y.**—*Cochran v. Wiechers*, 119 N. Y. 399, 23 N. E. 803, 7 L. R. A. 553.

**92.** *Diversey v. Smith*, 103 Ill. 378, 42 Am. Rep. 14, stating test as to whether liability is penal or contractual. See *Moies v. Sprague*, 9 R. I. 541, query.

a stockholder, based upon the right of the corporation and its failure or refusal to sue, does not abate upon the stockholder's death.<sup>93</sup> And a stockholder's suit brought by two or more stockholders does not abate upon the death of one.<sup>94</sup> A suit to enjoin an officer from removing the books of a corporation does not survive his death.<sup>95</sup>

**Under Sherman Act.**—A cause of action under section seven of the Sherman act to recover treble damages for unlawful monopoly, survives.<sup>96</sup>

**15. Patents, Copyrights and Trade-Marks.**—An action to restrain the infringement of a patent, copyright, or trade-mark with a claim for profits and damages survives the death of the plaintiff.<sup>97</sup> But it has been held that causes of action for actual damages for infringement of a patent,<sup>98</sup> and for penalties for violation of the patent and copyright laws<sup>99</sup> do not survive.

**16. Licenses.**—Proceedings to compel issuance of a license to conduct a business do not survive the death of the applicant.<sup>1</sup>

**17. Inquisition of Lunacy.**—A proceeding to have a person declared a lunatic abates on the death of the defendant.<sup>2</sup>

**18. Bankruptcy and Insolvency Proceedings.**—An involuntary insolvency proceeding abates on the debtor's death during its pendency, unless statute provides otherwise.<sup>3</sup> But the rule is otherwise in case of bankruptcy proceedings.<sup>4</sup>

**19. Annulment of Marriage and Divorce.**—Proceedings for the annulment of marriage,<sup>5</sup> or for divorce,<sup>6</sup> abate on the death of parties thereto. But after judgment of divorce the subsequent proceedings in review do not abate so far as property rights may be affected.<sup>7</sup>

**20. Taxpayer's Action.**—A suit by a taxpayer on behalf of himself and other taxpayers to prevent unlawful action by officers and others which would injure taxpayers, survives the death of the plaintiff.<sup>8</sup>

93. *Spring v. Webb*, 227 Fed. 481.

94. *Martin v. D. B. Martin Co.*, 10 Del. Ch. 336, 92 Atl. 262.

95. *Conley v. Huntoon*, 37 R. I. 343, 92 Atl. 865.

96. *United Copper Securities Co. v. Amalgamated Copper Co.*, 232 Fed. 574, 146 C. C. A. 532; *Imperial Film Exch. v. General Film Co.*, 244 Fed. 985.

97. *Moses v. Wooster*, 115 U. S. 285, 6 Sup. Ct. 38, 29 L. ed. 391; *Illinois Cent. R. Co. v. Turrill*, 110 U. S. 301, 4 Sup. Ct. 5, 28 L. ed. 154; *Oakey v. Dalton*, 35 Ch. Div. (Eng.) 700, 56 L. J. Ch. 823, 57 L. T. N. S. 18, 35 Wkly. Rep. 709.

98. *Van Choate v. General Elec. Co.*, 245 Fed. 120. But see *May v. Board of Comrs. of Logan Co.*, 30 Fed. 250.

99. *Schreiber v. Sharpless*, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. ed. 65; *Van Choate v. General Elec. Co.*, 245 Fed.

120, an action for additional compensation mentioned in the statute abates.

1. *Hannon v. Harper*, 9 Cal. App. 260, 98 Pac. 685.

2. *Posey v. Posey*, 113 Tenn. 588, 83 S. W. 1.

3. See 13 STANDARD PROC. 676.

4. See 3 STANDARD PROC. 990.

5. See 19 STANDARD PROC. 371.

[a] Questioning validity of void marriage after death of parties, see 19 STANDARD PROC. 372, note 17. See also *Sharon v. Terry*, 36 Fed. 337, 13 Sawy. 387, 1 L. R. A. 572, as to survival of a right of action to cancel a forged marriage contract.

6. See 7 STANDARD PROC. 809.

7. See *supra*, I, C, 7, d.

8. *Gorden v. Strong*, 158 N. Y. 407, 53 N. E. 33.

Effect of death of persons suing in



**21. Probate and Contest of Wills.**—A proceeding to probate a will does not abate on the death of the proponent, being brought on behalf of all persons interested.<sup>9</sup> The right to contest a will survives<sup>10</sup> although some courts hold otherwise.<sup>11</sup> Where one of several parties die in a will contest, the suit may proceed as to the survivor.<sup>12</sup>

**22. Adoption.**—An action to set aside a decree of adoption, being of a personal nature, does not survive the death of the plaintiff.<sup>13</sup>

**23. Removal of Executors and Administrators.**—A proceeding to remove an executor or administrator abates on his death.<sup>14</sup>

**24. Criminal Proceedings.**—It is a rule of the common law that all public and private wrongs die with the offender.<sup>15</sup> From this it follows that criminal proceedings permanently abate on the death of the defendant,<sup>16</sup> whether the sentence imposed or to be imposed is a fine<sup>17</sup> or imprisonment,<sup>18</sup> whether the defendant dies before or after judgment,<sup>19</sup> or pending appeal or proceedings on error.<sup>20</sup> Criminal

representative capacity generally, see *supra*, I, C, 4.

9. *Matter of Lasak*, 131 N. Y. 624, 30 N. E. 112. See also *Carolan v. O'Donnell*, 141 App. Div. 463, 126 N. Y. Supp. 501, suit to determine validity of alleged will.

10. *Ind.*—*Crawfordsville Trust Co. v. Ramsey*, 178 Ind. 258, 98 N. E. 177, under statute providing "all other causes of action survive." *N. Y.* *Brady v. McCosker*, 1 N. Y. 214, 3 Denio 610, 4 How. Pr. 291. *Wash.* *Ingersoll v. Gourley*, 72 Wash. 462, 130 Pac. 743.

11. *Selden v. Illinois Tr. & Sav. Bank*, 239 Ill. 67, 77, 87 N. E. 860, 130 Am. St. Rep. 180; *Ligon v. Hawkes*, 110 Tenn. 514, 75 S. W. 1072. See *Diffenderffer v. Griffith*, 57 Md. 81, holding the court cannot substitute new parties.

12. *Diffenderffer v. Griffith*, 57 Md. 81.

13. *Naylor v. Naylor*, 99 Wash. 396, 169 Pac. 819.

14. *McCalmont's Estate*, 242 Pa. 578, 89 Atl. 687.

15. *U. S.*—*United States v. Dunne*, 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145. *Wash.*—*State v. Furth*, 82 Wash. 665, 144 Pac. 907. *Eng.*—*Hambly v. Trott*, 1 Cowp. 371, 98 Eng. Reprint 1136.

16. *Ia.*—*Babbitt v. Corrigan*, 157 Iowa 382, 138 N. W. 466. *Mo.*—*Carrollton v. Rhomberg*, 78 Mo. 547. *Ore.* *State v. Martin*, 30 Ore. 108, 47 Pac. 196. *Okla.*—*Jeffries v. State*, 11 Colo. Crim. 411, 146 Pac. 1086; *Yota v. State*, 10 Okla. Crim. 26, 133 Pac. 257.

*Wash.*—*State v. Furth*, 82 Wash. 665, 144 Pac. 907.

[a] Where there are several defendants, the death of one abates the criminal proceeding as to him. *People v. Pouchot*, 174 Ill. App. 1.

17. *U. S.*—*United States v. Mitchell*, 163 Fed. 1014; *United States v. Pomeroy*, 152 Fed. 279. *Cal.*—*People v. St. Maurice*, 166 Cal. 201, 135 Pac. 952. *Ind.*—*Blackwell v. State*, 185 Ind. 227, 113 N. E. 723. *Mo.*—*Carrollton v. Rhomberg*, 78 Mo. 547. *Okla.*—*Sharp v. State*, 13 Okla. Crim. 59, 161 Pac. 1178; *Boyd v. State*, 3 Okla. Crim. 684, 108 Pac. 431. *Ore.*—*State v. Martin*, 30 Ore. 108, 47 Pac. 196. *Wash.*—*State v. Furth*, 82 Wash. 665, 144 Pac. 907.

18. *State v. Furth*, 82 Wash. 665, 144 Pac. 907. And see cases cited *supra*, and *infra*, this section.

19. *United States v. Mitchell*, 163 Fed. 1014; *United States v. Pomeroy*, 152 Fed. 279; *Overland Cotton Mill Co. v. People*, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74.

20. *U. S.*—*Menken v. Atlanta*, 131 U. S. 405, 9 Sup. Ct. 794, 33 L. ed. 221; *List v. Pennsylvania*, 131 U. S. 396, 9 Sup. Ct. 794, 33 L. ed. 222; *United States v. Dunne*, 173 Fed. 254, 97 C. C. A. 420, 19 Ann. Cas. 1145. *Cal.*—*People v. St. Maurice*, 166 Cal. 201, 135 Pac. 952. *Ill.*—*O'Sullivan v. People*, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143. *Okla.*—*Jeffries v. State*, 11 Okla. Crim. 411, 146 Pac. 1086; *Fletcher v. State*, 9 Okla. Crim. 464, 132 Pac. 498; *Boyd v. State*, 3 Okla. Crim. 684, 108 Pac. 431. *Ore.*—*State v. Martin*, 30 Ore. 108, 47 Pac. 196. *Tex.*—*Burks*

proceedings do not abate on the death of the complaining witness.<sup>21</sup>

**25. Bastardy Proceedings.**—A bastardy proceeding or a right of action against the putative father for support of a bastard child abates on the death of the father,<sup>22</sup> unless statute otherwise provides.<sup>23</sup> But the death of the mother pendente lite does not abate the proceeding,<sup>24</sup> although the contrary has been held.<sup>25</sup> If the action is brought by an officer, his death does not abate it.<sup>26</sup> The death of the child born alive, pending the proceeding does not abate it,<sup>27</sup> although where the proceedings were commenced before the birth of the child, the action would abate if the child should not be born alive.<sup>28</sup>

**26. Actions by and Against Public Officers.**—The general rules as to the survival of actions and of causes of action apply to actions by and against public officers.<sup>29</sup> If by the tortious act of an officer the estate of the wrongdoer is benefited, the cause of action survives against his personal representatives,<sup>30</sup> but if by such act the deceased had no gain, the action dies with him.<sup>31</sup> If the wrong lessens the estate of the person injured, the cause of action survives his death.<sup>32</sup> And if a cause of action is contractual in nature, it will survive against the executor or administrator of the officer.<sup>33</sup>

*v. State (Tex. Crim.)*, 105 S. W. 496; *Hudson v. State (Tex. Crim.)*, 70 S. W. 82. **Wash.**—*State v. Furth*, 82 Wash. 665, 144 Pac. 907.

**21.** *Queen v. Truelove*, 5 Q. B. Div. (Eng.) 336.

**22. Me.**—*McKenzie v. Lombard*, 85 Me. 224, 27 Atl. 110. **Mich.**—*People v. Kemppainen*, 163 Mich. 186, 128 N. W. 183, 30 L. R. A. (N. S.) 1166, note. **N. C.**—*Clements v. Durham's Admrs.*, 52 N. C. 100.

**23.** *State ex rel. Wilson v. Williams*, 8 Ind. 191.

**24.** *People v. Nixon*, 45 Ill. 353 (she is not a party although allowed to control the suit); *County of Dodge v. Kemnitz*, 28 Neb. 224, 44 N. W. 184, where suit was revived in name of county. See *R. R. v. J. M.*, 3 N. H. 135, 141.

**25.** *Rollins v. Chalmers*, 49 Vt. 515.

**26.** *Sadler v. Jappson*, 82 N. J. L. 20, 82 Atl. 316. *Contra*, *State v. Sullivan*, 12 R. I. 212.

**27. Ill.**—*Hauskins v. People*, 82 Ill. 193. **Ind.**—*Malson v. State*, 75 Ind. 142. **Me.**—*Smith v. Lint*, 37 Me. 546,

the father is chargeable with expenses incurred before death. **Neb.**—*Hanisky v. Kennedy*, 37 Neb. 618, 56 N. W. 208. **N. Y.**—*People ex rel. Moore v. Beehler*, 63 Hun 42, 17 N. Y. Supp. 418, 43 N. Y. St. 90. **N. C.**—*State v. Beatty*, 66 N. C. 648. **Ohio.**—*Hinton v. Dickinson*, 19 Ohio St. 583.

But see *Rollins v. Chalmers*, 49 Vt. 515.

**28.** *Hauskins v. People*, 82 Ill. 193. Compare *State v. Addington*, 143 N. C. 683, 57 S. E. 398.

**29.** See *supra*, I, B, 1 and 2.

**30.** *Cravath v. Plympton*, 13 Mass. 454.

[a] An action of debt against a sheriff for money had and received survives against his personal representatives. *Chenault's Admrs. v. Walker*, 22 Ala. 275.

[b] A cause of action against an officer for conversion of personal property survives the officer's death. *Coleman v. Woodworth*, 28 Cal. 567.

**31. U. S.**—*United States v. Daniel*, 6 How. 11, 12 L. ed. 323. **Mass.**—*Cravath v. Plympton*, 13 Mass. 454. **Me.** *Gent v. Gray*, 29 Me. 462.

**32.** *Dinenny v. Fay*, 38 Barb. (N. Y.) 18.

[a] Under a statute providing for survival of actions for damages done to real and personal estate a cause of action against an officer in not keeping property attached on mesne process and in not delivering it to the officer holding execution in the suit survives. *Dana v. Lull*, 21 Vt. 383.

**33.** See *infra*, this note.

[a] An action against an officer and sureties on his bond for defaults of the officer in the performance of his duties is *ex contractu* and as such

In accordance with these rules, a cause of action for a false return not benefiting the estate of the officer does not survive his death,<sup>34</sup> unless statute so provides.<sup>35</sup> But, under the statute of 4 Edward III, such action survives the death of the plaintiff, especially upon final process, when the estate of the plaintiff is lessened,<sup>36</sup> although under other statutes, it is held that the cause of action dies with the plaintiff.<sup>37</sup> An action for nonfeasance in failing to make a levy,<sup>38</sup> in not serving in time an attachment and trustee process,<sup>39</sup> in failing to take a sufficient bail bond,<sup>40</sup> or in failing to make a return,<sup>41</sup> as well as for an escape,<sup>42</sup> dies with the wrongdoer unless it is proved that his estate was benefited.<sup>43</sup> But an action for failure to return an execution survives the creditor's death where his estate is lessened.<sup>44</sup> And the same is true as to a cause of action for failure to arrest a debtor upon execution.<sup>45</sup> A cause of action against a tax collector for the recovery of money paid under protest on account of duties, or taxes erroneously or illegally assessed survives the death of the officer at common law.<sup>46</sup>

Summary proceedings against public officers were unknown to the common law, and they cannot be revived against the personal representatives of the officer,<sup>47</sup> unless statute so provides.<sup>48</sup>

**Cause of Action for Acts of Deputy.**—At common law, a deputy of a sheriff, or other public officer is but the agent of the officer himself. When the deputy is guilty of a misfeasance or nonfeasance, the officer is deemed to be a principal tortfeasor. And therefore on the death of the officer, a cause of action against him arising out of the default of his deputy does not survive if it is one that would not have survived were he the real offender.<sup>49</sup> But where a deputy is not a mere agent of the sheriff but is to a certain extent an independent public

survives against his personal representative. *Wilson v. Young*, 58 Ark. 593, 25 S. W. 870.

[b] A cause of action against a sheriff for failure to require sureties on a bail bond to justify is contractual as he is liable as bail, and therefore survives his death. *Hamilton v. Gorman*, 25 Civ. Proc. 70, 14 Misc. 114, 35 N. Y. Supp. 183.

34. *United States v. Daniel*, 6 How. (U. S.) 11, 12 L. ed. 323.

35. See the statutes and *Jewett v. Weaver*, 10 Mo. 234.

36. *Williams v. Cary*, 4 Mod. 403, 87 Eng. Reprint 468.

37. *Me.*—*Valentine v. Norton*, 30 Me. 194. *N. Y.*—*Benjamin's Exrs. v. Smith*, 174 Wend. 208. *Vt.*—*Admr. of Barrett v. Copeland*, 20 Vt. 244, construing statute. *Explained in Dana v. Lull*, 21 Vt. 383, 388.

38. *Cravath v. Plympton*, 13 Mass. 454.

39. *Gent v. Gray*, 2<sup>nd</sup> Me. 462.

40. *Cunningham v. Jaques*, 19 N. J. L. 42.

41. *People v. Gibbs*, 9 Wend. (N. Y.) 29; *Mason v. Ballew*, 35 N. C. 483.

42. *U. S.*—*United States v. Daniel*, 6 How. 11, 12 L. ed. 323. *N. J.*—*Cunningham v. Jaques*, 19 N. J. L. 42. *N. Y.*—*Martin v. Bradley*, 1 Caines 124. *N. C.*—*Rhodes v. Gregory's Admrs.*, 3 N. C. 351.

43. See *People v. Gibbs*, 9 Wend. (N. Y.) 29.

44. *Paine v. Ulmer*, 7 Mass. 317.

45. *Dinenny v. Fay*, 38 Barb. (N. Y.) 18.

46. *Patton v. Brady*, 184 U. S. 608. 22 Sup. Ct. 493, 46 L. ed. 713; *Tamble v. Pullman Co.*, 207 Fed. 30, 124 C. C. A. 590.

47. *Logan v. Barclay*, 3 Ala. 361.

48. See the statutes.

49. *U. S.*—*United States v. Daniel*, 6 How. 11, 12 L. ed. 323. *Conn.*—*McEvers v. Pitkin*, 1 Root 216. *N. Y.*—*People v. Gibbs*, 9 Wend. 29; *Franklin*



officer, and the sheriff is merely a surety rather than a principal tortfeasor, the reason of the maxim *actio personalis* fails, and the cause of action survives.<sup>50</sup>

When the deputy dies, the rule as to survival of causes of action against his estate is that governing the survival of actions generally on the death of the wrongdoer himself.<sup>51</sup> But the cause of action against the officer for the default of the deputy is not affected by the death of the deputy,<sup>52</sup> even though no action will lie against the personal representative of the latter.<sup>53</sup>

Some statutes provide that actions for malfeasance of a sheriff or his deputy may be brought against the personal representatives of the sheriff.<sup>54</sup>

A pending action by or against an officer in his official and representative capacity does not abate on the death of the officer.<sup>55</sup>

**27. Actions by and Against Trustees.**—The effect of the death of a trustee in an action by or against him is elsewhere discussed.

**E. PLEADINGS AND PROCEEDINGS AFTER DEATH.**<sup>56</sup>—**1. Death Before Action Brought.**—In an action brought after the death of one of the parties to the transaction, the pleadings of the plaintiff must show that the cause of action is one which survives.<sup>57</sup> Where action

*v. Low*, 1 Johns. 396, 402. **Vt.**—See also *Dana v. Lull*, 21 Vt. 383.

[a] **Illustrations.**—(1) If the deputy marshal, in the misfeasance complained of, receives property or money, the cause of action will survive against the executors of the marshal. *United States v. Daniel*, 6 How. (U. S.) 11, 12 L. ed. 323. (2) A cause of action against a sheriff for the default of his deputy in not paying over money collected on an execution survives against the representatives of the sheriff under statute. *Bellows v. Allen's Admr.*, 22 Vt. 108.

[b] A cause of action against a postmaster for embezzlement by his clerk does not survive the death of the postmaster. The cause of action arises *ex delicto* and no action would lie on an assumption. *Franklin v. Low*, 1 Johns. (N. Y.) 396, based on *Hambly v. Trott*, Cowp. 371, 98 Eng. Reprint 1136.

50. *Dayton v. Lynes*, 30 Conn. 351.

51. *Valentine v. Norton*, 30 Me. 194; *Cravath v. Plympton*, 13 Mass. 454.

52. *Rice v. Hosmer*, 12 Mass. 127.

53. *Rice v. Hosmer*, 12 Mass. 127.

54. *Mellen v. Baldwin*, 4 Mass. 480.

[a] This statute does not cause the action to survive against the representatives of the deputy. *Cravath v. Plympton*, 13 Mass. 454; *Mellen v.*

*Baldwin*, 4 Mass. 480, followed in *Valentine v. Norton*, 30 Me. 194.

55. **Ark.**—*Edrington v. Mathews*, 30 Ark. 665. **Fla.**—*Mugge v. Jackson*, 50 Fla. 235, 39 So. 157. **Ill.**—*McDonald v. Algeo*, 96 Ill. App. 79. **Ky.**—*Com. v. Southern Pac. Co.*, 127 Ky. 358, 105 S. W. 466. **N. J.**—*Sadler v. Jappson*, 82 N. J. L. 20, 82 Atl. 316. **N. Y.** *Dickinson v. Oliver*, 112 App. Div. 806, 99 N. Y. Supp. 432. **Tenn.**—*Felts v. Memphis*, 2 Head 650.

[a] The reason is, that when an officer sues in his official capacity for the public benefit, the law regards the name of the office, not the adjunct name of the individual. If the officer die before the determination of the suit, his successor may continue it. *Felts v. Memphis*, 2 Head (Tenn.) 650. See *supra*, I, C, 4.

[b] The officer's successor, not his personal representative must be substituted. *Edrington v. Mathews*, 30 Ark. 665; *McDonald v. Algeo*, 96 Ill. App. 79. See the title "Revivor."

In bastardy proceeding, see *supra*, I, D, 25.

56. Dead persons as plaintiffs or defendants, see 20 STANDARD PROC. 892, and 925.

Judgments for or against dead persons, see 14 STANDARD PROC. 782, 1025.

57. See *infra*, this note.

is brought on a cause of action which does not survive because of death, and the pleadings show the death, the objection may be raised by demurrer,<sup>58</sup> or, where it is regarded as going to the court's jurisdiction of the subject matter, by motion to dismiss.<sup>59</sup> Where the plaintiff's pleading does not show the death, the fact of death may be given in evidence under a plea of not guilty,<sup>60</sup> but not under a plea of non-assumpsit;<sup>61</sup> it may be pleaded in abatement or in bar, or it may be availed of by writ of error coram nobis.<sup>62</sup>

**2. Death Pending Action.**—The death of a party to an action or suit does not ipso facto abate or suspend proceedings, without an order of court to that effect.<sup>63</sup> The death must be suggested.<sup>64</sup> The suggestion of death may be made by either party,<sup>65</sup> in any court,<sup>66</sup> at any stage of the proceedings.<sup>67</sup> Death of a party pending action may be suggested by plea in abatement,<sup>68</sup> or it has been held, by asking an instruction of the court,<sup>69</sup> or by objecting to the cause proceeding without bringing in the proper parties,<sup>70</sup> or, where the complaint shows the case is one which does not survive, by demurrer.<sup>71</sup> Upon

[a] **Under a statute** providing for survival of causes of action for personal injuries "other than those resulting in death," it is necessary to allege and prove that the injured party did not die as a result of the injuries sued for. *Greer v. St. Louis, I. M. & S. R. Co.*, 173 Mo. App. 276, 158 S. W. 740, citing local cases.

58. *Leathers v. Raburn*, 17 Ga. App. 437, 87 S. E. 754.

[a] **Oral Demurrer.**—But an objection that a cause of action does not survive and that the heirs or representatives cannot bring an action thereon cannot be raised by an oral demurrer, at trial, to their capacity to sue. *Duke v. Postal Tel. Cable Co.*, 71 S. C. 95, 50 S. E. 675.

59. *Hey v. Prime*, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N. S.) 570. See 17 STANDARD PROC. 902, note 51.

[a] **The motion may be made at any stage** of the case, as the court has no jurisdiction. *Hey v. Prime*, 197 Mass. 474, 84 N. E. 141, 17 L. R. A. (N. S.) 570.

60. *Gosser v. Hickenlooper*, 81½ Pa. 281.

61. *Stoetzell v. Fullerton*, 44 Ill. 108.

62. See 20 STANDARD PROC. 978.

**Where defendant has died**, see 20 STANDARD PROC. 970.

[a] **Where one joint plaintiff died** before action brought, a plea in abatement is proper and necessary. *Camden v. Robertson*, 3 Ill. 507.

63. See *infra*, this note.

[a] **In Equity.**—The death of a party to an equity suit does not ipso facto abate it without an order of court. *Danforth v. Danforth*, 111 Ill. 236; *Crook's Exr. v. Turpin*, 10 B. Mon. (Ky.) 243.

64. See *infra*, this section.

65. Ill.—*Danforth v. Danforth*, 111 Ill. 236; *Stoetzell v. Fullerton*, 44 Ill. 108. Ore.—*Stivers v. Byrnett*, 56 Ore. 565, 108 Pac. 1014, 109 Pac. 386. Pa.—*Philadelphia v. Jenkins*, 162 Pa. 451, 29 Atl. 794.

66. *Judson v. Love*, 35 Cal. 463.

67. *Judson v. Love*, 35 Cal. 463.

[a] **Nunc Pro Tunc.**—A suggestion of death may sometimes be made nunc pro tunc. *Stoetzell v. Fullerton*, 44 Ill. 108.

[b] **A motion to dismiss filed for the first time on appeal** is too late where the plaintiff died pending trial. *Dana v. Lull*, 21 Vt. 383.

68. *Stoetzell v. Fullerton*, 44 Ill. 108; *McPherson v. Wood*, 52 Ill. App. 170. But see *Baltimore & O. R. Co. v. Ritchie*, 31 Md. 191, 199.

[a] **Plea as a Suggestion of Death.** A plea in abatement which is stricken out cannot stand as a suggestion of death on which to abate the suit. *Hargis v. Ayres*, 8 Yerg. (Tenn.) 467.

69. *Baltimore & O. R. Co. v. Ritchie*, 31 Md. 191.

70. *Hasbrouck v. Bunce*, 62 N. Y. 475, 483, where party made a motion to nonsuit.

71. *Leggate v. Moulton*, 115 Mass.

such suggestion, and upon proper proof of death,<sup>72</sup> as by affidavit,<sup>73</sup> the case, if one which does not survive, should be entered abated,<sup>74</sup> and not dismissed,<sup>75</sup> or discontinued.<sup>76</sup> If the cause of action survives, all proceedings, on such suggestion, are stayed or suspended until the proper persons are made parties by appropriate proceedings.<sup>77</sup> Where the suggestion of death is made in bad faith for delay it may be disregarded.<sup>78</sup>

**II. ON TRANSFER OR DEVOLUTION OF TITLE OR INTEREST.**—A. AT COMMON LAW.—At common law the termination of the interest of the plaintiff in the subject matter of the action might be pleaded in abatement.<sup>79</sup> But a transfer of his interest by one co-plaintiff to his co-plaintiff,<sup>80</sup> or to the defendant,<sup>81</sup> does not abate the action.

B. IN EQUITY.—TRANSFER OF INTEREST OF COMPLAINANT.—Although in equity an assignment of the whole interest of a complainant suing alone in his sole right may not operate strictly as an abatement

552. See *Voyles v. Postal Tel. Cable Co.*, 78 S. C. 430, 59 S. E. 68.

72. See *infra*, this note.

[a] A mere suggestion of death by counsel does not establish the death as a fact so that an abatement can be entered. *Young v. Officer*, 7 Yerg. (Tenn.) 137, the court must have the fact established to its satisfaction.

73. *Judson v. Love*, 35 Cal. 463, suggestion may be by affidavit.

74. *Clark v. Carroll*, 59 Md. 180; *Johnson v. Elwood*, 82 N. Y. 362.

75. *Clark v. Carroll*, 59 Md. 180.

[a] A motion to dismiss is not a proper method of objecting that a cause of action does not survive so as to permit of a revivor. *Holton v. Daly*, 106 Ill. 131. But see *Nettleton v. Dinehart*, 5 Cush. (Mass.) 543; *Noyes v. Hyde Park*, 73 Vt. 261, 50 Atl. 1068.

76. *Johnson v. Elwood*, 82 N. Y. 362.

77. *Judson v. Love*, 35 Cal. 463; *Sanchez v. Roach*, 5 Cal. 248. See the title "Revivor."

Suggestion of death where one of several parties die, see *supra*, I, C, 6.

[a] Effect of Suggestion.—The suggestion of death and the name of the executor or heir does not operate as a substitution but supports a scire facias. *Philadelphia v. Jenkins*, 162 Pa. 451, 29 Atl. 794.

78. *Gillespie v. Bailey*, 12 W. Va. 70, 83, 29 Am. Rep. 445.

79. U. S.—*Elliot v. Teal*, 5 Sawy.

188, 8 Fed. Cas. No. 4,389. Conn. *Curtis v. Bemis*, 26 Conn. 1, 68 Am. Dec. 377. Ky.—*Hall v. Gentry*, 1 A. K. Marsh. 555.

Removal of guardian pending suit does not abate it, see 10 STANDARD PROC. 864.

Executor may plead revocation of letters, see 8 STANDARD PROC. 747, 764.

On dissolution of corporation, see the title "Winding Up Corporations."

[a] Plea Where Transfer Is to Defendant.—The transfer of the plaintiff's interest in the subject matter of a suit to the defendant may be pleaded in bar of further maintenance of the suit, but not in bar of the suit generally. *Leavitt v. School Dist.*, 78 Me. 574, 7 Atl. 600.

[b] In ejectment the lease is fictitious and the legal title is in the lessor. Hence, the conveyance, marriage, or death of the lessor pendente lite will not abate the suit. *Hubbard v. Bardstown*, 2 J. J. Marsh. (Ky.) 81. Compare *M'Culloch v. Cowher*, 5 Watt & S. (Pa.) 427, holding that a plaintiff in ejectment who parts with his title to his co-plaintiff cannot recover for the use of his vendee, nor can the co-plaintiff recover on the title conveyed to him.

80. Mass.—*Coburn v. Palmer*, 8 Cush. 124. Mo.—*Luebbering v. Oberkoetter*, 1 Mo. App. 393. Neb.—*Mageau v. Bell*, 13 Neb. 247, 13 N. W. 277.

81. *McPike v. McPherson*, 41 Mo. 621.



of the suit, its effect is much the same.<sup>82</sup> Whether the complainant's right is transferred by sale,<sup>83</sup> or by operation of law,<sup>84</sup> and whether before<sup>85</sup> or after decree, if there is to be any further litigation in the case,<sup>86</sup> the action cannot be carried on by or in the name of the original plaintiff by the party who acquires the right. But may be continued by making the assignee a party.<sup>87</sup> And a reassignment to the original complainant does not obviate the filing of an original bill in the nature of a supplemental bill.<sup>88</sup>

**Transfer of Interest of Defendant.**—An assignment by a sole defendant of his interest in an equity suit will not abate the suit.<sup>89</sup> And the assignee taking pendente lite will be bound by the litigation if he neglects to come in by appropriate application.<sup>90</sup>

**C. UNDER STATUTES.**—The codes and statutes generally provide that actions shall not abate by the transfer of any interest therein if the action survive or continue.<sup>91</sup>

82. **U. S.**—Barnard *v.* Hartford P. & F. R. Co., 2 Fed. Cas. No. 1,003. **Ia.**—Wright *v.* Meek, 3 G. Gr. 472, 480. **Mich.**—Webster *v.* Hitchcock, 11 Mich. 56. **N. Y.**—Sedgwick *v.* Cleveland, 7 Paige Ch. 287. **Tex.**—Drouilhet *v.* Pinckard (Tex. Civ. App.), 42 S. W. 135.

[a] **Transfer of a Part Interest.** The transfer of the property of the plaintiff in an action to cancel a forged marriage contract does not abate the action if he retain the right to claim the rents and profits thereof. Sharon *v.* Terry, 36 Fed. 337, 13 Sawy. 387, 1 L. R. A. 572.

83. **U. S.**—Pittsburgh, S. & N. R. Co. *v.* Fiske, 178 Fed. 66, 101 C. C. A. 560; Automatic Switch Co. *v.* Cutler-Hammer Mfg. Co., 147 Fed. 250, 77 C. C. A. 176; Tappan *v.* Smith, 5 Biss. 73, 23 Fed. Cas. No. 13,748; Hoxie *v.* Carr, 1 Sumn. 173, 12 Fed. Cas. No. 6,802. **Me.**—Mason *v.* York & C. R. Co., 52 Me. 82. **Mich.**—Perkins *v.* Perkins, 16 Mich. 162; Webster *v.* Hitchcock, 11 Mich. 56. **Minn.**—Chisholm *v.* Clitherall, 12 Minn. 375. **N. J.**—Fulton *v.* Greacen, 44 N. J. Eq. 443, 15 Atl. 827. **N. Y.**—Van Hook *v.* Throckmorton, 8 Paige Ch. 33; Sedgwick *v.* Cleveland, 7 Paige Ch. 287; Mills *v.* Hoag, 7 Paige 18, 31 Am. Dec. 271. **Tenn.**—Haynes *v.* Rizer, 14 Lea 246. **Va.**—Campbell *v.* Shipman, 87 Va. 655, 13 S. E. 114. **Eng.**—Johnson *v.* Thomas, 11 Beav. 501, 50 Eng. Reprint 911; Solomon *v.* Solomon, 13 Simons 516, 7 Jur. 806, 60 Eng. Reprint 200.

84. Springer *v.* Vanderpool, 4 Edw. Ch. (N. Y.) 362; Talmage *v.* Pell, 9

Paige Ch. (N. Y.) 410; Sedgwick *v.* Cleveland, 7 Paige Ch. (N. Y.) 287; Mills *v.* Hoag, 7 Paige (N. Y.) 18, 31 Am. Dec. 271; Bailey *v.* Smith, 10 R. I. 29, where plaintiff went into bankruptcy.

85. Mills *v.* Hoag, 7 Paige (N. Y.) 18, 31 Am. Dec. 271.

86. Mills *v.* Hoag, 7 Paige (N. Y.) 18, 31 Am. Dec. 271.

[a] **Appeal.**—A complainant who has assigned his interest in a suit is not a proper party to appeal. Mills *v.* Hoag, 7 Paige (N. Y.) 18, 31 Am. Dec. 271. See generally the title "Appeals."

87. See 20 STANDARD PROC. 968.

88. Automatic Switch Co. *v.* Cutler-Hammer Mfg. Co., 147 Fed. 250, 77 C. C. A. 176.

[a] **Reason of Rule.**—All the assignee has to reconvey so far as its effect on the suit is concerned is the right to file an original bill in the nature of a supplemental bill. Automatic Switch Co. *v.* Cutler-Hammer Mfg. Co., 147 Fed. 250, 77 C. C. A. 176.

89. Pittsburgh, S. & N. R. Co. *v.* Fiske, 178 Fed. 66, 101 C. C. A. 560; Mickle *v.* Maxfield, 42 Mich. 304, 3 N. W. 961.

90. Pittsburgh, S. & N. R. Co. *v.* Fiske, 178 Fed. 66, 101 C. C. A. 560; Hoxie *v.* Carr, 1 Sumn. 173, 12 Fed. Cas. No. 6,802.

91. **U. S.**—Elliot *v.* Teal, 5 Sawy. 188, 8 Fed. Cas. No. 4,389. **Cal.**—Vance *v.* Gilbert, 174 Pac. 42; Crescent Canal Co. *v.* Montgomery, 124 Cal. 134, 56 Pac. 797. **Ia.**—Price *v.* Baldauf, 90

D. BY INSOLVENCY OR BANKRUPTCY OF PARTY.—Insolvency statutes generally provide that pending actions against the insolvent be held in abeyance pending the insolvency proceedings,<sup>92</sup> and a similar result is provided for by the bankruptcy act.<sup>93</sup> The trustee of the bankrupt may be directed by the court to prosecute or defend pending suits by or against the bankrupt.<sup>94</sup>

**III. AFTER MARRIAGE OF FEMALE PARTY.—A. PLAINTIFF.**  
**At Common Law.**—At common law the marriage of a female plaintiff abates the suit,<sup>95</sup> unless she becomes a widow before the marriage is pleaded in abatement.<sup>96</sup>

—The marriage of a plaintiff pendente lite abates a bill in equity and it cannot proceed without a revivor,<sup>97</sup> although the marriage occurred after decree.<sup>98</sup>

**Under Statute.**—Statutes generally provide that actions shall not abate by the marriage of a female plaintiff if the cause of action survive.<sup>99</sup>

Iowa 205, 57 N. W. 710. **Kan.**—Crock-  
 er v. Ball, 10 Kan. App. 364, 59 Pac.  
 691. **Mich.**—Sayre v. Detroit, G. H.  
 & M. Ry. Co., 171 N. W. 502. **Neb.**  
 McCague Sav. Bank v. Croft, 80 Neb.  
 702, 115 N. W. 315. **N. Y.**—Hirshfeld  
 v. Fitzgerald, 157 N. Y. 166, 177, 51  
 N. E. 997, 46 L. R. A. 839. **N. C.**  
 Burnett v. Lyman, 141 N. C. 500, 54  
 S. E. 500, 115 Am. St. Rep. 691. **Ohio.**  
 See Lowry v. Anderson, 57 Ohio St.  
 179, 48 N. E. 810. **Okla.**—Cushing v.  
 Newbern, 183 Pac. 409.

See 20 STANDARD PROC. 969.

[a] A transfer of title through fore-  
 closure proceedings does not abate the  
 action. Citizens' State Bank v. Jess,  
 127 Iowa 450, 103 N. W. 471.

92. See 13 STANDARD PROC. 683.

93. See 3 STANDARD PROC. 938.

94. See 3 STANDARD PROC. 939.

95. **Conn.**—Northum v. Kellogg, 15  
 Conn. 569. **Mass.**—Haines v. Corliss, 4  
 Mass. 659. **S. C.**—Guphill v. Isbell, 1  
 Bailey 230, 19 Am. Dec. 675. **Vt.**  
 Bates v. Stevens, 4 Vt. 545.

[a] Defendant may plead the mar-  
 riage (1) pending suit in abatement.  
 Haines v. Corliss, 4 Mass. 659; Gup-  
 hill v. Isbell, 1 Bailey (S. C.) 230,  
 19 Am. Dec. 675. (2) But where the  
 right to the property sued for passes  
 to the husband on the marriage, the  
 marriage may be pleaded in bar. Gate-  
 wood v. Tunk, 3 Bibb (Ky.) 246.

[b] The marriage of the lessor in  
 ejectment does not abate the suit. Hub-  
 bard v. Bardstown, 2 J. J. Marsh. (Ky.)  
 81.

96. Gerrish v. Gary, 1 Allen (Mass.)  
 213.

97. **Ala.**—Bowie v. Minter, 2 Ala.  
 406. **Md.**—Manning v. Mills, 1 Bland  
 132. **N. H.**—Boynton v. Boynton, 21  
 N. H. 246. **N. Y.**—Quackenbush v.  
 Leonard, 10 Paige 131.

[a] A revivor is necessary except  
 to set aside irregular proceedings in  
 the master's office since marriage.  
 Quackenbush v. Leonard, 10 Paige (N.  
 Y.) 131.

[b] But a decree in the name of  
 the plaintiff without a revivor binds  
 the defendant. Quackenbush v. Leon-  
 ard, 10 Paige (N. Y.) 131.

As to revivor see the title "Re-  
 vivor."

98. Quackenbush v. Leonard, 10  
 Paige (N. Y.) 131.

99. **Ala.**—James v. Tait, 8 Port.  
 476. **Ark.**—Laster v. Toliver, 11 Ark.  
 450. **N. Y.**—Mapes v. Snyder, 59 N.  
 Y. 450. **N. C.**—Shuler v. Millsap's  
 Exr., 71 N. C. 297; Hobbs v. Bush, 19  
 N. C. 508. **Tex.**—Western Cottage  
 Piano & O. Co. v. Anderson, 45 Tex.  
 Civ. App. 513, 101 S. W. 1061.

[a] An action for wrongful death  
 does not abate on the remarriage of  
 the widow. Wabash R. Co. v. Gret-  
 zinger, 182 Ind. 155, 104 N. E. 69.

[b] An action for breach of prom-  
 ise of marriage cannot be prosecuted  
 after marriage of the plaintiff to the  
 defendant. And counsel cannot con-  
 tinue the action for fees. Harris v.  
 Tison, 63 Ga. 629, 36 Am. Rep. 126.

**B. DEFENDANT.**—The marriage of a female defendant pending an action at common law,<sup>1</sup> or a suit in equity,<sup>2</sup> does not cause an abatement of the action or suit. At common law the suit may proceed against her without noticing the marriage and without making the husband a party.<sup>3</sup> But in equity it is necessary to obtain an order that the suit proceed against the husband and wife.<sup>4</sup>

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| <p>1. Ala.—Bobe <i>v.</i> Frowner, 18 Ala.<br/>       89. Ga.—Phillips <i>v.</i> Stewart, 27 Ga.<br/>       402. Ind.—Sackett <i>v.</i> Wilson, 2 Blackf.<br/>       85. Mass.—Com. <i>v.</i> Phillipsburg, 10<br/>       Mass. 78.<br/>       2. Quackenbush <i>v.</i> Leonard, 10</p> | <p>Paige (N. Y.) 131; Campbell <i>v.</i> Bowne,<br/>       5 Paige (N. Y.) 34.<br/>       3. Ala.—Bobe <i>v.</i> Frowner, 18 Ala.<br/>       89. Ind.—Sackett <i>v.</i> Wilson, 2 Blackf.<br/>       85. Ky.—Roe <i>v.</i> Miller, 1 B. Mon.<br/>       227.<br/>       4. See the title "<b>Revivor.</b>"</p> |
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**SWEARING.**—See Blasphemy; Disorderly Conduct; Oath and Affirmation; Obscenity; Profanity; Verification.

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**SYMBOLS.**—See Indictment and Information; Pleading.

Vol. XXIV



# TAXATION

By the Editorial Staff.

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For forms, see 9 STANDARD PROC. 1195.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. COMPELLING, RESTRAINING AND REVIEWING LEVY.**

A. IN GENERAL. — Notwithstanding the fact that the levying of a tax is legislative and administrative in character,<sup>1</sup> it may, under proper

1. See *Adams v. Southern R. Co.*, 9 Ala. App. 201, 62 So. 466, although levied by a body clothed in other mat- | ters with judicial powers and func- | tions. [a] An assessment may be levied

circumstances, be compelled by mandamus,<sup>2</sup> or an illegal levy may be restrained by injunction,<sup>3</sup> unless the remedy at law under the particular circumstances of the case is adequate.<sup>4</sup> Certiorari may be employed to review the action of the officer making the levy;<sup>5</sup> but an appeal from the levy will not lie unless expressly authorized by statute.<sup>6</sup> The public necessity or the expediency of levying a tax,<sup>7</sup> or the amount for which a levy shall be made is a matter resting within the discretion of the proper administrative officers, and the exercise of their discretion will not be controlled,<sup>8</sup> except in clear cases of its abuse.<sup>9</sup>

B. MANDAMUS PROCEEDINGS. — Where a public corporation is under the legal duty of raising funds by taxation for the purpose of paying<sup>10</sup>

upon property in the hands of a receiver without first obtaining the consent of the court by whom the receiver was appointed. *Coy v. Title Guarantee & Trust Co.*, 212 Fed. 520.

2. See *infra*, I, B.

3. Ga.—*Schwarz v. National Packing Co.*, 122 Ga. 533, 50 S. E. 494. Kan.—*Andrews v. Love*, 46 Kan. 264, 26 Pac. 746, proceedings for the levy must have been actually instituted. Md.—*Leser v. Wagner*, 120 Md. 671, 87 Atl. 1040.

Injunctions against municipalities and officers, see 20 STANDARD PROC. 164, 778.

[a] Only the levy of the illegal portion of the proposed tax will be enjoined if it is separable from the remainder of the levy. *Southern R. Co. v. Board of Comrs.*, 148 N. C. 220, 61 S. E. 690.

[b] An action to contest a tax levy by way of a removal of a cloud upon the title of property will not lie. *Standrod v. Case*, 24 Idaho 365, 133 Pac. 651.

Enjoining collection of tax because of irregularities in the levy, see *infra*, V, G.

4. *Torgrinson v. Norwich School Dist.*, 14 N. D. 10, 103 N. W. 414.

5. *People ex rel. Toms v. Board of Suprs.*, 199 N. Y. 150, 92 N. E. 389; *Bellinger v. Gray*, 51 N. Y. 610. See generally the title "Certiorari," and *infra*, II, E, 3.

[a] "Such review will be allowed only in exceptional cases in which the public interests may be jeopardized. Where the errors complained of are in the auditing of town or county charges, though adding somewhat to the burden of the relator, the court will not, in the exercise of its discretion, inconvenience the public by the

holding up of an assessment roll for review under the writ." *People ex rel. Toms v. Bd. of Suprs.*, 199 N. Y. 150, 92 N. E. 389.

6. *Whedon v. Lancaster*, 76 Neb. 761, 107 N. W. 1092.

Compare *infra*, II, E, 2, and 20 STANDARD PROC. 233.

7. *Williams v. School District*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; *Petition of Powers*, 52 Mo. 218.

8. Ill.—*People v. Atchison, T. & S. F. R. Co.*, 261 Ill. 33, 103 N. E. 614. Nev.—*State ex rel. Holley v. Boerlin*, 30 Nev. 473, 98 Pac. 402. Pa.—*Wharton v. School Directors*, 42 Pa. 358; *West End Coal Co. v. Conyngham Township*, 42 Pa. Co. Ct. 510. Tenn.—*Clay v. Justices of Hawkins Co.*, 5 Lea 137.

9. See *infra*, this note.

[a] Rule Stated.—"It is the duty of the public authorities to use sound business judgment on the question of estimating the amount of taxes required each year. They should endeavor to have in the treasury at all times enough money to meet all claims upon it, but sound public policy condemns exactions from the people, as taxes or otherwise, in advance of any needs of the government. The courts, however, will only interfere with the decision of the public authorities on these questions to prevent a clear abuse by such officials of their discretionary powers." *People ex rel. Stuckard v. Sandberg Co.*, 277 Ill. 567, 570, 115 N. E. 741.

10. U. S.—*Hubert v. New Orleans*, 215 U. S. 170, 30 Sup. Ct. 40, 54 L. ed. 144; *Harper v. Daniels*, 211 Fed. 57, 129 C. C. A. 242. Ala.—*Miller v. McWilliams*, 50 Ala. 427, 20 Am. Rep. 297. Cal.—*Emeric v. Gilman*, 19 Cal. 404, 70 Am. Dec. 742. Colo.—*Lake*

a judgment, bonds, or the interest upon them,<sup>11</sup> for public improvements, legally authorized,<sup>12</sup> school,<sup>13</sup> or other<sup>14</sup> proper and legal pur-

County *v.* Schradsky, 43 Colo. 84, 95 Pac. 312; Stoddard *v.* Benton, 6 Colo. 508, 517. **Ind.**—Sheridan *v.* State, 182 Ind. 497, 106 N. E. 878. **Ia.**—Palmer *v.* Jones, 49 Iowa 405. **Kan.**—Equitable Inv. Trust Co. *v.* Wyandotte County, 86 Kan. 708, 121 Pac. 1097. **Ky.**—Muhlenberg *v.* Morehead, 20 Ky. L. Rep. 436, 46 S. W. 691. **La.**—State *v.* New Orleans, 37 La. Ann. 13. **Mich.**—Hammond *v.* Place, 116 Mich. 628, 74 N. W. 1002, 72 Am. St. Rep. 543. **Mont.**—State *v.* Helena, 24 Mont. 521, 63 Pac. 99, 81 Am. St. Rep. 453, 55 L. R. A. 336. **N. J.**—Shackelton *v.* Guttenberg, 39 N. J. L. 660. **N. C.**—Broadfoot *v.* Fayetteville, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610; Leach *v.* Fayetteville, 84 N. C. 829. **Ohio.**—State *v.* Harris, 17 Ohio St. 608. **S. D.**—Howard *v.* Huron, 5 S. D. 539, 59 N. W. 833, 26 L. R. A. 493. **Tex.**—Clarendon *v.* Betts (Tex. Civ. App.), 174 S. W. 958; San Antonio *v.* Routledge, 46 Tex. Civ. App. 196, 102 S. W. 756, the city alone and not its officers is the proper defendant. **Va.**—Cumberland *v.* Randolph, 89 Va. 614, 16 S. E. 722. **Wash.**—State Sav. Bank *v.* Davis, 22 Wash. 406, 61 Pac. 43. **W. Va.**—State *ex rel.* Old Nat. Bk. *v.* Phillippi, 80 W. Va. 437, 92 S. E. 725. **Wis.**—State *v.* Milwaukee, 25 Wis. 122.

[a] A mandamus proceeding is equivalent to an execution and must be instituted within the time prior to which the judgment does not become dormant. Harper *v.* Daniels, 211 Fed. 57, 129 C. C. A. 242. And see Rosenbaum *v.* Bauer, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. ed. 743; State *ex rel.* Craig *v.* School Dist., 25 Neb. 301, 41 N. W. 155; 20 STANDARD PROC. 113, note 30.

[b] The validity of the claim on which the judgment is based cannot be questioned. **U. S.**—Harshman *v.* Knox, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. ed. 1152; Ralls County Court *v.* United States, 105 U. S. 733, 26 L. ed. 1220; Tucker *v.* Hubbert, 196 Fed. 849, 117 C. C. A. 365. **Colo.**—People *v.* Rio Grande, 11 Colo. App. 124, 52 Pac. 748. **Kan.**—Equitable Inv. Tr. Co. *v.* Wyandotte County, 86 Kan. 708, 121 Pac. 1097. **Tex.**—Sherman *v.* Langham,

92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258.

[c] Where the judgment has been reversed a petition for a writ of mandate will be dismissed. Currie *v.* United States, 129 U. S. 44, 9 Sup. Ct. 213, 32 L. ed. 592; Equitable Inv. Trust Co. *v.* Wyandotte County, 86 Kan. 708, 121 Pac. 1097.

11. **U. S.**—Von Hoffman *v.* Quincy, 4 Wall. 535, 18 L. ed. 403. **Cal.**—Robinson *v.* Butte, 43 Cal. 353. **Fla.**—Columbia *v.* King, 13 Fla. 451. **Kan.**—Sedgwick County *v.* Bailey, 11 Kan. 631. **Nev.**—Davis *v.* Simpson, 25 Nev. 123, 58 Pac. 146, 83 Am. St. Rep. 570. **N. C.**—Pegram *v.* Cleaveland, 64 N. C. 557. **Pa.**—Com. *v.* Allegheny, 32 Pa. 218. **Tenn.**—Clay *v.* Justices of Hawkins Co., 5 Lea 137.

12. **U. S.**—Cushman *v.* Warren-Scharf Asphalt Pav. Co., 220 Fed. 857, 135 C. C. A. 289. **Ga.**—Manor *v.* McCall, 5 Ga. 522. **Kan.**—Board of Comrs. of Douglas County *v.* Leavenworth County, 98 Kan. 389, 157 Pac. 1180. **Mo.**—State *v.* Holt County Ct., 135 Mo. 533, 37 S. W. 521. **N. Y.**—Holroyd *v.* Indian Lake, 180 N. Y. 318, 73 N. E. 36, cost of construction of a waterworks system. **Wis.**—Waupaca *v.* Matteson, 79 Wis. 67, 48 N. W. 213, cost of repair of a bridge.

[a] The officer whose duty it is to carry out the improvement, may apply for the writ. Manor *v.* McCall, 5 Ga. 522.

Compelling levy of a special assessment, see the title "Special Assessment."

13. **Ill.**—People *v.* Powell, 274 Ill. 222, 113 N. E. 614. **Md.**—Worcester County Comrs. *v.* School Comrs., 113 Md. 305, 77 Atl. 605. **Mo.**—State *v.* Patton, 108 Mo. App. 26, 82 S. W. 537.

14. See *infra*, this note.

[a] A special tax imposed by law, will be required to be levied. **Colo.**—Perkins *v.* People, 59 Colo. 107, 147 Pac. 356, park fund tax. **N. J.**—State *v.* Jersey City, 53 N. J. L. 62, 20 Atl. 755, library tax. **N. C.**—Southern R. Co. *v.* Board of Comrs., 148 N. C. 220, 61 S. E. 690, a poll tax.

[b] Taxes due to one political subdivision from another will be required



poses, the levying of a proper tax will be required by mandamus.<sup>15</sup> If the petitioner's right to have the levy made is not clearly established,<sup>16</sup> if the amount of the debt or claim is unliquidated,<sup>17</sup> if the municipality has no power or authority to levy taxes for the purpose of paying such a debt,<sup>18</sup> if the limit of the taxing power vested in the municipality has been reached,<sup>19</sup> or if any fact exists which is suffi-

to be levied. *State v. Asotin County*, 79 Wash. 634, 140 Pac. 914.

15. See *infra*, this note, and 20 STANDARD PROC. 112.

[a] A demand that the tax be levied should ordinarily be made (*Grand v. People*, 16 Colo. App. 215, 64 Pac. 675; *Garden City First Nat. Bank v. Morton County*, 7 Kan. App. 739, 52 Pac. 580. But see *United States v. Saundacs*, 124 Fed. 124, 59 C. C. A. 394), but is unnecessary (2) where it is clear that a demand if made would be useless. *Port Townsend v. First Nat. Bank*, 241 Fed. 32, 154 C. C. A. 32; *State v. Byrne*, 32 Wash. 264, 73 Pac. 394.

[b] A relevy will be required whenever it is proper. *Ia.*—*Coy v. Lyons City*, 17 Iowa 1, 85 Am. Dec. 539. *Ky.*—*Lexington v. Lexington Board of Education*, 23 Ky. L. Rep. 1663, 65 S. W. 827. *N. Y.*—*People ex rel. Walton v. Delaware County*, 173 N. Y. 297, 66 N. E. 7.

[c] Federal courts have jurisdiction (1) to award the writ when the legal duty to pay the judgment is imposed by state laws (*Riggs v. Johnson*, 6 Wall. [U. S.] 166, 18 L. ed. 768; *Cushman v. Warren-Scharf Asphalt Pav. Co.*, 220 Fed. 857, 135 C. C. A. 289), but (2) not otherwise. *Graham v. Parham*, 32 Ark. 676.

[d] As an Independent Proceeding. (1) "The writ of mandamus in the circuit courts is never an independent suit, as it is in many states and in England, but it is only a proceeding ancillary to the judgment which gives the jurisdiction, and when issued becomes a substitute for the ordinary process of execution." *Fuller v. Aylesworth*, 75 Fed. 694, 699, 21 C. C. A. 505. (2) But the judgment in the action in which the claim is established cannot order the levying of a tax to satisfy it, since such an action has none of the features of a mandamus proceeding. *Clarendon v. Betts* (Tex. Civ. App.), 174 S. W. 958.

Compelling levy by municipal cor-

poration, see the title "Municipal Corporations."

16. *Springfield & Ill. S. E. Ry. Co. v. Wayne County Clerk*, 74 Ill. 27.

17. *U. S.*—*Heine v. Levee Comrs.*, 19 Wall. 655, 22 L. ed. 223. *Ia.*—*Coy v. Lyons City*, 17 Iowa 1, 85 Am. Dec. 539. *Ky.*—*King v. Trustees*, 17 Ky. L. Rep. 803, 32 S. W. 752. *La.*—*Badger v. New Orleans*, 49 La. Ann. 804, 21 So. 870, 37 L. R. A. 540.

[a] A judgment establishing the claim (1) is necessary (*Heine v. Levee Comrs.*, 19 Wall. [U. S.] 655, 22 L. ed. 223; *Bath v. Amy*, 13 Wall. [U. S.] 244, 20 L. ed. 539; *Walkley v. Muscatine*, 6 Wall. [U. S.] 481, 18 L. ed. 930; *State ex rel. Pfister v. Manitowoc*, 52 Wis. 423, 9 N. W. 607), except (2) the amount and validity of the debt is not controverted (*Ky.*—*Maddox v. Graham*, 2 Metc. 56. *Ohio.*—*State v. Clinton County*, 6 Ohio St. 280. *Pa.*—*Com. v. Allegheny*, 37 Pa. 277; *Com. v. Select & Common Councils of Pittsburgh*, 34 Pa. 496. *Wis.*—*State ex rel. Pfister v. Manitowoc*, 52 Wis. 423, 9 N. W. 607), as where, (3) in some jurisdictions, the claim has been allowed. *Colo.*—*Grand v. People*, 16 Colo. App. 215, 64 Pac. 675. *Minn.*—*State v. Gunn*, 92 Minn. 436, 100 N. W. 97. *Miss.*—*Klein v. Bd. of Suprs.*, 54 Miss. 254. And see *Board of Revenue v. Farson, Son & Co.*, 197 Ala. 375, 72 So. 613, L. R. A. 1918B, 881; 20 STANDARD PROC. 154.

18. *Carroll County v. United States*, 18 Wall. (U. S.) 71, 21 L. ed. 771; *Cooper v. Anthony*, 142 Ga. 692, 83 S. E. 523. See 20 STANDARD PROC. 112, note 27.

[a] If the judgment purports to be based on such a claim it is conclusive on that point. *Harshman v. Knox*, 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. ed. 1152.

19. *U. S.*—*Clay County v. McAleer*, 115 U. S. 616, 6 Sup. Ct. 199, 29 L. ed. 482; *United States v. Macon*, 99 U. S. 582, 25 L. ed. 331. *Ill.*—*Sparland v. Barnes*, 98 Ill. 595. *Miss.*

cient to induce the court to withhold the writ in the exercise of its judicial discretion,<sup>20</sup> mandamus will not issue. While the determination of the proper authorities of the amount for which a tax levy shall be made will not ordinarily be controlled,<sup>21</sup> if the amount of money required to meet a particular existing and valid obligation is fixed and definite a levy sufficient to meet the obligation will be enforced.<sup>22</sup> If however, the officers whose duty it is and who are ordered to make the levy, still refuse to perform their duty, the court is without authority to appoint a commissioner to perform their duty for them.<sup>23</sup>

The procedure in this class of cases is governed by the rules elsewhere treated.<sup>24</sup>

**II. PROCEEDINGS RELATING TO AND GROWING OUT OF ASSESSMENT.** — A. AGAINST ASSESSORS. — The performance by assessors of ministerial duties will be enforced by mandamus.<sup>25</sup> Thus they will be required to proceed to assess property, in accordance with

*Jonestown v. Ganong*, 97 Miss. 67, 52 So. 579, 692. *Neb.*—*State v. Sheldon*, 53 Neb. 365, 73 N. W. 694.

See 20 STANDARD PROC. 112, note 27.

[a] Only such surplus revenues as are not required for the administration of the government, can be appropriated to payment of the debt. *Clarendon v. Betts* (Tex. Civ. App.), 174 S. W. 958.

[b] A change (1) in the limitation of the taxing power of the municipality, made after the debt was incurred, is inoperative. *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. ed. 620; *United States v. New Orleans*, 103 U. S. 358, 26 L. ed. 395. (2) But this rule is inapplicable where the judgment was founded upon a tort. *Louisiana ex rel. Folsom v. New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. ed. 936; *Sherman v. Langham*, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258.

20. See *infra*, this note.

[a] Where the budget for the year was made up prior to the rendition of the judgment, the amount of the judgment will not be required to be incorporated in the levy for the current year. *Kinlein v. Baltimore*, 118 Md. 576, 85 Atl. 679. But see *State v. Byrne*, 32 Wash. 264, 73 Pac. 394.

21. *Nev.*—*State ex rel. Holley v. Boerlin*, 30 Nev. 473, 98 Pac. 402. *Tenn.*—*Clay v. Justices of Hawkins Co.*, 5 Lea 137. *Tex.*—*Sherman v. Langham*, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258.

And see *supra*, I, A. and the titles "Mandamus;" "Municipal Corporations."

22. *Board of Revenue v. Farson, Son & Co.*, 197 Ala. 375, 72 So. 613, L. R. A. 1918B, 881.

23. *Yost v. Dallas County*, 236 U. S. 50, 35 Sup. Ct. 235, 59 L. ed. 460; *Rees v. Watertown*, 19 Wall. (U. S.) 107, 22 L. ed. 72; *Rusch v. Des Moines*, *Woolw.* 313, 21 Fed. Cas. No. 12,142.

24. See the titles "Mandamus;" "Municipal Corporations."

25. *U. S.*—*United States v. Jimmerson*, 222 Fed. 489, 138 C. C. A. 85, L. R. A. 1918B, 1102, assessment or property at its true value. *W. Va.* *County Court v. Brammer*, 68 W. Va. 25, 69 S. E. 450, to extend a levy. *Wis.*—*Neu v. Voegel*, 96 Wis. 489, 71 N. W. 880.

[a] The listing of property for taxation (1) in the name of its owner may be required by mandamus (*State ex rel. Matson v. Laurendine* [Ala.], 74 So. 370), but only (2) where the evidence of title is clear and conclusive. *State v. Board of Assessors*, 113 La. 925, 37 So. 878.

[b] If performance of the duty would be useless and ineffectual, for any reason, the writ will be refused. *La.*—*Gaither v. Green*, 40 La. Ann. 362, 4 So. 210, where assessment proceedings had been completed and the tax roll delivered to the collector. *Mich.*—*W. A. Sturgeon & Co. v. Board of Assessors*, 159 Mich. 199, 123 N. W. 593. *Minn.*—*State v. Archibald*, 43 Minn. 328, 45 N. W. 606. See generally the titles "Mandamus;" "Officers."

the law,<sup>26</sup> though the amount of the assessment they shall make will not be determined.<sup>27</sup> While an assessor will not be liable for mere errors of judgment or innocent mistakes in the performance of his official duties, he may be held responsible to a property owner in an action for damages, for his unauthorized, malicious or wrongful acts.<sup>28</sup>

[c] **Judicial Discretion.**—(1) Since the issuance of a writ of mandate is a matter resting within the sound judicial discretion, the writ will not issue to compel the performance by an assessor of ministerial duties, where public inconvenience would be occasioned (*People v. Olsen*, 215 Ill. 620, 74 N. E. 785), or (2) where petitioner has been guilty of unwarranted delay in applying for the writ. *People v. Olsen*, 215 Ill. 620, 74 N. E. 785. But see *Com. v. Hanna*, 17 Pa. Dist. 308.

26. *Ark.*—*State ex rel. Nelson v. Meek*, 127 Ark. 349, 192 S. W. 202, L. R. A. 1918F, 642. *Cal.*—*Hyatt v. Allen*, 54 Cal. 353. *Mo.*—*State v. Riley*, 85 Mo. 156. *S. C.*—*Fuller v. Payne*, 96 S. C. 471, 81 S. E. 176. *W. Va.*—*State v. Buchanan*, 24 W. Va. 362.

[a] **Property erroneously treated as exempt from taxation** may be required to be assessed. *State v. Board of Assessors*, 52 La. Ann. 223, 26 So. 872; *State v. Herrald*, 36 W. Va. 721, 15 S. E. 974.

[b] **Assessment of property according to the class in which it legally falls** will be required. *State v. Herrald*, 36 W. Va. 721, 15 S. E. 974.

[c] **When an assessor acts in bad faith**, and not in the honest exercise of his discretion and judgment, his acts will be treated as equivalent to no action, and proper performance of his duties will be required. *State ex rel. Dillon v. Bare*, 60 W. Va. 483, 56 S. E. 390.

[d] **Where fraud in making an assessment is established**, the pretended assessment may be disregarded and a proper assessment be required to be made. *State Board v. People*, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513.

[e] **The writ will not issue merely in anticipation of a refusal of an assessor to perform his duties.** *Hardin v. Guthrie*, 26 Nev. 246, 66 Pac. 744.

[f] **A taxpayer has sufficient interest in the subject matter to petition**

for the issuance of the writ. *Hyatt v. Allen*, 54 Cal. 353. See 19 *STANDARD PROC.* 248.

27. *People v. Webb*, 256 Ill. 364, 100 N. E. 224. But see preceding note.

[a] **A revaluation of property cannot be required.** *Hardin v. Guthrie*, 26 Nev. 246, 66 Pac. 744.

28. *Curtis v. Barker*, 24 App. Div. 71, 48 N. Y. Supp. 934, the making of the assessment must be clearly alleged.

[a] **Refusal of the assessor to take as true a person's statement as to his non-ownership of property, is not actionable.** *Hopkins v. Leach*, 125 App. Div. 294, 109 N. Y. Supp. 713.

[b] **Averment of Wrongful Conduct.**—"The averment that Mason 'wilfully and against law' assessed plaintiff's property at too large a sum does not imply that he acted maliciously, or with intent to wrong or injure the owner. And in the absence of some averment to this effect, we must assume that he simply erred in his judgment. But for such an error the only remedy is by application to the board of equalization." *Ballerino v. Mason*, 83 Cal. 447, 23 Pac. 530.

[c] **Jurisdiction.**—An action for damages for unreasonable and fraudulent assessment does not involve the "validity of a tax" and jurisdiction therefore depends upon the amount in controversy. *Perkins v. Ralls*, 71 Cal. 87, 11 Pac. 860. See the title "*Jurisdiction*."

[d] **Trespass is the appropriate form of action.** *Me.*—*Ware v. Percival*, 61 Me. 391, 14 Am. Rep. 565. *Mass.*—*Little v. Merrill*, 10 Pick. 543; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145. *Vt.*—*Stearns v. Miller*, 25 Vt. 20; *Fuller v. Gould*, 20 Vt. 643.

[e] **He is estopped to sue if he has received from the municipality the proceeds of the property sold under illegal assessment.** *Ware v. Percival*, 61 Me. 391, 14 Am. Rep. 565.



Criminal liability is also sometimes imposed for official misconduct.<sup>29</sup>

B. AGAINST BOARDS OF EQUALIZATION. — Performance of the duties imposed by law upon a board of equalization will be enforced by mandamus,<sup>30</sup> though it is beyond the power of a court to control the exercise of their discretion.<sup>31</sup>

C. ACTION BY OTHER OFFICERS. — When officers other than assessors or members of a board of equalization are charged by law with the performance of duties in connection with the levying of an assessment, performance of their duties will be enforced by mandamus,<sup>32</sup> subject

29. See the statutes and *Siebe v. Superior Court*, 114 Cal. 551, 46 Pac. 456.

30. U. S.—*United States v. Jimmerson*, 222 Fed. 489, 138 C. C. A. 85, L. R. A. 1819B, 1102; *Huidekoper v. Hadley*, 177 Fed. 1, 100 C. C. A. 395, 40 L. R. A. (N. S.) 505. Ill.—*People v. Webb*, 256 Ill. 364, 100 N. E. 224 (to list for taxation property which has been omitted in former years; the owners of such property are not necessary parties to the proceeding); *People v. Upham*, 221 Ill. 555, 77 N. E. 931. Nev.—*State ex rel. Holley v. Boerlin*, 30 Nev. 473, 98 Pac. 402. N. J.—*Cooper v. Cape May Point*, 72 N. J. L. 164, 60 Atl. 516; *State ex rel. Cooper v. Springer* (N. J. Eq.), 52 Atl. 996, confirmation of an assessment by a city council. N. Y.—*People ex rel. Cobleskill v. Supervisors*, 140 App. Div. 769, 126 N. Y. Supp. 259; *People ex rel. Chambers v. Wells*, 110 App. Div. 336, 97 N. Y. Supp. 333. Pa.—*Com. v. Hanna*, 17 Pa. Dist. 308.

*Compare Covington v. Ludlow*, 8 Ky. L. Rep. 706.

See generally the titles "Mandamus;" "Officers."

[a] Where only a question of law is presented to a board of equalization, mandamus will lie to require them to perform the act properly under the law. *San Diego & A. R. Co. v. State Board*, 165 Cal. 560, 132 Pac. 1044, to list certain railroad property as operative property. And see *Huidekoper v. Hadley*, 177 Fed. 1, 100 C. C. A. 395, 40 L. R. A. (N. S.) 505.

[b] A reassessment where the original assessment was fraudulent, may be required. *State Board v. People*, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513.

[c] A proceeding against a state board is not treated as a proceeding against the state. *Huidekoper v. Had-*

*ley*, 177 Fed. 1, 100 C. C. A. 395, 40 L. R. A. (N. S.) 505. See the title "States and Territories."

[d] Although the term of office of some or all of the members of the board has expired, the writ may issue against their successors in office. *People ex rel. Cobleskill v. Supervisors*, 140 App. Div. 769, 126 N. Y. Supp. 259.

[e] Adjournment of the board pending an application for a writ of mandate does not operate to prevent the issuance of the writ. *State Board v. People*, 191 Ill. 528, 61 N. E. 339, 58 L. R. A. 513.

31. Idaho.—*Blomquist v. Board of Comrs.*, 25 Idaho 284, 137 Pac. 174. Ia.—*Meyer v. Dubuque*, 43 Iowa 592. Neb.—*State v. Savage*, 65 Neb. 714, 91 N. W. 716. Nev.—*State ex rel. Holley v. Boerlin*, 30 Nev. 473, 98 Pac. 402. N. Y.—*People ex rel. Chambers v. Wells*, 110 App. Div. 336, 97 N. Y. Supp. 333.

See the titles "Mandamus;" "Officers."

32. Cal.—*People v. Ashbury*, 46 Cal. 523. Ind.—*State v. Stout*, 61 Ind. 143. N. Y.—*People ex rel. Consol. W. Co. v. Barrett*, 68 Misc. 59, 123 N. Y. Supp. 421. Ohio.—*Dye v. State*, 73 Ohio St. 231, 76 N. E. 829. Okla.—*State ex rel. Freeling v. Erwin*, 49 Okla. 25, 150 Pac. 1103, listing of omitted property by county treasurer. S. C.—*State v. Covington*, 35 S. C. 245, 14 S. E. 499; *State v. Cromer*, 35 S. C. 213, 14 S. E. 493.

[a] Extending a levy upon the proper books (1) will be required (Ill. *People v. Salomon*, 54 Ill. 39. Mo. *State v. Patton*, 108 Mo. App. 26, 82 S. W. 537. Ohio.—*State ex rel. Donahay v. Roose*, 90 Ohio St. 345, 107 N. E. 760. Wash.—*State v. Headlee*, 22 Wash. 126, 60 Pac. 126), unless (2) the proposed tax is in fact illegal or

to the general limitations elsewhere discussed.<sup>33</sup>

D. FAILURE OF OWNER TO RETURN PROPERTY FOR ASSESSMENT. — A property owner who fails to make a true and proper return of the property owned by him, as required by law, for purposes of assessment and taxation not only may have an arbitrary valuation placed upon the property by the assessor, or a penalty added to its estimated value,<sup>34</sup> but, under many statutes, he becomes liable for the imposition of a fine, in a court proceeding,<sup>35</sup> or subject to a criminal prosecution.<sup>36</sup> The indictment must be certain and specific in its allegations,<sup>37</sup> though pursuant to the general rule in such cases<sup>38</sup> it may charge the offense substantially in the terms of the statute.<sup>39</sup>

E. JUDICIAL REVIEW OF ASSESSMENTS. — 1. In General. — Acts of an assessor or board of equalization without or in excess of the jurisdiction conferred upon them by law, will be relieved against by the courts,<sup>40</sup> and fraudulent or capricious and arbitrary conduct upon their part will also be remedied.<sup>41</sup> Under some statutes, too, mistakes and irregularities can be corrected by the courts,<sup>42</sup> and an assessment made

fraudulent. *Board of Suprs. v. Mentor*, 94 Mich. 386, 54 N. W. 169.

[b] An increase or reduction in a tax levy, made by a board of equalization will be required to be entered by the auditor, in his books. *People v. Strother*, 67 Cal. 624, 8 Pac. 383; *Ridley v. Dougherty*, 77 Iowa 226, 42 N. W. 178.

[c] Entry of delinquent taxes on the next assessment roll, by the auditor may be required by mandamus. *People v. Ashbury*, 46 Cal. 523.

33. See generally the titles "Mandamus," "Officers."

34. See the statutes and *People v. Fisher*, 274 Ill. 116, 113 N. E. 47.

[a] If failure to file a schedule is due to an honest mistake, no penalty should be added. *Monticello Seminary v. Board of Review*, 249 Ill. 481, 94 N. E. 938.

35. *State v. Halter*, 149 Ind. 292, 47 N. E. 665, 49 N. E. 7 (a separate action exists for each year in which the owner fails to make a return); *State ex rel. O'Brien v. Weaver*, 38 S. D. 44, 159 N. W. 884.

[a] Alleged false returns need not be filed with the complaint, as they are not the basis of the action. *State v. Halter*, 149 Ind. 292, 47 N. E. 665, 49 N. E. 7.

36. See the statutes and *People v. Fisher*, 274 Ill. 116, 113 N. E. 47 (holding the earlier statute repealed by a subsequent one); *Durham v. State*, 116 Ind. 514, 19 N. E. 329 (for

a false return no prosecution lies); *Durham v. State* (Ind.), 17 N. E. 629.

[a] Until the full time elapsed within which the required return can be made, no indictment can be returned. *Com. v. Hollidy*, 98 Ky. 616, 33 S. W. 943.

37. *Alexander v. Com.*, 1 Bibb (Ky.) 515; *Caldwell v. State*, 14 Tex. App. 171 (stating in detail the requisites of an indictment); *Berry v. State*, 10 Tex. App. 315, the year for which the property was assessable should be stated.

[a] If fraud is charged in a return which has been made, the nature of the fraud should be set out. *State v. Welch*, 28 Mo. 600.

38. See 12 STANDARD PROC. 442, 447.

39. *Com. v. Engle*, 21 Ky. L. Rep. 1019, 52 S. W. 811.

40. *Pilgrim Consol. Min. Co. v. Board of Comrs.*, 32 Colo. 334, 76 Pac. 364; *Portland University v. Multnomah*, 31 Ore. 498, 50 Pac. 532. See *infra*, this section.

Compare 20 STANDARD PROC. 164, 232, 778.

41. *Mich.*—*Pioneer Iron Co. v. Ne-gaunee*, 116 Mich. 430, 74 N. W. 700. *Minn.*—*Arosin v. London & N. W. Am. Mtg. Co.*, 80 Minn. 277, 83 N. W. 339. *Wash.*—*Olympia Water Works v. Gelbach*, 16 Wash. 482, 48 Pac. 251, fraud must be specifically and clearly alleged.

42. *Ark.*—*Clay County v. Brown Lumb. Co.*, 90 Ark. 413, 119 S. W. 251.

upon omitted property.<sup>43</sup> But, in the absence of statute, the courts have no power to revise the valuation placed upon property,<sup>44</sup> assess omitted property,<sup>45</sup> or correct mere irregularities not rendering the assessment illegal and void.<sup>46</sup>

**2. By Appeal.** — a. *In General.*<sup>47</sup> — Under express statutory provisions in many states, a direct appeal to the courts from an assessment is provided for,<sup>48</sup> though in the absence of such a statute the

**Fla.**—*Jackson v. Thornton*, 44 Fla. 610, 33 So. 291. **Ore.**—*Portland University v. Multnomah*, 31 Ore. 498, 50 Pac. 532.

[a] **Retroactive Statutes.** — "The fact that no statutory remedy exists for the correction of an erroneous assessment at the time it is made does not preclude the legislature from granting a remedy at a subsequent time." *State ex rel. Moose v. Kansas City & M. Ry. & B. Co.*, 117 Ark. 606, 174 S. W. 248.

**Appeal**, see *infra*, II, E, 2.

43. *Com. v. Glover*, 132 Ky. 588, 116 S. W. 769; *Com. v. Coffee*, 12 Ky. L. Rep. 717.

44. **Ariz.**—*Atlantic & P. R. Co. v. Yavapai*, 3 Ariz. 117, 21 Pac. 768. **Cal.** *Bank of California v. San Francisco*, 142 Cal. 276, 75 Pac. 832, 100 Am. St. Rep. 130, 64 L. R. A. 918. **Ill.**—*Weber v. Baird*, 208 Ill. 209, 70 N. E. 231; *People v. Lots in Ashley*, 122 Ill. 297, 13 N. E. 556. **Ind.**—*Rhoads v. Cushman*, 45 Ind. 85. **Ia.**—*Polk v. Sherman*, 99 Iowa 60, 68 N. W. 562. **Ky.**—*Albin County v. Louisville*, 117 Ky. 895, 79 S. W. 274. **Mo.**—*Hamilton v. Rosenblatt*, 8 Mo. App. 237. **Mont.**—*Danforth v. Livingston*, 23 Mont. 558, 59 Pac. 916. **N. J.**—*Newark v. North Jersey St. R. Co.*, 68 N. J. L. 486, 53 Atl. 219. **W. Va.**—*Clark v. Mercer County Court*, 55 W. Va. 278, 47 S. E. 162. **Wis.**—*Marsh v. Richwood*, 113 Wis. 111, 88 N. W. 916; *Brown v. Oneida*, 103 Wis. 149, 79 N. W. 216. **Wyo.**—*Ricketts v. Crewdson*, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1.

45. *State v. Revenue & Road Comrs.*, 73 Ala. 65.

46. *Bank of California v. San Francisco*, 142 Cal. 276, 75 Pac. 832, 100 Am. St. Rep. 130, 64 L. R. A. 918, assessor's method of arriving at valuation will not be controlled.

**Enjoining collection of taxes for irregularities in assessment proceedings**, see *infra*, V, G.

47. See 20 STANDARD PROC. 233.

48. **Ariz.**—*Cochise County v. Copper Queen Cons. Min. Co.*, 8 Ariz. 221, 71 Pac. 946, prior to 1901 the right to an appeal did not exist. **Ark.**—*Clay County v. Bank of Knobel*, 105 Ark. 450, 151 S. W. 1013; *Lloyd v. Gilbreath*, 27 Ark. 675. **Colo.**—*Board of Comrs. v. Denver Union Water Co.*, 32 Colo. 382, 76 Pac. 1060. **Conn.**—*Bugbee v. Putnam*, 90 Conn. 154, 96 Atl. 955. **Ill.** *Sanitary District v. Board of Review*, 258 Ill. 316, 101 N. E. 555, on the question whether property is properly exempt. **Ia.**—*Peterson v. Clarence Board of Review*, 138 Iowa 717, 116 N. W. 818. **Ky.**—*Ward v. Beale*, 91 Ky. 60, 14 S. W. 967, from an order of board of Supervisors. But see *Paducah St. Ry. Co. v. McCracken*, 105 Ky. 472, 49 S. W. 178, no appeal from order of board of equalization. **La.**—*Carr v. Louisiana Central Lumb. Co.*, 136 La. 1025, 68 So. 113. **Miss.**—*Jennings v. Board of Suprs.*, 79 Miss. 523, 31 So. 107. See *Darnell v. State Revenue Agent*, 109 Miss. 570, 68 So. 780. **Neb.** *State Bank v. Seward Co.*, 95 Neb. 665, 146 N. W. 1046. But see *Webster v. Lincoln*, 50 Neb. 1, 69 N. W. 394. **Okla.** *Atoka County v. Oklahoma State Bank*, 161 Pac. 1087 (discussing the difference between appeals from county boards of equalization and boards of county commissioners); *Hopper v. Oklahoma County*, 43 Okla. 288, 143 Pac. 4, L. R. A. 1915B, 875; *Thompson v. Brady*, 42 Okla. 807, 143 Pac. 6; *In re Western Union Tel. Co.*, 29 Okla. 483, 118 Pac. 376. **Pa.**—*Bell's Appeal*, 11 Pa. Dist. 732; *Bell Tel. Co. v. Harrisburg*, 53 Pa. Super. 458. **Tenn.**—*Warner Iron Co. v. Pace*, 89 Tenn. 707, 15 S. W. 1077. **W. Va.**—*West Virginia Nat. Bank v. Spencer*, 71 W. Va. 678, 77 S. E. 269.

[a] **The jurisdiction of the court is a special, statutory and limited jurisdiction; it is appellate and not original and cannot exceed the jurisdiction of the body from which the appeal was taken.** *Board of Comrs. v. Denver Un-*



right to an appeal does not exist.<sup>49</sup> An appeal, when authorized by statute is usually regarded as being an exclusive remedy.<sup>50</sup> It must be perfected within the time limited by the particular statute under which it is taken,<sup>51</sup> and any condition precedent to the right to appeal, created by statute, must be complied with.<sup>52</sup> An appeal from the

ion Water Co., 32 Colo. 382, 76 Pac. 1060; *Milam v. Smith-Mauer Bros.*, 38 Okla. 328, 133 Pac. 33.

[b] Where an appeal is given to a property owner the value of whose property is "fixed by the board of equalization," the right of appeal exists when the board merely confirms the value placed upon the property by the assessor. *Arizona Copper Co. v. State*, 15 Ariz. 9, 137 Pac. 417.

[c] The grant of an appeal to the courts is not unconstitutional as conferring upon them legislative powers. *Hopper v. Oklahoma County*, 43 Okla. 288, 143 Pac. 4, L. R. A. 1915B, 875. *Contra*, *Silven v. Board of Comrs.*, 76 Kan. 687, 92 Pac. 604, 13 L. R. A. (N. S.) 716, 14 Ann. Cas. 163.

[d] An appeal by one property owner from the amount of an assessment upon another property owner, is given by some statutes. *Carr v. Louisiana Central Lumb. Co.*, 136 La. 1025, 68 So. 113.

[e] **Limitations on the Right to Appeal.**—An appeal can be maintained only upon such grounds and to review such matters as are specified in the statute. *Colo.*—*Board of Comrs. v. Denver Union Water Co.*, 32 Colo. 382, 76 Pac. 1060. *Okla.*—*Rogers v. Duncan*, 57 Okla. 20, 156 Pac. 678. *Pa.*—*H. C. Frick Coke Co. v. Mt. Pleasant*, 35 Pa. Co. Ct. 138.

[f] Thus, (1) in some states an appeal lies only to review the question whether property is exempt from taxation (*Sanitary District v. Board of Review*, 258 Ill. 316, 101 N. E. 555; *Keokuk & H. Bridge Co. v. People*, 185 Ill. 276, 56 N. E. 1049), and (2) not to determine whether an assessment was so grossly excessive as to amount to fraud. *Sanitary District v. Board of Review*, 258 Ill. 316, 101 N. E. 555.

[g] The right to an appeal may be given by clear implication from the language of a statute which does not expressly confer it. *Ex parte Howard-Harrison Iron Co.*, 119 Ala. 484, 24 So. 516, 72 Am. St. Rep. 928.

[h] **Effect.**—An appeal to the courts

does not vacate the assessment or suspend proceedings to collect the tax. *Ind.*—*Jeffersonville, M. & I. R. Co. v. McQueen*, 49 Ind. 64. *Me.*—*Penobscot Chemical Fibre Co. v. Inhabitants of Bradley*, 99 Me. 263, 59 Atl. 83. *Miss.*—*Board of Suprs. v. Tate*, 78 Miss. 294, 29 So. 74. *Pa.*—*Frick Coke Co. v. Mt. Pleasant Township*, 222 Pa. 451, 71 Atl. 930.

*Compare* 20 STANDARD PROC. 233.

49. *Idaho.*—*Blomquist v. Board of Comrs.*, 25 Idaho 284, 137 Pac. 174; *Feltham v. Board of County Comrs.*, 10 Idaho 182, 77 Pac. 332. *Mont.*—*Danforth v. Livingston*, 23 Mont. 558, 59 Pac. 916. *Ohio.*—*Musser v. Adair*, 55 Ohio St. 466, 45 N. E. 903. *Wash.*—*Knapp v. King*, 15 Wash. 541, 46 Pac. 1047.

[a] A right to a hearing in a court is not necessary to the validity of an assessment. "The legislature has the power to designate the tribunal which shall make assessments upon property. It may confer this power upon a judicial or a non-judicial body, and the owner of property assessed cannot claim that he has been deprived of 'due process of law' because the legislature does not permit him to have a hearing in court." *In re Mississippi River Power Co.*, 241 Fed. 194. And see *Paducah St. Ry. Co. v. McCracken*, 105 Ky. 472, 49 S. W. 178.

50. *Rogers v. Hayes*, 3 Idaho 597, 32 Pac. 259; *Ferguson v. Board of Review*, 119 Iowa 338, 93 N. W. 352.

51. See the statutes, and the following cases: *Clay County v. Bank of Knobel*, 105 Ark. 450, 151 S. W. 1013; *Clay County v. Brown Lumb. Co.*, 90 Ark. 413, 119 S. W. 251; *Barz v. Klemme Bd. of Equalization*, 133 Iowa 563, 111 N. W. 41, time for appeal commences to run from date of final adjournment of board.

52. See the statutes and 20 STANDARD PROC. 235.

[a] **Payment of the tax assessed** is not necessary before appealing, in some states. *Board of Suprs. v. Tate*, 78 Miss. 294, 29 So. 74. In others the

court hearing the proceeding to a higher court is provided for under some statutes,<sup>53</sup> but not under others.<sup>54</sup>

An appeal to a tax commission having quasi-judicial powers is authorized in some states.<sup>55</sup>

b. *Parties.*—The appeal may be taken either by the property owner affected, or by any person aggrieved by the assessment,<sup>56</sup> or, under some statutes, by the public officer charged with the performance of duties in this connection,<sup>57</sup> and, in some proceedings, by the state or municipal corporation levying the assessment;<sup>58</sup> but there is no right of appeal by the latter bodies in some states,<sup>59</sup> especially where they are not considered a party to the proceedings.<sup>60</sup>

c. *Procedure.*—Notice of the appeal must be given as required by statute.<sup>61</sup> The proceedings for the transfer of the case,<sup>62</sup> the character

rule is otherwise. See *Arapahoe County v. Denver Union Water Co.*, 32 Colo. 382, 76 Pac. 1060.

[b] A property owner who has failed or refused to file the list of his taxable property with the assessor, as required by law, cannot maintain the appeal. *Travelers' Ins. Co. v. Board of Assessors*, 122 La. 129, 47 So. 439, 24 L. R. A. (N. S.) 388; *J. S. Hatcher & Co. v. Gosper County*, 95 Neb. 543, 145 N. W. 993.

53. *Ala.*—*Ex parte Howard-Harrison Iron Co.*, 130 Ala. 185, 30 So. 400. *Okla.*—*Cleveland County v. Johnson*, 157 Pac. 1035. Under an earlier statute no appeal was authorized. See *Grady County v. Chickasha Cotton Oil Co.*, 164 Pac. 457; *In re Duncan*, 43 Okla. 691, 144 Pac. 374; *Board of Comrs. v. Guarantee State Bank*, 27 Okla. 736, 117 Pac. 216. *W. Va.*—*West Virginia Nat. Bank v. Spencer*, 71 W. Va. 678, 77 S. E. 269. But see *Mackin v. Taylor County Court*, 38 W. Va. 338, 18 S. E. 632.

54. *Colo.*—*Board of Comrs. v. Pinacle Gold Min. Co.*, 36 Colo. 492, 85 Pac. 1005; *Pilgrim Consol. Min. Co. v. Board of Comrs.*, 20 Colo. App. 311, 78 Pac. 617. *Ky.*—*Marion v. Wilson*, 105 Ky. 302, 49 S. W. 8, 799. *Tex.*—*Scottish-American Mtg. Co. v. Board of Equalization (Tex. Civ. App.)*, 45 S. W. 757.

55. *State ex rel. Baker v. Haugen*, 164 Wis. 443, 160 N. W. 269; *State ex rel. Wickham v. Nygaard*, 159 Wis. 396, 150 N. W. 513, Ann. Cas. 1917A, 1065.

56. See the statutes.

[a] A person employed to discover property not listed for assessment has

not such an interest in the subject matter as will authorize him to prosecute an appeal. *In re Treasurer of Woodbury County*, 129 Iowa 588, 105 N. W. 1023; *In re Boston Store*, 53 Okla. 565, 157 Pac. 746; *In re Stewart Brothers*, 53 Okla. 153, 155 Pac. 1124.

57. *Atoka County v. Oklahoma State Bank (Okla.)*, 161 Pac. 1087, the county attorney.

[a] A county income tax assessor may appeal to the state tax commission if dissatisfied with the decision of the board of review. *State ex rel. Wickham v. Nygaard*, 159 Wis. 396, 150 N. W. 513, Ann. Cas. 1917A, 1065.

58. *Ex parte Howard-Harrison Iron Co.*, 130 Ala. 185, 30 So. 400; *Farmers' Loan & Tr. Co. v. Newton*, 97 Iowa 502, 66 N. W. 784.

59. *Com. v. Big Sandy Co.*, 155 Ky. 412, 159 S. W. 956; *Cleveland County v. Johnson (Okla.)*, 157 Pac. 1035, holding that a county cannot prosecute an appeal in its own name.

60. *In re Treasurer of Woodbury County*, 129 Iowa 588, 105 N. W. 1023.

61. *City Council of Marion v. Cedar Rapids & M. C. R. Co.*, 120 Iowa 259, 94 N. W. 501; *German-American Sav. Bank v. Council of Burlington*, 118 Iowa 84, 91 N. W. 829; *Atoka County v. Oklahoma State Bank (Okla.)*, 161 Pac. 1087.

62. See *infra* this section, and 20 STANDARD PROC. 235.

[a] A bond (1) for payment of the tax assessed is required under some statutes (*Bank of Oxford v. Board of Suprs.*, 79 Miss. 152, 29 So. 825), but (2) not under others. *City Council of Marion v. Cedar Rapids & M. C. R. Co.*, 120 Iowa 259, 94 N. W. 501.

and form of the pleadings,<sup>63</sup> and transcript or record,<sup>64</sup> must also conform to the statutory requirements. Where the cause is tried *de novo*, the general rules of practice are applicable to the hearing.<sup>65</sup>

d. *Extent of Review.*—The nature and extent of the review by the court of the assessment proceedings varies greatly in different states.<sup>66</sup> Only the assessment on the property of objecting owners will be reviewed,<sup>67</sup> and in some states only such objections to the assessment as were made before the assessing body will be considered.<sup>68</sup> In some

[b] **Variations from the statutory method of procedure** which could not have injured the respondent, will sometimes be disregarded. *United States Envelope Co. v. Vernon*, 72 Conn. 329, 44 Atl. 478.

[c] **An agreed statement of facts** will not be considered where the statutory provisions for the transfer of the case have not been followed. *Furnas v. Nemaha*, 5 Neb. 367.

63. See *State v. Sloss-Sheffield Steel & I. Co.*, 162 Ala. 234, 50 So. 366; *Carr v. Louisiana Central Lumb. Co.*, 136 La. 1025, 68 So. 113.

[a] **A complaint** need not be filed, in some states. *Board of Comrs. v. Denver Union Water Co.*, 32 Colo. 382, 76 Pac. 1060.

[b] **Failure to file an answer** is not an admission or confession of error. *City Council v. National Loan & Inv. Co.*, 122 Iowa 629, 98 N. W. 488.

[c] **Where the only questions for review** are such as were presented to the board from whose order the appeal is taken, allegations from pleadings not relevant to such matters will be stricken out. *State Bank v. Seward County*, 95 Neb. 665, 146 N. W. 1046.

64. **Ia.**—*Peterson v. Clarence Board of Review*, 138 Iowa 717, 116 N. W. 818. **Neb.**—*State ex rel. Union Pac. R. Co. v. State Board*, 81 Neb. 139, 115 N. W. 789; *Field v. Nebraska Tel. Co.*, 74 Neb. 419, 104 N. W. 932, procedure for settling a bill of exceptions discussed. **Ore.**—*Northern Pac. R. Co. v. Clatsop County*, 74 Ore. 250, 145 Pac. 271.

See 20 STANDARD PROC. 235.

[a] **Record.**—“Taxpayers may properly appear when they desire and discuss the matter of their assessment in an informal way before the board of equalization; but, when an appeal to the Circuit Court is desired to be taken, it is incumbent upon the petitioner or applicant to make such a record be-

fore the board as will inform the Circuit Court upon an appeal of the issues to be tried.” *Northern Pac. Ry. Co. v. Clatsop County*, 74 Ore. 250, 145 Pac. 271.

[b] **Failure to file a transcript** until the trial, does not oust the court of jurisdiction acquired by serving notice of appeal. *City Council of Marion v. Cedar Rapids & M. C. R. Co.*, 120 Iowa 259, 94 N. W. 501.

65. *Lehigh Valley Coal Co. v. Northumberland Co. Comrs.*, 250 Pa. 515, 95 Atl. 712.

[a] **Statement of the Rule.**—“The judge who hears the case, sitting as a chancellor, is clothed with the powers of a court to hear and determine the issues involved, subject to the rules of practice and of law applicable to other hearings of an analagous character. The taxing authorities make out a *prima facie* case by the introduction in evidence of the assessment of record in the office of the county commissioners, as approved by the board of revision, together with such other books and data as may be on file relating to the valuation of the tracts of land in question. . . . Tax assessment cases should be heard and decided just like any case of similar character brought before a judicial tribunal.” *Lehigh Valley Coal Co. v. Northumberland Co. Comrs.*, 250 Pa. 515, 95 Atl. 712.

[b] **An order for the examination of mining property** cannot be made. *New York & Lehigh Coal Co.’s Appeal*, 24 Pa. Dist. 462. See generally the title “*Mines and Minerals.*”

66. See the statutes and *infra* this section.

67. *Bell’s Appeal*, 11 Pa. Dist. 732.

68. **Ia.**—*First Nat. Bank v. Council Bluffs*, 182 Iowa 107, 161 N. W. 706; *Barhydt v. Cross*, 156 Iowa 271, 136 N. W. 525, Ann. Cas. 1915C, 792, 40 L. R. A. (N. S.) 986; *Gibson v. Cooley*, 129 Iowa 529, 105 N. W. 1011. **Neb.**



states the proceedings are de novo, and any matter within the original jurisdiction of the assessing or equalizing body may be reviewed;<sup>69</sup> but in other states, the review is limited to the determination of specific matters designated in the statute.<sup>70</sup> The evidence must be clear and satisfying to warrant the court in setting aside the action of the assessing officers.<sup>71</sup>

e. *Judgment and Relief*.—Subject to the limitations on the scope of the review,<sup>72</sup> the court may by its judgment correct errors or irregularities in the assessment,<sup>73</sup> reduce an overvaluation,<sup>74</sup> and in general make such orders as justice and the necessities of the case require.<sup>75</sup> It cannot make an assessment upon omitted property,<sup>76</sup> or increase the valuation as fixed by the assessment,<sup>77</sup> or give any relief not within the limits of its statutory jurisdiction.<sup>78</sup> Costs may be awarded the

State Bank *v.* Seward Co., 95 Neb. 665, 146 N. W. 1046; Nebraska Tel. Co. *v.* Hall, 75 Neb. 405, 106 N. W. 471. Okla.—*In re* Western Union Tel. Co., 29 Okla. 483, 118 Pac. 376.

[a] (1) "The objections must indicate with reasonable certainty the matters in the assessment to which the complaining party takes exception" (First Nat. Bank *v.* Council Bluffs [Iowa] 161 N. W. 706), though (2) no technical form of expression is required. Schoonover *v.* Peteina, 126 Iowa 261, 100 N. W. 490. And see Nahkonsa Inv. Co. *v.* Ft. Dodge, 125 Iowa 148, 100 N. W. 517.

69. Ala.—Birmingham Bldg. & L. Assn. *v.* State, 120 Ala. 403, 25 So. 52. Ia.—Lyons *v.* Board of Equalization, 102 Iowa 1, 70 N. W. 711. Ky.—Com. *v.* Mitchell, 124 Ky. 581, 99 S. W. 670. Md.—Wannenwetch *v.* Baltimore, 115 Md. 446, 81 Atl. 3. Okla.—*In re* Western Union Tel. Co., 29 Okla. 483, 118 Pac. 376. Pa.—Pennsylvania Stave Co.'s Appeal, 236 Pa. 97, 84 Atl. 761; Reading Iron Co.'s Appeal, 21 Pa. Co. Ct. 429; New York & Lehigh Coal Co.'s Appeal, 24 Pa. Dist. 462.

See 20 STANDARD PROC. 236.

[a] The true ownership of the property may be determined. Rogers *v.* Duncan, 57 Okla. 20, 156 Pac. 678.

[b] Taxability and judicial questions relating to an ascertainment of valuation are cognizable. West Virginia Nat. Bank *v.* Spencer, 71 W. Va. 678, 77 S. E. 269.

70. *In re* Maple Wood Coal Co., 213 Ill. 283, 72 N. E. 786, whether the property was subject to taxation.

71. Ky.—Thomas *v.* Jackson County, 119 S. W. 209. Md.—Meushaw *v.*

State, 109 Md. 84, 71 Atl. 457. Neb. Blue Hill First Nat. Bank *v.* Webster County, 77 Neb. 815, 113 N. W. 190.

72. See *supra*, II, E, 2, d.

[a] Where the issues raised involve matters not within the judgment of the court, judgment of dismissal must be given. Board of Comrs. *v.* Denver Union Water Co., 32 Colo. 382, 76 Pac. 1060.

73. Cedar Rapids & M. C. Ry. Co. *v.* Cedar Rapids, 106 Iowa 476, 76 N. W. 728. Compare Milam *v.* Smith-Mauer Bros., 38 Okla. 328, 133 Pac. 33, assessment of property to the wrong person cannot be corrected.

74. Ark.—*Ex parte* Ft. Smith & V. B. Bridge Co., 62 Ark. 461, 36 S. W. 1060. Haw.—Hawi Mill & Plantation Co. *v.* Forrest, 21 Hawaii 389. Ia. Kamrar *v.* Webster City, 120 N. W. 120. Pa.—*In re* Assessment of Irwin Basin Coal Lands, 17 Pa. Dist. 825.

75. *In re* Lehigh & W.-B. Coal Co.'s Assessment, 225 Pa. 272, 74 Atl. 65.

76. Cedar Rapids & M. C. Ry. Co. *v.* Cedar Rapids, 106 Iowa 476, 76 N. W. 728.

77. Ark.—*Ex parte* Ft. Smith & V. B. Bridge Co., 62 Ark. 461, 36 S. W. 1060. Ia.—Ferguson *v.* Rolfe, 94 N. W. 1129. Pa.—Mineral R. & M. Co. *v.* Northumberland Co. Comrs., 241 Pa. 339, 88 Atl. 496; Drake *v.* Northampton Co., 14 Pa. Dist. 688.

78. See *infra*, this note.

[a] A personal judgment for the amount of the taxes held properly assessable, cannot be given. *Ex parte* Howard-Harrison Iron Cp., 130 Ala. 185, 30 So. 400; Morris Ice Co. *v.* Adams, 75 Miss. 410, 22 So. 944.

successful party.<sup>79</sup> The judgment becomes *res judicata* of all matters properly embraced within it and is not subject to a collateral attack.<sup>80</sup> The case may be remitted to the board from whose order the appeal was taken for further proceedings in accordance with the rulings of the court.<sup>81</sup>

**3. By Certiorari.**<sup>82</sup> — a. *Availability of Remedy.* — Certiorari is an appropriate remedy by which the proceedings of an assessor or board of equalization may be reviewed,<sup>83</sup> upon the ground that they have acted beyond or without jurisdiction,<sup>84</sup> or that the assessment is illegal.<sup>85</sup> Mere irregularities or mistakes cannot be corrected, where the issuance of the writ is based on general common law principles,<sup>86</sup> but under some statutes broadening its scope, relief may be obtained even under such circumstances.<sup>87</sup> If an adequate remedy of another kind is open to the property owner the writ will not issue.<sup>88</sup> **Applica-**

79. *Stahmer v. State*, 125 Ala. 72, 27 So. 311.

80. *West Virginia Nat. Bank v. Spencer*, 71 W. Va. 678, 77 S. E. 269, a suit to enjoin the collection of the tax cannot be maintained. See generally the title "*Res Judicata*" and 15 STANDARD PROC. 377, et seq.

[a] If the court exceeded its jurisdiction the judgment is void. *Rogers v. Duncan*, 57 Okla. 20, 156 Pac. 678.

81. *Lehigh Valley Coal Co. v. Northumberland Co. Comrs.*, 250 Pa. 515, 95 Atl. 712; *Pennsylvania State Co.'s Appeal*, 236 Pa. 97, 84 Atl. 761. See generally the title "*Mandate and Proceedings Thereafter*."

[a] The board may be ordered to reconvene for the purpose of acting upon the cause. *Sarpy v. Clarke*, 4 Neb. (Unof.) 87, 93 N. W. 416.

82. *Procedure on certiorari generally*, see 4 STANDARD PROC. 881.

83. *Idaho.*—*Orr v. State Board of Equalization*, 3 Idaho 190, 28 Pac. 416. *Mo.*—*State v. Casey*, 210 Mo. 235, 109 S. W. 1; *Blocklock v. Board of Equalization*, 36 S. W. 1132. *N. Y.*—*New York v. Tucker*, 182 N. Y. 535, 75 N. E. 1128, *affirming* 91 App. Div. 214, 86 N. Y. Supp. 509; *People ex rel. Am. Thread Co. v. Feitner*, 30 Misc. 641, 64 N. Y. Supp. 321. *N. C.*—*Middle Canal Co. v. Whitley*, 172 N. C. 100, 90 S. E. 1.

See 20 STANDARD PROC. 237, and the title "*Certiorari*."

84. *Mo.*—*State ex rel. Van Raalte v. Board of Equalization*, 256 Mo. 455, 165 S. W. 1047. *Utah.*—*Rich County v. Bailey*, 47 Utah 378, 154 Pac. 773. *Wis.*—*State ex rel. Miller v. Thompson*, 151 Wis. 184, 138 N. W. 628.

85. *D. C.*—*District of Columbia v. Witmer*, 39 App. Cas. 334. *Mo.*—*State v. Baker*, 170 Mo. 383, 70 S. W. 872. *Wash.*—*State ex rel. Spokane etc. R. Co. v. State Board*, 75 Wash. 90, 134 Pac. 695; *Dexter Horton Nat. Bank v. McKenzie*, 69 Wash. 314, 124 Pac. 915.

The objection that the property assessed was legally exempt from taxation may be asserted, see *infra*, III.

[a] Where the legality of the assessment is not seriously contested, but the petitioner seeks to have a prior tax, assessed and paid by him, recovered or set off on the ground of its illegality, the writ will not issue. *Lehigh Valley R. Co. v. Sohmer*, 174 App. Div. 732, 161 N. Y. Supp. 557.

86. See cases cited *infra*, this note.

[a] The amount of the assessment cannot be questioned. *Ia.*—*Woodbury County v. Talley*, 153 Iowa 28, 129 N. W. 967. *Minn.*—*State ex rel. Hennepin H. Co. v. Minnesota Tax Com.*, 135 Minn. 282, 160 N. W. 665; *State ex rel. Brown v. Board of Public Works*, 134 Minn. 204, 158 N. W. 977. *Wash.*—*State ex rel. Spokane etc. R. Co. v. State Board*, 75 Wash. 90, 134 Pac. 695. Compare, *State v. Lawler*, 103 Wis. 460, 79 N. W. 777.

87. See the statutes.

[a] **Alleged Overvaluation May Be Passed Upon.**—*Long Dock Co. v. State Board*, 86 N. J. L. 592, 92 Atl. 439 (reviewing prior conflicting decisions); *Millville Gas Light Co. v. Millville*, 84 N. J. L. 409, 86 Atl. 449.

88. See *infra*, this note, and 4 STANDARD PROC. 895.

[a] If an appeal from the assess-

tion for the writ must be made within the time limited by the statutes,<sup>89</sup> and even in the absence of any statutory limitation, relief will be denied, at least in a doubtful case, where the petitioner has been guilty of unwarranted delay in seeking the writ.<sup>90</sup> The taxes assessed need not be paid as a condition to the issuance of the writ,<sup>91</sup> unless this is expressly required by statute,<sup>92</sup> and the prior payment of the tax, under protest, will not be a bar to the proceedings.<sup>93</sup>

b. *Grounds for Refusal of Writ.*—The issuance of a writ of certiorari to review an assessment proceeding is a matter within the sound discretion of the court.<sup>94</sup> The writ will not issue to review on assessment where the petitioner has been guilty of misconduct upon his part,<sup>95</sup> where the right to the writ is not clearly established and its issuance would result in great public inconvenience and mischief,<sup>96</sup> where the writ if issued, would be futile,<sup>97</sup> or where it does not clearly appear that petitioner will not be prejudiced if the writ is refused.<sup>98</sup>

ment is provided by statute, certiorari will not issue. *Sears v. Assessors of Nahant*, 208 Mass. 208, 94 N. E. 467.

[b] *Review by Board of Equalization.*—(1) A property owner who fails to have an assessment reviewed by a board of review or equalization is not entitled to the writ. *People ex rel. Hallett v. Board of Comrs.*, 27 Colo. 86, 59 Pac. 733; *People ex rel. T. Realty Corp. v. Purdy*, 174 App. Div. 702, 162 N. Y. Supp. 56. (2) But if the assessment is entirely void, a prior resort to the board is not required. *Earles v. Ramsey*, 61 N. J. L. 194, 38 Atl. 812 (where the property assessed was not in existence); *People ex rel. Sub. Inv. Co. v. Miller*, 73 Misc. 214, 131 N. Y. Supp. 868; *People ex rel. Realty Co. v. Garland*, 72 Misc. 413, 131 N. Y. Supp. 180, where want of jurisdiction on the part of the assessors was changed.

[c] *If the defense relied upon could be raised in proceedings to enforce the tax*, certiorari will not lie. *State ex rel. Hennepin v. Minnesota Tax Com.*, 135 Minn. 282, 160 N. W. 665.

89. See the statutes and 4 STANDARD PROC. 911. See also *People ex rel. C. H. G. & Elec. Co. v. Woodbury*, 171 App. Div. 300, 157 N. Y. Supp. 29 (a statutory provision is jurisdictional and cannot be waived); *People ex rel. Imp. & T. Nat. Bk. v. Purdy*, 167 App. Div. 50, 152 N. Y. Supp. 275.

90. *D. C.*—*Padgett v. District of Columbia*, 17 App. Cas. 255. *N. J.* *Union Waxed & Parchment P. Co. v. State Board*, 73 N. J. L. 374, 63 Atl. 1006. *N. Y.*—*People ex rel. Am. Ex.*

*Nat. Bk. v. Purdy*, 196 N. Y. 270, 89 N. E. 838; *People ex rel. Bank v. Purdy*, 154 App. Div. 529, 139 N. Y. Supp. 180, *affirmed*, 207 N. Y. 758, 101 N. E. 455. *Utah.*—*Rich County v. Bailey*, 47 Utah 378, 154 Pac. 773.

See 4 STANDARD PROC. 912.

91. *Singer Sewing Mach. Co. v. State Bd. Assessors*, 54 N. J. L. 90, 22 Atl. 1085.

92. *People ex rel. L. V. R. Co. v. Sohmer*, 84 Misc. 518, 147 N. Y. Supp. 636.

93. *People ex rel. Warren v. Carter*, 119 N. Y. 557, 23 N. E. 926.

94. *Padgett v. District of Columbia*, 17 App. Cas. (D. C.) 255; *Woodworth v. Gibbs*, 61 Iowa 398, 16 N. W. 287. See 4 STANDARD PROC. 892.

95. *People ex rel. T. Realty Corp. v. Purdy*, 174 App. Div. 702, 162 N. Y. Supp. 56, refusal to appear before board of equalization.

[a] *Failure to furnish necessary reports to the proper authorities or unreasonable delay in furnishing such reports, will justify the court in refusing the writ.* *People ex rel. C. C. R. Co. v. State Tax Comrs.*, 159 App. Div. 137, 144 N. Y. Supp. 74 (holding that the delay shown was not unreasonable); *People ex rel. Tel. Co. v. State Board of Tax Comrs.*, 134 N. Y. Supp. 987.

96. *Rich County v. Bailey*, 47 Utah 378, 154 Pac. 773.

97. *Hoboken v. Jersey City*, 68 N. J. L. 607, 53 Atl. 595; *People ex rel. Gray v. Phillips*, 67 N. Y. 582.

98. *D. C.*—*Padgett v. District of*



c. *Parties.*<sup>99</sup>—Any taxpayer who suffers an injury from an assessment upon his property may apply for the writ,<sup>1</sup> and where the matter is one of general and common interest any taxpayer may maintain the proceedings.<sup>2</sup> Property owners who are affected in the same way by the error of which they complain, may join as petitioners for the writ.<sup>3</sup> The writ should be addressed to the assessor or board of equalization, whose action is under review and whose record would furnish the basis of the proceedings.<sup>4</sup>

d. *Form of Petition.*—The petition should be in the form adapted to certiorari proceedings generally.<sup>5</sup> The errors or grounds of illegality upon which the petitioner relies as invalidating the assessment must be clearly stated,<sup>6</sup> in accordance with the general rules applicable to such a petition which are elsewhere fully discussed.<sup>7</sup>

Columbia, 17 App. Cas. 255. Mass. Worcester Agricultural Soc. v. Worcester, 116 Mass. 189. N. Y.—People ex rel. U. V. Copper Co. v. Feitner, 54 App. Div. 217, 66 N. Y. Supp. 769 affirmed, 165 N. Y. 645, 59 N. E. 1129.

99. See 4 STANDARD PROC. 907, and the title "*Parties.*"

1. People ex rel. Water Supply Co. v. State Tax Comrs., 196 N. Y. 39, 89 N. E. 581.

[a] *Stockholders* cannot have an assessment upon corporate property reviewed. State v. Flavell, 24 N. J. L. 370.

2. Orr v. State Board of Equalization, 3 Idaho 190, 28 Pac. 416.

3. People ex rel. Zollikoffer v. Feitner, 74 App. Div. 130, 77 N. Y. Supp. 436, affirmed, 172 N. Y. 618, 64 N. E. 1124.

[a] *Taxpayers* residing in different townships cannot join in an attack upon taxes levied in such townships although they were levied for the same purpose. Woodworth v. Gibbs, 61 Iowa 393, 16 N. W. 287.

4. State v. Casey, 210 Mo. 235, 109 S. W. 1; People ex rel. Benedict v. Roe, 25 App. Div. 107, 49 N. Y. Supp. 227, all members of a board of equalization should be included.

[a] *Intervention* by local assessors when the order of a board of review is under consideration, will not be permitted. People ex rel. Rochester Tel. Co. v. Priest, 181 N. Y. 300, 73 N. E. 1100, reversing 101 App. Div. 223, 91 N. Y. Supp. 1006.

[b] Where all papers have been transmitted by the assessor to the tax collector, the writ may properly be directed to the latter. Reese v. Sherrer,

49 N. J. L. 610, 10 Atl. 286.

5. See 4 STANDARD PROC. 906, 907; 9 STANDARD PROC. 252.

[a] *Form of Petitions To Review Assessment Proceedings.*—See Greenough v. Board of Canvassers, 33 R. I. 559, 82 Atl. 406.

[b] *An improper appeal* will sometimes be treated as an application for a writ of certiorari, to avoid a multiplicity of suits. Board of Comrs. v. Denver Union Water Co., 32 Colo. 382, 76 Pac. 1060; Schmuck v. Hartman, 222 Pa. 190, 70 Atl. 1091. But see Insurance Co. of North America v. Bonner, 24 Colo. 220, 49 Pac. 366.

6. People ex rel. McClure Pub. v. Purdy, 161 App. Div. 541, 146 N. Y. Supp. 646; People ex rel. Sweet v. Blake, 72 Misc. 646, 132 N. Y. Supp. 191; People ex rel. Powdered Milk Co. v. Rowe, 161 N. Y. Supp. 1064.

[a] *The manner in which petitioner has been injured* should be made to appear. People ex rel. Kellogg v. Wells, 182 N. Y. 314, 74 N. E. 878.

7. See 4 STANDARD PROC. 908.

[a] *The fact that the objections* relied upon were called to the attention of the assessor or board of review must appear from the petition. People ex rel. Powdered Milk Co. v. Rowe, 161 N. Y. Supp. 1064.

[b] *Where discrimination and inequality* in the assessment are claimed to exist, other assessments which are disproportionate to petitioner's assessment must be described. People ex rel. Gas & Elec. Co. v. Woodbury, 67 Misc. 481, 123 N. Y. Supp. 592.

[c] *Overvaluation.*—If it is claimed that an excessive valuation has been placed upon the property, the facts

e. *Writ and Return*.—The writ and return should be in the form and comply with the general requirements elsewhere discussed.<sup>8</sup> The issuance of the writ does not vacate the assessment or stay proceedings for the collection of the tax.<sup>9</sup> The return should by its denials, clearly place in issue those matters which are relied upon in defence.<sup>10</sup>

f. *Hearing*.—The hearing must be had promptly<sup>11</sup> in the venue designated by statute.<sup>12</sup> Objections not made before the assessor or board of review will not be considered.<sup>13</sup> The hearing must be upon the record alone, and extrinsic evidence cannot be received,<sup>14</sup> except

showing its true value must be set forth. *People ex rel. Thomson v. Feitner*, 61 App. Div. 117, 70 N. Y. Supp. 360, *affirmed*, 168 N. Y. 441, 61 N. E. 763; *People ex rel. N. Y. & R. B. R. Co. v. State Board of Tax Comrs.*, 79 Misc. 135, 140 N. Y. Supp. 691.

8. See 4 STANDARD PROC. 928, 935; 9 STANDARD PROC. 252.

[a] Only that part of the records which affect (1) the property of petitioner should be required to be returned. *People ex rel. Eno v. New York Tax Comrs.*, 10 Abb. N. C. (N. Y.) 35. (2) The order of the board of equalization affirming an assessment should be brought up. *Bancroft Training School v. Haddonfield*, 82 N. J. L. 192, 82 Atl. 20. (3) If unnecessary papers are called for by the writ, the error should be corrected by motion and not by appeal. *People ex rel. L. I. R. Co. v. Wolf*, 152 App. Div. 173, 136 N. Y. Supp. 465.

[b] The authority by or under which the assessment was made should not be required to be specified. *People ex rel. Fitzgerald v. Feitner*, 40 App. Div. 620, 57 N. Y. Supp. 1062.

[c] Evidence acted upon by the assessing body (1) but not shown by the record, should be set out in the return, under some statutes. *People ex rel. B. Gas Co. v. State Board of Tax Comrs.*, 199 N. Y. 162, 92 N. E. 215; *People ex rel. Water Supply Co. v. State Tax Comrs.*, 196 N. Y. 39, 89 N. E. 581; *People ex rel. H. & M. R. Co. v. Board of Tax Comrs.*, 143 App. Div. 26, 127 N. Y. Supp. 918; *People ex rel. H. & M. R. Co. v. Board of Tax Comrs.*, 142 App. Div. 220, 126 N. Y. Supp. 1063; *People ex rel. Bryan v. State Tax Comrs.*, 67 Misc. 474, 123 N. Y. Supp. 609. (2) A statement that the ground of valuation fixed by the assessing officers was their own judgment of the value of the property derived from

their own knowledge "would seem to be sufficient, though not to be commended." *People ex rel. B. Gas Co. v. State Board of Tax Comrs.*, 199 N. Y. 162, 92 N. E. 215.

[d] An amended or additional return may be filed. *People ex rel. H. & M. R. Co. v. Board of Tax Comrs.*, 142 App. Div. 220, 126 N. Y. Supp. 1063; *People ex rel. Barney v. Barker*, 35 App. Div. 486, 54 N. Y. Supp. 848, *affirmed*, 159 N. Y. 569, 54 N. E. 1093.

9. *Singer Sewing Mach. Co. v. State Bd. Assessors*, 54 N. J. L. 90, 22 Atl. 1085. Compare 4 STANDARD PROC. 932.

10. *People ex rel. N. Y. C. & H. R. R. Co. v. Sullivan*, 77 Misc. 535, 138 N. Y. Supp. 48; *People ex rel. Speir v. Tax Comrs.*, 23 Misc. 591, 59 N. Y. Supp. 1010. Compare 4 STANDARD PROC. 935.

[a] A denial of all the allegations in the petition, "except in so far as the same are shown to be true by this answer," although objectionable as argumentative and indefinite, was upheld. *People ex rel. Gas & Elec. Co. v. Woodbury*, 67 Misc. 481, 123 N. Y. Supp. 592. See the title "Denials."

11. *State v. Robinson*, 38 N. J. L. 267.

12. *People ex rel. N. Y. C. & H. R. R. Co. v. State Board of Tax Comrs.*, 124 N. Y. Supp. 276, the court has discretion to change the venue.

13. *People ex rel. Champlin v. Gray*, 185 N. Y. 196, 77 N. E. 1172; *People ex rel. Edison E. Co. v. Feitner*, 86 App. Div. 46, 83 N. Y. Supp. 1114, *affirmed*, 178 N. Y. 577, 70 N. E. 1106; *People ex rel. Powdered Milk Co. v. Rowe*, 161 N. Y. Supp. 1064. See 4 STANDARD PROC. 947.

14. *D. C.*—District of Columbia v. *Witmer*, 39 App. Cas. 334. *Mo.*—*State v. Cunningham*, 153 Mo. 642, 55 S. W. 249. *Wash.*—*State ex rel. Spokane etc.*

in those jurisdictions in which, by statute, the common law scope of the proceeding has been broadened and new evidence is permitted to be received.<sup>15</sup>

g. *Relief To Be Granted*.<sup>16</sup> — The assessment, when declared to be illegal may be set aside,<sup>17</sup> and, in states in which mistakes, irregulari-

R. Co. v. State Board, 75 Wash. 90, 134 Pac. 695.

See 4 STANDARD PROC. 941.

[a] **Effect To Be Accorded the Order of Board.**—(1) An order by an assessing body which appears on its face to be regular, is prima facie evidence that necessary preliminary jurisdictional requirements were complied with. *State ex rel. Ruemmele v. Haugen*, 160 Wis. 494, 152 N. W. 176. And see *Greenough v. Board of Canvassers*, 33 R. I. 559, 82 Atl. 406. (2) But when the petition for the writ challenging the validity of the proceedings upon specific failure, to observe jurisdictional requirements, is answered by a return purporting to show just what was done, it cannot be presumed in favor of the respondent that anything additional was done. *State ex rel. Ruemmele v. Haugen*, 160 Wis. 494, 152 N. W. 176.

15. *Centre Bridge Co. v. Stockton*, 80 N. J. L. 126, 76 Atl. 315; *Trenton Heat & Power Co. v. State Board*, 73 N. J. L. 370, 63 Atl. 1005; *People ex rel. K. R. Co. v. Tax Comrs.*, 157 App. Div. 731, 142 N. Y. Supp. 986; *People ex rel. B. Dev. Co. v. Purdy*, 96 Misc. 10, 159 N. Y. Supp. 778; *People ex rel. Sweet v. Blake*, 72 Misc. 646, 132 N. Y. Supp. 191.

[a] **Proceedings under a statutory writ of certiorari** are in the nature of a new trial. "The return is not in this writ of review de nova conclusive upon the questions of fact stated therein. The petition and return are regarded simply as pleadings in the proceeding." *People ex rel. B. Dev. Co. v. Purdy*, 96 Misc. 10, 159 N. Y. Supp. 778. And see *People ex rel. Hempstead v. Tax Comrs.*, 214 N. Y. 594, 108 N. E. 913; *People ex rel. Real Estate Co. v. O'Donnell*, 198 N. Y. 48, 91 N. E. 276.

[b] "The presumption is that the assessors have acted regularly and properly. To set the court in motion, the petition must state such facts as, if admitted by the return, would show

that the relator was entitled to relief. If this is not done, a motion to dismiss the proceeding will be granted. If it does, and these facts are not disputed by the return, an order granting proper relief follows. If the facts are in dispute, and evidence is necessary for the proper disposition of the matter, such evidence will be taken by the court or a referee." *People ex rel. Sweet v. Blake*, 72 Misc. 646, 132 N. Y. Supp. 191.

[c] **Where the knowledge of members of a board of review is made evidential**, upon the question of the value of property they assess, they may be called as witnesses and cross-examined as to their individual knowledge of facts, but not as to the method by which the board reached its result. *Long Dock Co. v. State Board*, 86 N. J. L. 592, 92 Atl. 439.

[d] **Rules Governing Review of Evidence.**—(1) The action of the assessor or board of review is presumed to be correct (*Centre Bridge Co. v. Stockton*, 80 N. J. L. 126, 76 Atl. 315; *People ex rel. City Inv. Co. v. Saxe*, 177 App. Div. 16, 163 N. Y. Supp. 942), and (2) will not be set aside (*Kearny v. Board of Equalization*, 81 N. J. L. 106, 78 Atl. 1050; *People ex rel. H. & M. R. Co. v. Board of Tax Comrs.*, 143 App. Div. 26, 127 N. Y. Supp. 918), unless (3) clearly unsupported by the evidence. *Long Dock Co. v. State Board*, 89 N. J. L. 108, 97 Atl. 900.

[e] **A reference** may be ordered when deemed advisable by the court. *People ex rel. Sweet v. Blake*, 72 Misc. 646, 132 N. Y. Supp. 191. See *People ex rel. N. Y. C. & H. R. R. Co. v. Woodbury*, 167 App. Div. 428, 153 N. Y. Supp. 537, and generally the title "References."

16. See generally 4 STANDARD PROC. 948.

17. *Matter of New York, O. & W. R. Co.*, 155 App. Div. 866, 140 N. Y. Supp. 678, stating the test for determining whether a judgment is illegal or merely erroneous.



ties, or valuations may be reviewed on certiorari proceedings,<sup>18</sup> the judgment should correct any errors which the court finds to exist.<sup>19</sup>

h. *Appeals*. — The general rules applicable to appeals in certiorari proceedings apply to the particular class of proceedings here under consideration.<sup>20</sup>

i. *Costs*. — Costs will ordinarily be awarded to the successful party.<sup>21</sup> An assessor will not be made personally liable for the costs, where his action though erroneous was not taken in bad faith.<sup>22</sup>

4. *By Mandamus*. — The performance by assessors of their ministerial duties will be enforced by a writ of mandate though their discretion will not be controlled in such matters.<sup>23</sup> Mandamus cannot be maintained to review and correct an alleged overvaluation of assessed property,<sup>24</sup> though where the assessment of property is illegal it may be stricken from the rolls by mandamus proceedings,<sup>25</sup> unless there is an adequate remedy at law.<sup>26</sup> Clerical mistakes in an assessment may be corrected by mandamus,<sup>27</sup> and the assessment records made to speak the truth.<sup>28</sup>

5. *Equitable Relief by Injunction*.<sup>29</sup> — The courts will not ordinar-

18. See *supra*, II, E, 3, f.

19. *Matter of New York, O. & W. R. Co.*, 155 App. Div. 866, 140 N. Y. Supp. 678.

[a] *Discrimination in valuations* may be corrected. *People ex rel. K. R. Co. v. Tax Comrs.*, 157 App. Div. 731, 142 N. Y. Supp. 986. See *People ex rel. N. Y. C. & H. R. R. Co. v. Priest*, 206 N. Y. 274, 99 N. E. 547.

[b] Whether the case should be sent back to the assessing body or the mistakes be corrected by the court is a matter being within its discretion. *Long Dock Co. v. State Board*, 89 N. J. L. 108, 97 Atl. 900.

20. See 4 STANDARD PROC. 951.

[a] *A finding on a question of fact* will not be set aside if there is any evidence to support it. *Guggenheim v. Long Branch*, 83 N. J. L. 628, 84 Atl. 21.

21. See 4 STANDARD PROC. 950, and the title "*Costs*."

[a] *Unless the assessment is found to be excessive* in at least one-half of the amount claimed, costs will be awarded against the relator under some statutes. *People ex rel. K. R. Co. v. Tax Comrs.*, 157 App. Div. 731, 142 N. Y. Supp. 986; *People ex rel. Loomis v. Purdy*, 167 App. Div. 857, 153 N. Y. Supp. 793 (the statute is mandatory); *People ex rel. H. & M. R. Co. v. Tax Comrs.*, 69 Misc. 1, 125 N. Y. Supp. 895.

22. *People ex rel. Oswego v. Board*

of Assessors, 134 N. Y. Supp. 177.

[a] *Where action was taken in bad faith*, costs will be charged against the assessor. *People ex rel. Hamilton College v. Lawlor*, 74 App. Div. 553, 77 N. Y. Supp. 840, *affirmed*, 179 N. Y. 535, 71 N. E. 1136.

23. See *supra*, II, A, and the titles "*Mandamus*;" "*Officers*."

24. *Ia*.—*Meyer v. Dubuque*, 43 Iowa 592. *Ky*.—*Southern Pac. Co. v. Com.*, 134 Ky. 410, 120 S. W. 309. *Nev.* *Hardin v. Guthrie*, 26 Nev. 246, 66 Pac. 744.

25. *County Comrs. v. Baltimore Sugar Refining Co.*, 99 Md. 481, 58 Atl. 211.

26. *W. A. Sturgeon & Co. v. Board of Assessors*, 159 Mich. 199, 123 N. W. 593; *State v. Drexel*, 75 Neb. 751, 107 N. W. 110.

27. *People ex rel. Nostrand v. Wilson*, 119 N. Y. 515, 23 N. E. 1064; *People ex rel. Lawyer v. Board of Supers.*, 39 Misc. 162, 79 N. Y. Supp. 145.

28. *State v. Dodge Co.*, 20 Neb. 595, 31 N. W. 117.

29. See generally the title "*Injunctions*."

*Injunction suits to prevent collection of illegal taxes*, see *infra*, V, F.

[a] *Injunction against officers generally*, see the title "*Officers*;" against municipalities and their officers, see the title "*Municipal Corporations*."

ily interfere by injunction with assessment proceedings, before they have been completed,<sup>30</sup> the remedy at law usually being adequate to afford all needed relief.<sup>31</sup> But where the threatened action of the taxing officers would be clearly illegal, or without jurisdiction,<sup>32</sup> or would create a cloud upon plaintiff's title,<sup>33</sup> or lead to his irreparable injury,<sup>34</sup> or a multiplicity of suits,<sup>35</sup> and there is no adequate remedy at law, a court of equity will restrain the threatened action.<sup>36</sup>

30. **U. S.**—*Albuquerque First Nat Bank v. Albright*, 208 U. S. 548, 28 Sup. Ct. 349, 52 L. ed. 614; *Western Union Tel. Co. v. Howe*, 180 Fed. 44, 103 C. C. A. 398; *Tacoma Ry. & P. Co. v. Pierce County*, 193 Fed. 90. **Colo.** *People v. District Court*, 29 Colo. 182, 68 Pac. 242. **Ind.**—*McConnell v. Hampton*, 164 Ind. 547, 73 N. E. 1092. **N. M.**—*First Nat. Bank v. Albright*, 13 N. M. 514, 86 Pac. 548, *affirmed*, 208 U. S. 548, 28 Sup. Ct. 349, 52 L. ed. 614. **Tex.**—*Missouri, K. & T. R. Co. v. Shannon*, 100 Tex. 379, 100 S. W. 138, 10 L. R. A. (N. S.) 681.

[a] Mere irregularities furnish no ground for equitable relief. **Ark.** *Equalization Board v. Land Owners*, 51 Ark. 516, 11 S. W. 822. **Ind.**—*Crowder v. Riggs*, 153 Ind. 158, 53 N. E. 1019. **Ore.**—*Ankeny v. Blakley*, 44 Ore. 78, 74 Pac. 485. **Pa.**—*Manor Real Estate & Tr. Co. v. Cooner*, 13 Pa. Dist. 83.

31. **U. S.**—*Western Union Tel. Co. v. Howe*, 180 Fed. 44, 103 C. C. A. 398, review by board of equalization. **Ill.** *Schaeffer v. Ardery*, 241 Ill. 27, 89 N. E. 294. **Ia.**—*Security Savs. Bank v. Carroll*, 128 Iowa 230, 103 N. W. 379. **Ky.**—*Ryan v. Louisville*, 133 Ky. 714, 118 S. W. 992. **Okla.**—*Black v. Geisler*, 58 Okla. 335, 159 Pac. 1124. But see *Weatherford Mill. Co. v. Duncan*, 42 Okla. 242, 140 Pac. 1184. **Pa.** *Manor Real Estate & Tr. Co. v. Cooner*, 13 Pa. Dist. 83. **Wis.**—*Foster v. Rowe*, 132 Wis. 268, 111 N. W. 688.

32. **U. S.**—*Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. ed. 761, *Central Pac. R. Co. v. Evans*, 111 Fed. 71. **Ill.**—*Schaeffer v. Ardery*, 241 Ill. 27, 89 N. E. 294. **Ind.**—*Hart v. Smith*, 159 Ind. 182, 64 N. E. 661, 95 Am. St. Rep. 280, 58 L. R. A. 949, acts beyond the jurisdiction of a board of tax commissioners will be enjoined. **Md.** *Schley v. Montgomery County Comrs.*, 106 Md. 407, 67 Atl. 250. **N. M.**—*Poe v. Howell*, 67 Pac. 62. **Tenn.**—*Briscoe v. McMillan*, 117 Tenn. 115, 100 S. W. 111.

[a] Where an illegal plan of assessment has been adopted, injunction is a proper remedy. *Houston v. Baker* (Tex. Civ. App.), 178 S. W. 820.

[b] Where board is proceeding under unconstitutional law, an injunction may issue. *Union Pac. R. Co. v. Alexander*, 113 Fed. 347; *Green v. Hutchinson*, 128 Ga. 379, 57 S. E. 353. *Compare People v. District Court*, 29 Colo. 182, 68 Pac. 242.

Enjoining assessment of exempt property, see *infra*, III.

[c] Illegal Discrimination. — The taxing authorities of a state may be enjoined by a federal court from "systematically and intentionally overvaluing the property of one class of property owners as compared with that of another class, though the discrimination is due to the fact that the property of the latter is itself undervalued, and although the valuation of the two classes is by different taxing boards." *Illinois Cent. R. Co. v. Mississippi R. R. Com.*, 229 Fed. 248.

33. **Fla.**—*Pickett v. Russell*, 42 Fla. 116, 634, 28 So. 764. **N. M.**—*Laughlin v. Santa Fe*, 3 N. M. 420, 5 Pac. 817. **N. Y.**—*Thompson Ely Realty Co. v. Fitz*, 131 N. Y. Supp. 375. **Tex.**—*Houston v. Baker* (Tex. Civ. App.), 178 S. W. 820.

34. *Scribner v. Allen*, 12 Minn. 148.

35. **U. S.**—*Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. ed. 761 (where a state auditor was enjoined from certifying an assessment to county auditors); *Western Union Tel. Co. v. Norman*, 77 Fed. 13. **N. J.**—*Morris Canal & Bkg. Co. v. Jersey City*, 12 N. J. Eq. 227. **Tex.**—*Houston v. Baker* (Tex. Civ. App.), 178 S. W. 820.

36. See cases in preceding notes.

[a] Parties, see *Wicomico County Comrs. v. Bancroft*, 135 Fed. 977, 70 C. C. A. 287, and the titles "Injunctions;" "Parties."

[b] One taxpayer may enjoin the levying of an illegal tax upon any property in the district. *Knopf v.*

**6. Action To Reduce or Increase Assessment.**—An action for the reduction or abatement of an assessment may be maintained in some states,<sup>37</sup> and is sometimes made the exclusive remedy in such matters.<sup>38</sup> Proceedings for the increase of an assessment at the suit of the public authorities are also authorized in some states.<sup>39</sup> The general rules governing suits of an equitable character, as to venue,<sup>40</sup> parties,<sup>41</sup> plead-

First Nat. Bank, 173 Ill. 331, 50 N. E. 660. And see *Collins v. Davis*, 57 Iowa 256, 10 N. W. 643.

[c] A suit may be instituted as soon as the taxing body has instituted proceedings for the assessment. *Houston v. Baker* (Tex. Civ. App.), 178 S. W. 820.

[d] A tender (1) of the amount properly due, where that can be ascertained, should be made. *Tacoma Ry. & P. Co. v. Pierce County*, 193 Fed. 90. (2) Where the assessment is claimed to be illegal as a whole, it is sufficient if the plaintiff offer to give security for the payment of any amount which should be found to be due. *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. ed. 761.

37. Mass.—*Essex Co. v. Lawrence*, 214 Mass. 79, 100 N. E. 1016. N. H. *Boston & M. R. R. Co. v. State*, 76 N. H. 515, 85 Atl. 616. Va.—*Com. v. Schmelz*, 116 Va. 62, 81 S. E. 45.

[a] Although the entire assessment is claimed to be illegal, a petition for abatement is the proper remedy. *Welch v. Boston*, 211 Mass. 178, 97 N. E. 893.

[b] The filing by a taxpayer of a list of his assessable property, is (1) a condition precedent to the maintenance of the action in some states (*Crowell & Spencer Lumb. Co. v. Lafleur*, 137 La. 772, 69 So. 170; *Mill-saps v. Traylor*, 128 La. 1068, 55 So. 677; *Bartlett v. New Boston*, 77 N. H. 476, 93 Atl. 796, Ann. Cas. 1917B, 777. But see *Essex Co. v. Lawrence*, 214 Mass. 79, 100 N. E. 1016), unless (2) the failure to do so was the result of a mistake. *Kerby v. Charlestown*, 78 N. H. 301, 99 Atl. 835, L. R. A. 1917D, 785.

[c] A corporation is a "person" within the meaning of a statute giving a person aggrieved the right to petition for the abatement of a tax. *Essex Co. v. Lawrence*, 214 Mass. 79, 100 N. E. 1016.

[d] The suit must be instituted within the time (1) limited by the par-

ticular statute under which it is brought. *Orient Ins. Co. v. Assessors of Orleans*, 221 U. S. 358, 31 Sup. Ct. 554, 55 L. ed. 769; *Paepcke Leicht Lumb. Co. v. Clack*, 137 La. 397, 68 So. 739; *Colorado Southern, N. O. & P. R. Co. v. Crowley*, 134 La. 180, 63 So. 868. But see, *Texas & P. R. Co. v. Flournoy*, 128 La. 71, 54 So. 475. (2) An agreement between the taxing officers and property owners, cannot extend the time. *Orient Ins. Co. v. Board of Assessors*, 124 La. 872, 50 So. 778.

[e] If an adequate remedy at law exists, the action cannot be maintained. Ark.—*Clay County v. Bank of Knobel*, 105 Ark. 450, 151 S. W. 1013, holding an appeal from the assessment to be an adequate remedy. La.—*New Orleans Warehouse Co. v. Marrero*, 106 La. 130, 30 So. 305. Wash.—*Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553.

[f] A Tender of the Valid Portion of the Tax Must Be Made.—*Tampa v. Mugge*, 40 Fla. 326, 24 So. 489. Compare, *Pettigrew v. Moody*, 17 S. D. 275, 96 N. W. 94.

38. *Attorney General v. East Boston Co.*, 222 Mass. 450, 111 N. E. 167; *Sears v. Assessors of Nahant*, 208 Mass. 208, 94 N. E. 467.

39. *Tennessee Coal, Iron & R. R. Co. v. State*, 141 Ala. 103, 37 So. 433.

40. See the title "Venue" and *New Orleans Great Northern R. Co. v. Thomas*, 129 La. 128, 55 So. 737, an action to abate an assessment by a state board of appraisers must be brought at its domicile but an action to have it declared a nullity may be maintained where the property is located.

41. See the titles "Injunctions;" "Parties;" and La.—*Colorado Southern, N. O. & P. R. Co. v. Crowley*, 134 La. 180, 63 So. 868 (tax collector a necessary party after the assessment has become final); *Texas & P. R. Co. v. Flournoy*, 128 La. 71, 54 So. 475, necessity of joining state board of ap-



ing,<sup>42</sup> evidence,<sup>43</sup> and practice,<sup>44</sup> apply to such actions.<sup>45</sup> The court has power to revise the findings of the board whose order is being reviewed,<sup>46</sup> but has no power to revise the rulings it made in the proceeding before it.<sup>47</sup>

**7. Action To Vacate Assessment.**—An action to vacate an improper or illegal assessment may be maintained in some states,<sup>48</sup> where the effect of the assessment is to create a cloud upon plaintiff's title,<sup>49</sup> or where some other ground of original equitable jurisdiction exists.<sup>50</sup>

praisers. **N. H.**—*Jaffrey v. Smith*, 76 N. H. 168, 80 Atl. 504, executor of deceased property owner may maintain the action. **Wash.**—*Citizens Nat. Bank v. Columbia*, 23 Wash. 441, 63 Pac. 209, the trustee of an express trust.

[a] **Persons whose right to an abatement rests upon the same basis may join as plaintiffs.** Appeal of Barrett, 73 Conn. 288, 47 Atl. 243.

[b] **The municipality and not the assessor, is the proper defendant in some states.** *Welch v. Boston*, 211 Mass. 178, 97 N. E. 893.

[c] **A board of equalization which is charged to have acted illegally, will be allowed to intervene.** *Millsaps v. Traylor*, 128 La. 1068, 55 So. 677.

42. *Collins v. King County*, 80 Wash. 251, 141 Pac. 305, discussing allegations as to excessive valuation for assessment purposes. See the titles "**Bills and Answers**;" "**Injunctions**;" and other titles dealing with particular aspects of pleading.

[a] **A prayer for annulment of an assessment will be construed as including a prayer for a reduction of its amount.** *Texas & P. R. Co. v. Flournoy*, 128 La. 71, 54 So. 475.

43. *Boston & M. R. R. v. State*, 76 N. H. 515, 85 Atl. 616. And see *National Lumb. & Mfg. Co. v. Chehalis County*, 86 Wash. 483, 150 Pac. 1164.

44. See *infra*, this note.

[a] **The trial should be had at the first term of court next succeeding the filing of the action.** *National Bank of Commerce v. New Bedford*, 175 Mass. 257, 56 N. E. 288.

45. See generally the title "**Equity Jurisdiction and Procedure**."

46. *Boston & M. R. R. v. State*, 76 N. H. 515, 85 Atl. 616.

47. *Boston & M. R. R. v. State*, 76 N. H. 515, 85 Atl. 616.

48. **Ky.**—*Louisville Water Co. v. Clark*, 94 Ky. 47, 21 S. W. 246. **N. Y.** *French v. New Rochelle*, 141 App. Div.

8, 125 N. Y. Supp. 677, the action is purely statutory. **Tex.**—*Brundrett v. Lucas* (Tex. Civ. App.), 194 S. W. 613.

*Compare, Buchanan v. Macfarland*, 31 App. Cas. (D. C.) 6.

[a] **Conditions Precedent.**—(1) The plaintiff must have applied to the assessing officers for relief, before he can maintain the action. *Marston v. Elliott*, 138 La. 574, 70 So. 519. (2) Failure of the taxpayer to list and return a statement of his assessable property will prevent the maintenance of the action in some states. *Marston v. Elliott*, 138 La. 574, 70 So. 519.

[b] **Parties.**—(1) Any person directly interested may maintain the action. *Kent v. Exeter*, 68 N. H. 469, 44 Atl. 607. (2) Several taxpayers having the same interest in having an assessment set aside, as illegal, may join in the action. *Thomas v. Moore*, 120 Mich. 535, 79 N. W. 812. (3) But where no community of interest exists and different questions are involved a joinder will not be permitted. *Tampa v. Mugge*, 40 Fla. 326, 24 So. 489. (4) The municipality levying the tax is the only necessary party defendant. **La.**—*Erwin v. Franklinton*, 130 La. 827, 58 So. 587, tax collector need not be joined. **Mich.**—*Thomas v. Moore*, 120 Mich. 535, 79 N. W. 812. **Wis.** *Gilman v. Sheboygan*, 79 Wis. 26, 48 N. W. 111.

49. See *infra*, this note.

[a] **Where the assessment is valid on its face and invalidity can be shown only by extrinsic evidence, an action to remove an assessment as a cloud upon title cannot be maintained.** *Bussing v. Mt. Vernon*, 198 N. Y. 196, 91 N. E. 543; *French v. New Rochelle*, 141 App. Div. 8, 125 N. Y. Supp. 677.

50. **Fraud in placing an excessive valuation upon the property, (1) is ground for relief.** See *Maish v. Arizona*, 164 U. S. 599, 17 Sup. Ct. 193, 41 L. ed. 567; *Wells Fargo & Co.'s Ex-*

The specific objections relied upon as rendering the tax illegal must be clearly set forth in the complaint.<sup>51</sup> The court will if necessary cancel the entire assessment roll,<sup>52</sup> but, where it is possible, will avoid doing this, and will merely strike the illegal assessment from the assessment roll,<sup>53</sup> or modify and correct the assessment in order to remove its illegal features.<sup>54</sup>

**III. ENFORCEMENT OF RIGHT TO EXEMPTIONS.**—The action of the administrative board clothed with the power and duty of passing upon a property owner's claim of exemption may be reviewed by the courts,<sup>55</sup> and the right to an exemption may be determined, either upon a petition,<sup>56</sup> an appeal from the assessment,<sup>57</sup> an action to abate or correct the assessment,<sup>58</sup> on certiorari proceedings,<sup>59</sup> by manda-

press *v. Crawford*, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371. (2) Where an assessment has been reviewed by a board of equalization it is not enough to show fraud upon the part of the assessor alone. *Southern Oregon Co. v. Coos*, 39 Ore. 185, 64 Pac. 646. (3) Mere overvaluation is not necessarily fraudulent, but gross overvaluation is presumptive evidence of fraud. *Southern Oregon Co. v. Coos*, 39 Ore. 185, 64 Pac. 646.

51. *Tampa v. Kaunitz*, 39 Fla. 683, 23 So. 416, 63 Am. St. Rep. 202.

52. *Auditor General v. Pioneer Iron Co.*, 123 Mich. 521, 82 N. W. 260.

[a] **Assessors May Be Ordered To Make a Reassessment.**—*Crossley v. East Orange*, 62 N. J. L. 583, 41 Atl. 712; *People ex rel. B. C. R. Co. v. Neff*, 19 App. Div. 590, 46 N. Y. Supp. 385, affirmed, 154 N. Y. 763, 49 N. E. 1102.

[b] **Proceedings Will Be Stayed Pending a Re-assessment.**—*Johnston v. Oshkosh*, 65 Wis. 473, 27 N. W. 320.

53. *Pilgrim Consol. Min. Co. v. Board of Comrs.*, 32 Colo. 334, 76 Pac. 364; *Yale University v. New Haven*, 71 Conn. 316, 42 Atl. 87, 43 L. R. A. 490.

54. *Hixon v. Eagle River*, 91 Wis. 649, 65 N. W. 366.

55. *State v. Board of Assessors*, 52 La. Ann. 223, 26 So. 872.

[a] **Review of Action.**—Administrative officers in passing upon a claim for exemption act judicially but their acts are not conclusive. They are officers clothed by statute with limited powers, and where the statute leaves to such officers the determination of questions of a jurisdictional character it is well settled that their decision does not

prevent an aggrieved party from invoking a judicial remedy and when their authority depends upon the existence of some fact which they erroneously determine to exist, their subsequent acts are void. *Elmhurst Fire Co. v. New York*, 213 N. Y. 87, 106 N. E. 920.

[b] **A property owner is entitled to assume that exempt property will not be assessed and is not required to appear before assessment officials and enter his objections as a condition to his right to resort to the courts.** *Rosehill Cemetery Co. v. Kern*, 147 Ill. 483, 35 N. E. 240.

56. *Com. v. Richmond, F. & P. R. Co.*, 111 Va. 611, 69 S. E. 1070, no strict rules of pleading are applicable to the proceeding.

57. *In re Appeal of Borden*, 208 Ill. 369, 70 N. E. 310. *Compare, Bell Tel. Co. v. Harrisburg School Dist.*, 40 Pa. Co. Ct. 50.

**Appeals from assessments generally**, see *supra*, II, E, 2.

58. *Colorado Southern, N. O. & P. R. Co. v. Crowley* 134 La. 180, 63 So. 868; *Texas & P. R. Co. v. Flournoy*, 128 La. 71, 54 So. 475. But see, *Portland University v. Multnomah*, 31 Ore. 498, 50 Pac. 532.

**Abatement of assessments generally**, see *supra*, II, E, 6.

59. *Montclair v. State Board*, 88 N. J. L. 374, 96 Atl. 44; *Hoboken Land & Imp. Co. v. Hoboken*, 31 N. J. Eq. 461; *People v. Tax Assessors*, 106 N. Y. 671, 12 N. E. 794; *Hygienic Ice & Ref. Co. v. Franey*, 142 App. Div. 143, 127 N. Y. Supp. 30.

**Review of assessments by certiorari proceedings**, see *supra*, II, E, 3.

mus,<sup>60</sup> or by a bill in equity to enjoin the assessment of the property,<sup>61</sup> or the collection of the tax,<sup>62</sup> or to have its illegality judicially determined,<sup>63</sup> the remedy at law in such cases being deemed inadequate.<sup>64</sup> The illegality of the assessment of exempt property may also be set up as a defense to an action or proceeding having for its object the collection of the assessment upon the exempt property.<sup>65</sup> The facts in support of a claim of exemption must be pleaded with certainty and particularity,<sup>66</sup> and must show that the property is within the exemption provided by the statute.<sup>67</sup> What constitutes an exemption from taxation is a question of law,<sup>68</sup> but whether the particular property is within the exemption is a question of fact.<sup>69</sup> Taxes which have been involuntarily paid on exempt property may be recovered.<sup>70</sup>

60. *State v. Board of Assessors*, 52 La. Ann. 223, 26 So. 872; *Matter of Brooklyn Children's Aid Soc.*, 166 App. Div. 852, 151 N. Y. Supp. 720.

[a] *Mandamus* may be maintained to compel the cancellation of an assessment upon exempt property where the legal duty of the officer is positive and clear. *In re Montefiore Home*, 159 App. Div. 644, 144 N. Y. Supp. 953.

61. *Ill.*—*Duckett v. Gerig*, 223 Ill. 284, 79 N. E. 94. *Ky.*—*Ryan v. Louisville*, 133 Ky. 714, 118 S. W. 992, jurisdiction is based upon prevention of creation of threatened cloud on the title. *Ohio.*—*Jones v. Davis*, 35 Ohio St. 474.

*Compare Hoboken Land & Imp. Co. v. Hoboken*, 31 N. J. Eq. 461.

62. *Colo.*—*Colorado Farm & L. S. Co. v. Beerbohm*, 43 Colo. 464, 96 Pac. 443. *Ill.*—*Rosehill Cemetery Co. v. Kern*, 147 Ill. 483, 35 N. E. 240; *Illinois Cent. R. Co. v. Hodges*, 113 Ill. 323. *La.*—*Taylor Bros. Iron Wks. v. New Orleans*, 44 La. Ann. 554, 11 So. 3. *Mont.*—*Northern Pac. R. Co. v. Carland*, 5 Mont. 146, 3 Pac. 134. *Pa.*—*Bell Tel. Co. v. Harrisburg School Dist.*, 40 Pa. Co. Ct. 50.

And see *infra*, V, G.

[a] *Injunction against prosecution of a pending suit* to collect the tax will not issue when the illegality of the tax can be set up in the pending action as matter of defense. *Utah & N. R. Co. v. Crawford*, 1 Idaho 770.

63. *Elmhurst Fire Co. v. New York*, 213 N. Y. 87, 106 N. E. 920; *Wey v. Salt Lake City*, 35 Utah 504, 101 Pac. 381.

64. *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 6 L. ed. 204; *Northern Pac. R. Co. v. Carland*, 5 Mont. 146, 188, 3 Pac. 134.

65. *Ark.*—*Cairo & F. R. Co. v. Parks*, 32 Ark. 131, defense to ejectment. *Idaho.*—*Utah & N. R. Co. v. Crawford*, 1 Idaho 770, action to recover taxes. *Ill.*—*Elmwood Cemetery Co. v. People*, 204 Ill. 468, 68 N. E. 500, application for judgment to enforce tax. *Miss.*—*Meridian v. Phillips*, 65 Miss. 362, 4 So. 119, ejectment to recover possession of land purchased at a tax-sale.

66. *Ark.*—*Cairo & F. R. Co. v. Parks*, 32 Ark. 131. *Ia.*—*Nugent v. Dilworth*, 95 Iowa 49, 63 N. W. 448. *Ky.*—*Louisville v. Board of Trade*, 90 Ky. 409, 14 S. W. 408, 9 L. R. A. 629.

[a] The general rule that all exceptions must be pleaded, if relied upon is applicable, since exemption is an exception to the rule that all property is taxable. *Nugent v. Dilworth*, 95 Iowa 49, 63 N. W. 448.

[b] The extent to which plaintiff is entitled to relief, where only a portion of the property is exempt must be clearly pointed out. *Louisville v. Board of Trade*, 90 Ky. 409, 14 S. W. 408, 9 L. R. A. 629.

67. *Campbell v. Wiggins*, 2 Tex. Civ. App. 1, 20 S. W. 730.

68. *People v. Illinois Cent. R. Co.*, 119 Ill. 83, 6 N. E. 469.

69. *Swank v. Sweetwater Irr. & P. Co.*, 15 Idaho 353, 98 Pac. 297; *People v. Illinois Cent. R. Co.*, 119 Ill. 83, 6 N. E. 469.

70. *Southern Pac. Co. v. Levee Dist. No. 1*, 172 Cal. 345, 156 Pac. 502; *Aetna Ins. Co. v. New York*, 153 N. Y. 331, 47 N. E. 593.

*Recovery of taxes paid*, generally, see *infra*, VII.

[a] "The tax being void, the amount paid the city may be recovered in an action for money had and re-



**IV. PROCEEDINGS AGAINST TAX COLLECTORS GENERALLY.**—A. SUMMARY PROCEEDINGS.<sup>71</sup>—In many states, a tax collector who is in default in the performance of his public duties or has failed to pay over to the proper authorities money he has collected may be proceeded against summarily, by motion for judgment, or rule to show cause,<sup>72</sup> or by execution or distress,<sup>73</sup> or even attachment of his person.<sup>74</sup>

B. MANDAMUS.—A tax collector may be compelled by mandamus to collect taxes due and unpaid,<sup>75</sup> to pay over to the proper officer taxes already collected,<sup>76</sup> and to allow an inspection of his books by officers authorized to examine them.<sup>77</sup>

C. ACTIONS.<sup>78</sup>—Taxes collected by a tax collector may be recovered from him by the public authorities in an action for money<sup>79</sup> had

ceived'' without having the assessment set aside and without making a demand for the return of the money. *Aetna Ins. Co. v. New York*, 153 N. Y. 331, 47 N. E. 593.

[b] Where the property owner has appealed to a board of review his remedy is limited to a review of their decision by certiorari and he cannot maintain an action to recover taxes paid. *Hygienic Ice & Ref. Co. v. Franey*, 142 App. Div. 143, 127 N. Y. Supp. 30.

71. See generally the title "Summary Proceedings."

Summary proceeding for enforcement of bond, see *infra*, 1V, D.

72. Ala.—*Walker v. Chapman*, 22 Ala. 116. Ky.—*Girdner v. Com.*, 13 Ky. L. Rep. 239. Tenn.—*Waters v. Edmondson*, 8 Heisk. 384; *Banks v. Bingham*, 3 Yerg. 312. Vt.—*Mt. Holly v. French*, 75 Vt. 1, 52 Atl. 1038.

[a] Notice of the proceedings must be given as required by the statute. *Walker v. Chapman*, 22 Ala. 116; *Whitnell v. Justices*, 4 Litt. (Ky.) 147.

73. Ga.—*Wilson v. Wright*, 83 Ga. 38, 9 S. E. 834. La.—*Scarborough v. Stevens*, 3 Rob. 147. Mass.—*Waldron v. Lee*, 5 Pick. 323. Mo.—*Judson v. Smith*, 104 Mo. 61, 15 S. W. 956. Pa.—*Schuykill & D. I. & R. Co. v. McCreary*, 58 Pa. 304.

[a] An "extent" which is in the nature of an execution, is provided for by some statutes. *Nason v. Fowler*, 70 N. H. 291, 47 Atl. 263. And see, *Ayer v. Goss*, 71 N. H. 66, 51 Atl. 253.

[b] Summary process provided by statute is in derogation of the common law and must show on its face strict compliance with all statutory require-

ments. *Weimer v. Bunbury*, 30 Mich. 201. And see *Haley v. Petty*, 42 Ark. 392; *Judson v. Smith*, 104 Mo. 61, 15 S. W. 956.

[c] The judgment in summary proceedings, must show upon its face every fact necessary to sustain it. *Crockett v. Parkinson*, 3 Coldw. (Tenn.) 219.

74. *Daggett v. Everett*, 19 Me. 373; *Com. v. Gregory*, 2 Pars. Eq. Cas. (Pa.) 241.

75. Cal.—*Moreing v. Shields*, 28 Cal. App. 513, 152 Pac. 964, collection of a special assessment. Ill.—*Geiersbach v. Fippinger*, 184 Ill. App. 58; *Murphy v. People*, 129 Ill. App. 533. La.—*State v. O'Kelly*, 48 La. Ann. 23, 18 So. 757. Miss.—*Adams v. Clarksdale*, 95 Miss. 88, 48 So. 242. Pa.—*Manley v. Killeullen*, 21 Pa. Dist. 263. Tenn.—*State ex rel. Bonner v. Andrews*, 131 Tenn. 554, 175 S. W. 563.

See generally the titles "Mandamus;" "Officers."

[a] An action on a tax collector's bond does not afford an adequate remedy. *State v. Fyler*, 48 Conn. 145. *Compare, Nottoway v. Powell*, 95 Va. 335, 29 S. E. 682.

76. *State ex rel. Trenton Public Schools v. Hammell*, 31 N. J. L. 446; *Attorney-General v. Taubenheimer*, 178 App. Div. 321, 164 N. Y. Supp. 904.

77. *Scott v. Richland*, 46 La. Ann. 278, 14 So. 521.

78. Actions on bonds, see *infra*, IV, D, 3.

79. Ill.—*Hindman v. Aledo*, 6 Ill. App. 436. Ind.—*Gibson v. Harrington*, 1 Blackf. 260, the remedy by motion for judgment is not exclusive. Me.—*Richmond v. Brown*, 66 Me. 373. Md.—*O'Neal v. Washington County School*

and received, or under some circumstances, by a suit in equity.<sup>80</sup> A counterclaim or set-off is not allowed in such actions.<sup>81</sup> A tax collector is liable in damages to a person injured by his negligent or illegal acts,<sup>82</sup> the common law remedy in such cases being trespass.<sup>83</sup>

**D. ENFORCING LIABILITY ON BONDS.—1. Summary Remedies.<sup>84</sup>** In some states summary proceedings, by motion, execution or distress may be invoked against both the tax collector and the sureties on his bond.<sup>85</sup> The obligee in the bond is the proper party plaintiff;<sup>86</sup> the tax collector and his sureties may be joined as parties defendant, or may be proceeded against individually.<sup>87</sup> Notice of the proceeding must be given.<sup>88</sup>

**2. Enforcing Lien of Bond.—**The lien<sup>89</sup> of a tax collector's bond

Comrs., 27 Md. 227, liability on his bond is not an exclusive remedy. **N. H.** *Wentworth v. Gove*, 45 N. H. 160.

[a] A demand for payment is not a condition precedent to maintenance of the action. *Wentworth v. Gove*, 45 N. H. 160; *Moore v. McIntosh*, 31 N. C. 307.

80. *Board of Suprs. v. Powell*, 106 Va. 751, 56 S. E. 812, where an accounting is required to determine the amount due. *Compare*, *Gladish v. Lovewell*, 95 Ark. 618, 130 S. W. 579.

[a] A settlement of his accounts by (1) a tax collector with the proper authorities may be corrected or surcharged by an action in equity. *Davis v. Com.*, 139 Ky. 334, 107 S. W. 306. (2) A demand for the money due need not be made before instituting an action to correct the account. *Davis v. Com.*, 139 Ky. 334, 107 S. W. 306.

81. **Ky.**—*Com. v. Rodes*, 5 Mon. 318. **La.**—*State v. Bradley*, 37 La. Ann. 623. **N. C.**—*State ex rel. Graded School v. McDowell*, 157 N. C. 316, 72 S. E. 1083; *Wilmington v. Bryan*, 141 N. C. 666, 54 S. E. 543.

See generally the title "**Set-Off, Counterclaim and Recoupment.**"

82. **Fla.**—*Florida Packing & Ice Co. v. Carney*, 51 Fla. 190, 41 So. 190. **Mass.**—*Cone v. Forest*, 126 Mass. 97. **Mich.**—*Raynsford v. Phelps*, 43 Mich. 342, 5 N. W. 403, 38 Am. Rep. 189. **Mo.**—*Chouteau v. Rowse*, 56 Mo. 65. **N. Y.**—*Denton v. Carroll*, 4 App. Div. 532, 40 N. Y. Supp. 19, 74 N. Y. St. 628. **Tex.**—*Wright v. Jones*, 14 Tex. App. 423, 38 S. W. 249.

See generally the title "**Officers.**"

83. **Me.**—*Robbins v. Swift*, 86 Me.

197, 29 Atl. 981; *Williamson v. Dow*, 32 Me. 559. See *Foss v. Whitehouse*, 94 Me. 491, 48 Atl. 109. **Mass.**—*Libby v. Burnham*, 15 Mass. 144. **Miss.**—*Tuttle v. Everett*, 51 Miss. 27, 24 Am. Rep. 622.

[a] Misconduct subsequent to the making of a lawful levy does not render him a trespasser ab initio. *Waterbury v. Lockwood*, 4 Day (Conn.) 257, 4 Am. Dec. 215; *Souhegan Nail, C. & W. Factory v. McConihe*, 7 N. H. 309.

84. See generally the title "**Summary Proceedings.**"

**Summary proceedings against tax collectors**, see *supra*, IV, A.

85. See the statutes and **Ala.** *Stamphill v. Franklin*, 86 Ala. 392, 5 So. 487. **Ga.**—*Perkins v. State*, 101 Ga. 291, 28 S. E. 840. **Ky.**—*Com. v. Howard*, 14 Ky. L. Rep. 430. **Mo.** *Wimpey v. Evans*, 84 Mo. 144. **Tenn.** *Brown v. State*, 8 Heisk. 871.

[a] A defective statutory bond though sufficient as a common-law bond, cannot be enforced summarily. *Miller v. Montgomery County Comrs.*, 1 Ohio 271.

86. *Quarles v. Governor*, 10 Humph. (Tenn.) 122.

87. *Marion v. Brown*, 43 Ala. 112; *Justices of Grant County v. Bartlett*, 5 B. Mon. (Ky.) 195. *Compare Martin v. Hardin Justices*, 6 J. J. Marsh. (Ky.) 7.

88. *Armstrong v. State*, Minor (Ala.) 160; *Lemon v. Hay*, 1 Blackf. (Ind.) 227.

[a] A judgment which fails to follow the notice as given, is invalid. *Monteith v. Com.*, 15 Gratt. (56 Va.) 172.

89. *Turner v. Teague*, 73 Ala. 554;

upon his property, created by some statutes, may be foreclosed by a suit in equity.

**3. Actions on Bonds.**—a. *In General.*—Upon default of a tax-collector in the performance of his duties, an action to enforce liability on his bond may be maintained.<sup>90</sup> A demand for payment need not be made before the institution of the action.<sup>91</sup> Unless the obligation of the sureties is regarded as merely that of guaranty,<sup>92</sup> a judgment against the principal is not a necessary prerequisite to a suit against them.<sup>93</sup>

b. *Parties.*—The parties to the action must be determined by the general rules elsewhere treated.<sup>94</sup> The state or municipal corporation for whose benefit the bond was given may sue for its enforcement.<sup>95</sup> If the bond was given to a particular public officer, the action may be maintained in his name.<sup>96</sup> On a joint and several bond the tax col-

*Knighton v. Curry*, 62 Ala. 404; *Crisfield v. Murdock*, 127 N. Y. 315, 27 N. E. 1046; *Chatfield v. Campbell*, 35 Misc. 355, 71 N. Y. Supp. 1004, *affirmed*, 75 App. Div. 631, 78 N. Y. Supp. 1113.

[a] A judgment at law ascertaining the amount of the default of the tax collector need not be obtained before foreclosure of the lien in equity. *Knighton v. Curry*, 62 Ala. 404.

90. See *infra*, this section, and 20 STANDARD PROC. 749.

[a] A provision for the settlement of a tax collector's accounts does not (1) afford an exclusive remedy. *Fidelity & Dep. Co. v. Logan*, 119 Ky. 428, 84 S. W. 341. (2) If an attempted settlement of the accounts of a tax collector is illegal, an action upon his bond may be obtained without first surcharging the settlement. *Com. v. Mackey*, 168 Ky. 58, 181 S. W. 621.

[b] Notification of the district attorney by the auditor of the tax collector's default is not a condition precedent to maintenance of the action. *State ex rel. Dist. Attorney v. Greer*, 109 Miss. 558, 68 So. 778.

[c] Until a designated court or officer has adjusted a tax collector's accounts, no action upon his bond can be maintained in some states. *State v. Nabors*, 103 Ark. 16, 145 S. W. 550; *Branch v. Youndt*, 23 Pa. 182.

91. *Mullins v. Pendleton County Court*, 13 Ky. Op. 273; *McGuire v. Williams*, 123 N. C. 349, 31 S. E. 627. See 20 STANDARD PROC. 750, and generally the title "Suits and Actions."

92. *Blanchard v. State*, 6 La. 290. See 10 STANDARD PROC. 670.

93. See 21 STANDARD PROC. 575, and *infra*, IV, D, 3, a.

94. See the title "Parties," and 11 STANDARD PROC. 957, et seq.; 20 STANDARD PROC. 750; 21 STANDARD PROC. 577. Compare also 10 STANDARD PROC. 673.

95. *Cal.*—*People v. Stacy*, 74 Cal. 373, 16 Pac. 192. *Ky.*—*Com. v. McClure*, 20 Ky. L. Rep. 1568, 49 S. W. 789. *Miss.*—*State v. Hathorn*, 36 Miss. 491. *Mo.*—*Dollarhide v. Parks*, 92 Mo. 178, 5 S. W. 3. *Tex.*—*State v. Kelley*, 43 Tex. 667.

See *Walling v. Morgan*, 126 Ala. 326, 28 So. 433. Compare 20 STANDARD PROC. 750, 909; 21 STANDARD PROC. 577.

[a] The state attorney may institute the action. *People v. Jamison*, 157 Ill. App. 546.

[b] The board of supervisors is the proper usee where suit is instituted in behalf of a county. *State v. Cooper*, 53 Miss. 615.

[c] Any taxpayer who will make himself responsible for costs, may institute the action, in some states upon the refusal of the proper officer to do so. *State v. Harris*, 52 Miss. 686, but see *People v. Holten*, 259 Ill. 219, 102 N. E. 171.

[d] Where failure to pay over county taxes is the default with which the collector, who gave a bond to the state is charged, the action may be maintained by the state for the use of the county. *People v. Love*, 25 Cal. 520. And see *Tappan v. People*, 67 Ill. 339.

96. See *Haynes v. Butler*, 30 Ark. 69.

[a] A bond given "to whom it may concern" may be sued on by the



lector and his sureties may be sued either jointly, or severally.<sup>97</sup>

c. *Pleadings*.—The complaint<sup>98</sup> should allege the contract created by the execution of the bond.<sup>99</sup> It should also allege the facts showing a breach of the obligation of the bond,<sup>1</sup> such as the levy and assessment of taxes,<sup>2</sup> the duty of the tax collector to collect them,<sup>3</sup> his collection of a specific sum of money in the performance of that duty,<sup>4</sup> and his duty and failure to pay over the amount collected or a specific portion thereof to the proper public officers.<sup>5</sup> An allegation as to the person for whose use the action is brought need not be made.<sup>6</sup>

d. *Relief*.—The judgment should follow the general rules elsewhere discussed.<sup>7</sup> The amounts due to different public corporations may properly be apportioned by the judgment.<sup>8</sup>

E. CRIMINAL LIABILITY.—Criminal liability for misconduct of a tax collector in office is created by various statutes.<sup>9</sup> The indictment<sup>10</sup>

officers to whom the funds collected should have been paid. *Walton v. Jones*, 7 Utah 462, 27 Pac. 580.

97. *Lott v. Mobile*, 79 Ala. 69; *Moore v. Foote*, 32 Miss. 469.

[a] The personal representatives of deceased sureties cannot be joined in an action against living sureties. *People v. Jamison*, 157 Ill. App. 546.

Joinder of parties to contracts, see generally 11 STANDARD PROC. 972, et seq.

Joinder of principal and surety, see generally 21 STANDARD PROC. 578; 20 STANDARD PROC. 750.

98. Form of complaint, see *State v. Seibert*, 148 Mo. 408, 50 S. W. 109.

99. *Mullins v. Pendleton County Court*, 13 Ky. Op. 273.

Pleading contract, see 21 STANDARD PROC. 580; 20 STANDARD PROC. 751; 11 STANDARD PROC. 981, et seq.; 4 STANDARD PROC. 497. See also the title "Exhibits."

1. See 20 STANDARD PROC. 751; 4 STANDARD PROC. 504.

2. *Evans v. State*, 2 Blackf. (Ind.) 387. But see *People v. Love*, 25 Cal. 520; *People v. Jamison*, 157 Ill. App. 546, "It was not necessary to aver that the taxes were collected and received by virtue of law."

3. Ky.—*Brown v. Com.*, 6 J. J. Marsh. 635. Md.—*State v. Horner*, 34 Md. 569. Mo.—See *State v. Seibert*, 148 Mo. 408, 50 S. W. 109.

[a] An omission to state when the tax collector was appointed or when the tax levies were made is immaterial. *State v. Horner*, 34 Md. 569.

4. *People v. Jamison*, 157 Ill. App. 546.

5. Ala.—*Stearnes v. Edmonds*, 189 Ala. 487, 66 So. 714. Ark.—*Goree v. State*, 22 Ark. 236. Ky.—*Mullins v. Pendleton County Court*, 13 Ky. Op. 273; *Lewis County Court v. Lovell*, 11 Ky. Op. 294. Mo.—*State v. Seibert*, 148 Mo. 408, 50 S. W. 109, where failure to pay over state revenues is charged, failure to pay monies into the county treasury need not be alleged. Pa.—*Com. v. Gruver*, 13 Pa. Super. 553.

[a] The several amounts which belong respectively to the state and to the county should be stated. *Whitfield v. Wooldridge*, 23 Miss. 183.

[b] Construction.—Allegations of breaches of official duty are construed most strongly against the pleader. *People v. Jamison*, 157 Ill. App. 546.

6. *People v. Jamison*, 157 Ill. App. 546.

7. See the title "Judgments," and 20 STANDARD PROC. 752; 21 STANDARD PROC. 585; 4 STANDARD PROC. 532.

[a] Upon a penal bond judgment must be for the full penal sum. *Com. v. Evans*, 8 Pa. Co. Ct. 665.

8. *Tappan v. People*, 67 Ill. 339. And see *People v. Love*, 25 Cal. 520.

9. See the statutes. And see Cal. *Woods v. Varnum*, 85 Cal. 639, 24 Pac. 843; *People v. Otto*, 70 Cal. 523, 11 Pac. 675. Ore.—*State v. Neilon*, 43 Ore. 168, 73 Pac. 321. Tex.—*Quillin v. State*, 79 Tex. Crim. 497, 187 S. W. 199, misapplication of state money.

10. See the title "Indictment and Information."

or information in such cases follows the general rules elsewhere treated.

**V. COLLECTION OF TAXES.**—A. **IN GENERAL.**—The power to levy and collect a tax carries with it implied power to adopt and employ the procedure necessary to make the collection,<sup>11</sup> and the form of the remedy to be adopted is a matter lying largely within the legislative discretion.<sup>12</sup> The tax collector is ordinarily confined to the statutory methods and cannot resort to an ordinary civil action unless the former prove unavailing or inadequate.<sup>13</sup> Statutes altering existing or creating new methods for the collection of taxes, are usually treated as remedial in character and as applying to taxes already levied.<sup>14</sup> Any existing remedy may be enforced by a tax collector although he has advanced the amount of the taxes in his settlement with the proper public officers.<sup>15</sup>

B. **SUMMARY REMEDIES.**—1. **In General.**—In many states, under express statutory provisions,<sup>16</sup> remedies of a more or less summary

[a] **Indictment for embezzlement,** see *State v. Egan*, 82 N. J. L. 317, 83 Atl. 235. See also the title "**Embezzlement.**"

[b] **Indictment for failure to report collections,** see *Com. v. Kennon*, 143 Ky. 214, 136 S. W. 198.

11. *Idaho*.—*Standrod v. Case*, 24 Idaho 365, 133 Pac. 651. **Ia.**—*Lucas v. Purdy*, 142 Iowa 359, 120 N. W. 1063, 24 L. R. A. (N. S.) 1294. **Mo.** *State v. Severance*, 55 Mo. 378. **S. D.** *Hanson v. Gray*, 12 S. D. 124, 80 N. W. 175, 76 Am. St. Rep. 591.

12. *Lucas v. Purdy*, 142 Iowa 359, 120 N. W. 1063, 24 L. R. A. (N. S.) 1294.

13. *Berry v. Davis*, 158 N. C. 170, 73 S. E. 900. See *infra*, V, C, 1, a; V, D, 1.

**Summary remedy exclusive,** see *infra*, V, B, 1, note 16.

14. **U. S.**—*League v. Texas*, 184 U. S. 156, 22 Sup. Ct. 475, 46 L. ed. 478. **Minn.**—*Taxes in Hennepin County v. Baldwin*, 62 Minn. 518, 65 N. W. 80. **Neb.**—*Holthaus v. Adams County*, 74 Neb. 861, 105 N. W. 632. **N. D.**—*Hanson v. Franklin*, 19 N. D. 259, 123 N. W. 386.

But see *State ex rel. Moose v. Kansas City & M. Ry. & B. Co.*, 117 Ark. 606, 174 S. W. 248.

15. *Berry v. Davis*, 158 N. C. 170, 73 S. E. 900.

16. See the statutes and the title "**Summary Proceedings.**"

[a] **Strict compliance with such statutes is necessary.** *D'Antignac v. Augusta*, 31 Ga. 700.

[b] **Such proceedings need not be conducted with the formalities of an ordinary civil action.** *East Tennessee Brew. Co. v. Currier*, 126 Tenn. 535, 150 S. W. 541; *Marye v. Diggs*, 98 Va. 749, 37 S. E. 315, 51 L. R. A. 902.

[c] **A remedy created by statute is exclusive** (1) of other remedies (*Fla.*—*Bloxham v. Consumers' Elec. Light & S. R. Co.*, 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507. *Neb.*—*Chamberlain v. Woolsey*, 66 Neb. 141, 92 N. W. 181, 95 N. W. 38. **N. J.**—*Board of Chosen Freeholders v. Inhabitants of Weymouth*, 68 N. J. L. 652, 54 Atl. 458. **N. C.**—*Board of Comrs. v. Murphy*, 107 N. C. 36, 12 S. E. 122. *Wash.*—*Pierce County v. Merrill*, 19 Wash. 175, 52 Pac. 854. **W. Va.**—*State v. Baltimore & O. R. Co.*, 41 W. Va. 81, 23 S. E. 677), unless (2) it is inadequate (*Succession of Mercier*, 42 La. Ann. 1135, 8 So. 732, 11 L. R. A. 817), though (3) in some states the rule is otherwise. See *Greil Bros. v. Montgomery*, 182 Ala. 291, 62 So. 692, Ann. Cas. 1915D, 738; *State ex rel. Attorney General v. New York Life Ins. Co.*, 119 Ark. 314, 171 S. W. 871, 173 S. W. 1099, action to collect corporation occupation tax may be maintained although privilege of doing business in the state might have been suspended. Compare 22 **STANDARD PROC.** 715, and the title "**Summary Proceedings.**"

nature may be employed for the collection of taxes.<sup>17</sup> No set-off or counterclaim can be interposed in such proceedings.<sup>18</sup>

**2. Tax Executions.**—A tax execution, based upon the delinquent tax list may be issued in some jurisdictions.<sup>19</sup> In form it must comply with the requirements of the particular statute under the authority of which it is issued;<sup>20</sup> the levy<sup>21</sup> of the execution must also comply with

17. See *infra*, this note.

[a] Garnishment proceedings may be maintained in some states. *Broadway Christian Church v. Com.*, 112 Ky. 448, 66 S. W. 32; *Wilmington v. Sprunt*, 114 N. C. 310, 19 S. E. 348.

[b] Property in Custodia Legis.

(1) Taxes due from an estate which is in process of settlement in the probate courts, may be ordered paid upon an order to show cause. *Ind. Gallup v. Schmidt*, 154 Ind. 196, 56 N. E. 443 (*affirmed*, 183 U. S. 300, 22 Sup. Ct. 162, 46 L. ed. 207); *Brunson v. Starbuck*, 32 Ind. App. 457, 70 N. E. 163. **La.**—*Succession of Mercier*, 42 La. Ann. 1135, 8 So. 732, 11 L. R. A. 817. **Neb.**—*Millett v. Early*, 16 Neb. 266, 20 N. W. 352. **Ohio.**—*Wolfe v. Geffroy*, 16 Ohio St. 219. (2) Where a corporation is in the hands of a receiver, taxes due from it may be ordered paid on petition to the court. *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. ed. 689; *Midland Guaranty & Tr. Co. v. Douglas County*, 217 Fed. 358, 133 C. C. A. 274; *Coy v. Title Guarantee & Tr. Co.*, 212 Fed. 520; *Central Trust Co. v. New York C. & N. R. Co.*, 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260.

[c] Collection of Taxes From Corporations.—(1) An injunction against the prosecution of its business by a corporation while taxes remain due and unpaid is authorized under some statutes. *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. ed. 790 (such a statute is void as to a corporation engaged in postal service); *Standard Underground Cable Co. v. Attorney General*, 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394. (2) Under other statutes, the forfeiture or suspension of the corporate franchise or privilege of doing business in the state for failure to pay taxes is provided for. See *State ex rel. Attorney General v. New York Life Ins. Co.*, 119 Ark. 314, 171 S. W. 871, 173 S. W. 1099 (the remedy

is not exclusive); *Harvey v. Provident Inv. Co.* (Tex. Civ. App.), 156 S. W. 1127.

Summary proceedings for enforcement of liens generally, see the title "Liens."

18. *Morgan v. Pueblo & A. V. R. Co.*, 6 Colo. 478; *Miller v. Wisener*, 45 W. Va. 59, 30 S. E. 237, in distress proceedings.

See generally the title "Set-Off, Counterclaim and Recoupment."

19. **U. S.**—*Georgia R. & Banking Co. v. Wright*, 207 U. S. 127, 28 Sup. Ct. 47, 52 L. ed. 134, reversing 125 Ga. 589, 54 S. E. 52. **Ala.**—*Albertville v. Hooper*, 196 Ala. 642, 72 So. 258, an execution is a nullity unless based upon a valid written assessment. **Ga.** *Cannon v. Gorham*, 136 Ga. 167, 71 S. E. 142, Ann. Cas. 1912C, 39. **Kan.** *Comrs. of Stafford Co. v. National Bank*, 48 Kan. 561, 30 Pac. 22. **N. C.** *Middle Canal Co. v. Whitley*, 172 N. C. 100, 90 S. E. 1. See *Berry v. Davis*, 158 N. C. 170, 73 S. E. 900. **Ore.** *Johnson v. White*, 60 Ore. 611, 112 Pac. 1083, 119 Pac. 769.

[a] An assignment of a tax execution is permitted by statute, in some states, under specified conditions. See *Hill v. Georgia State Bldg. & L. Assn.*, 120 Ga. 472, 47 S. E. 897; *Funkhouser v. Male*, 110 Ga. 766, 36 S. E. 57; *Wilson v. Herrington*, 86 Ga. 777, 13 S. E. 129.

20. **Ga.**—*Alaculsy Lumb. Co. v. Gudger*, 134 Ga. 603, 68 S. E. 427 (jurisdictional facts must be recited in it); *Equitable Bldg. & L. Assn. v. State*, 115 Ga. 746, 42 S. E. 87. **Ore.** *Johnson v. White*, 60 Ore. 611, 112 Pac. 1083, 119 Pac. 769; *Ayers v. Lund*, 49 Ore. 303, 89 Pac. 806, 124 Am. St. Rep. 1046. **S. C.**—*State v. Graham*, 2 Hill L. 457.

21. **Ind.**—*Midland Ry. Co. v. State*, 11 Ind. App. 433, 38 N. E. 57. **Neb.** *Chamberlain v. Woolsey*, 66 Neb. 141, 92 N. W. 181, 95 N. W. 38, seizure of an amount of property greatly in



the existing statutory provisions, as must the return.<sup>22</sup> Under some statutes property levied upon may be released upon execution of a proper bond.<sup>23</sup>

**3. Supplementary Proceedings.**—Upon the return by the tax collector of taxes as unpaid, proceedings supplementary to execution may be maintained against the taxpayer, in some states.<sup>24</sup>

**4. Distress.**—Distress proceedings may be maintained for the collection of unpaid taxes under the express provisions of many statutes.<sup>25</sup> Strict compliance with any conditions prescribed by the statute for its employment,<sup>26</sup> and with the limitations of the statute,<sup>27</sup> is required. Ordinarily only personal property<sup>28</sup> belonging to and in the possession of the taxpayer can be levied upon.<sup>29</sup> The proceedings are similar to

excess in value of the amount of the tax is void. *Wis.*—*Bonnin v. Zuehlke*, 122 Wis. 128, 99 N. W. 445 (officer need not have the tax warrant with him when making the levy); *New Richmond Lumb. Co. v. Rogers*, 68 Wis. 608, 32 N. W. 700.

**As to levy of execution generally,** see 15 STANDARD PROC. 901, 922.

[a] **An affidavit of legality** cannot be interposed against the levy of a tax warrant. *Georgia Trading Co. v. Marion*, 114 Ga. 397, 40 S. E. 250.

22. *Ayers v. Lund*, 49 Ore. 303, 89 Pac. 806, 124 Am. St. Rep. 1046, the return must state what was done. See generally the title "Returns."

23. See the statutes and *Curry v. Gila*, 6 Ariz. 48, 53 Pac. 4; *Midland Ry. Co. v. State*, 11 Ind. App. 433, 38 N. E. 57. See also generally the title "Forthcoming Bonds."

[a] **In an action on a forthcoming bond** an indebtedness of the tax collector cannot be set off. *Miller v. Wisener*, 45 W. Va. 59, 30 S. E. 237.

24. *Boucker Contracting Co. v. Calahan Contracting Co.*, 218 N. Y. 321, 113 N. E. 257; *In re Veith*, 165 N. Y. 204, 58 N. E. 886; *Matter of Bruere*, 174 App. Div. 298, 160 N. Y. Supp. 96, proceedings are maintainable against a foreign corporation. *Contra*, *Kirkwood v. Washington*, 32 Ore. 568, 52 Pac. 568.

See generally the title "Supplementary Proceedings."

25. *Haw.*—*Waterhouse v. Webster*, 2 Hawaii 259. *Minn.*—*Piper v. Branham*, 14 Minn. 548. *Pa.*—*West Caln v. Gibbs*, 4 Pa. Dist. 149. *Tenn.*—*State ex rel. Bonner v. Andrews*, 131 Tenn. 554, 175 S. W. 563. *Va.*—*Marye v.*

*Diggs*, 98 Va. 749, 37 S. E. 315, 51 L. R. A. 902. *Wash.*—*Pierce County v. Merrill*, 19 Wash. 175, 52 Pac. 854. *Wyo.*—*Noble v. Amoretti*, 11 Wyo. 230, 71 Pac. 879.

[a] **At common law and in the absence of a statute**, distress proceedings cannot be maintained. *Bergen v. Clarkson*, 6 N. J. L. 352.

26. See the statutes.

[a] **Notice and a prior demand for payment of the tax** is (1) usually required to be made (*Marshall v. Hunt*, 89 Ill. App. 634; *Hoozer v. Buckner*, 11 B. Mon. [Ky.] 183), though (2) under some statutes a demand is unnecessary. *C. N. Nelson Lumb. Co. v. McKinnon*, 61 Minn. 219, 63 N. W. 630; *East Tennessee Brew. Co. v. Currier*, 126 Tenn. 535, 150 S. W. 541, due process of law does not require notice and demand.

[b] **The filing of a delinquent tax list** is a condition to the issuance of a distress warrant, in some states. *Noble v. Amoretti*, 11 Wyo. 230, 71 Pac. 879.

27. *Saunders v. Russell*, 10 Lea (Tenn.) 293, distress warrant cannot be issued to a county other than that in which the taxpayer resides.

28. *Chicago & N. W. Ry. Co. v. Ellison*, 113 Mich. 30, 71 N. W. 324.

29. *Fowble v. Kemp*, 92 Md. 630, 48 Atl. 379; *Daniels v. Nelson*, 41 Vt. 161, 98 Am. Dec. 577, property formerly belonging to a taxpayer but sold by him cannot be levied upon although still in his possession.

[a] **Property of a public service corporation** employed in public use, cannot be seized. *Covington Gas Light Co. v. Covington*, 13 Ky. Op.

proceedings upon other classes of distress warrants.<sup>30</sup> The distress proceedings may be reviewed upon a writ of certiorari.<sup>31</sup>

**5. Arrest or Attachment.**—Except as authorized by statute,<sup>32</sup> a property owner cannot be arrested for the purpose of compelling payment of delinquent taxes.<sup>33</sup> Where authorized, the proceedings must conform to the statute.<sup>34</sup> An action based upon an attachment of the property which has been assessed may also be maintained.<sup>35</sup>

**C. SALE OF LAND IN JUDICIAL PROCEEDINGS.—1. In General.** Where by statute, a tax is made a lien upon the real property taxed, the statutory remedy for a sale of the property in case the tax is not paid is ordinarily exclusive,<sup>36</sup> and a court of equity has no jurisdiction

1079; *Chicago & N. W. Ry. Co. v. Forest County*, 95 Wis. 80, 70 N. W. 77. See generally the title "**Public Service Corporations.**"

[b] **Property of a tenant** may be seized for taxes on the real estate during his possession, under some statutes. *Sitler v. Singer Mfg. Co.*, 14 Pa. Dist. 382.

30. See *infra*, this note, and 18 STANDARD PROC. 521, et seq.

[a] **Issuing of the warrant is not a judicial act** and seal of court need not be affixed. *C. N. Nelson Lumb. Co. v. McKinnon*, 61 Minn. 219, 63 N. W. 630.

[b] **A writ of scire facias** issues, in some states, ordering the property owner to show cause why the distress warrant should not issue. *State ex rel. Bonner v. Andrews*, 131 Tenn. 554, 175 S. W. 563.

[c] **Bulky goods** need not be actually seized. *St. Anthony & D. Elev. Co. v. Soucie*, 9 N. D. 346, 83 N. W. 212, 50 L. R. A. 262.

[d] **A writ which has been issued may be withdrawn** from the officer before levy, and payment of the taxes under protest may be accepted. *Hill v. Allen* (Tenn.), 39 S. W. 892.

31. See *East Tennessee Brew. Co. v. Currier*, 126 Tenn. 535, 546, 150 S. W. 541, and generally the title "**Certiorari.**"

32. See the statutes and *Fenlason v. Shedd*, 109 Me. 326, 84 Atl. 409 (arrest allowed after refusal for twelve days to pay tax); *In re Collection of Poll Tax*, 21 R. I. 582, 44 Atl. 805.

[a] **A statute abolishing imprisonment for debt** does not prevent the arrest of a property owner for non-payment of taxes. *Appleton v. Hopkins*, 5 Gray (Mass.) 530.

[b] **Contempt proceedings** for failure to pay a tax, may be maintained in some states. *In re McLean*, 62 Hun 1, 16 N. Y. Supp. 417, 41 N. Y. St. 879; *In re Kahn*, 19 How. Pr. (N. Y.) 475, 11 Abb. Pr. 147.

33. See *infra*, this note.

[a] **The right of distress does not include the right to arrest.** *Marshall v. Wadsworth*, 64 N. H. 386, 10 Atl. 685.

34. See the statutes and *Hunt v. Holston*, 185 Mass. 137, 70 N. E. 96. See also the title "**Warrants.**"

[a] **Form of warrant**, see *Conn. Wilcox v. Gladwin*, 50 Conn. 77, statutory form is not mandatory. *R. I. In re Collection of Poll Tax*, 21 R. I. 582, 44 Atl. 805. *Vt.—Flint v. Whitney*, 28 Vt. 680.

[b] **The warrant should set out the facts justifying the commitment**; the amount of separate taxes should be stated separately. *In re Sommer*, 28 Pa. Co. Ct. 93.

[c] **Where a demand for payment is a condition to the right to arrest**, the demand must be made in person and a demand by letter through the mails is insufficient. *Clark v. Gray*, 113 Me. 443, 94 Atl. 881; *Hunt v. Holston*, 185 Mass. 137, 70 N. E. 96.

[d] **The warrant for arrest must be in the hands of the officer at the time he makes the arrest.** *Smith v. Clark*, 53 N. J. L. 197, 21 Atl. 491.

35. *Glasgow v. Peyton*, 22 N. M. 97, 159 Pac. 670. Compare 18 STANDARD PROC. 1006.

**As to actions to collect taxes**, see *infra*, V, D.

36. *Ala.—Greil Bros. Co. v. Montgomery*, 182 Ala. 291, 62 So. 692, Ann. Cas. 1915D, 738. *Colo.—Montezuma Valley Water Supply Co. v. Bell*, 20

to enforce the tax lien. If however, no statutory remedy exists,<sup>37</sup> or if the legal remedy is inadequate,<sup>38</sup> or if relief in equity is expressly authorized by statute,<sup>39</sup> an action to foreclose the tax lien may be maintained.<sup>40</sup> Statutes sometimes provide for obtaining a judgment for the sale of property to satisfy unpaid taxes.<sup>41</sup> Jurisdiction of sale proceedings is sometimes conferred upon specified courts.<sup>42</sup>

Colo. 175, 36 Pac. 1102. **Ill.**—*People v. Biggins*, 96 Ill. 481, the tax lien is a legal and not an equitable lien; subsequently a statute changed the law in Illinois. **N. D.**—*McHenry v. Kidder*, 8 N. D. 413, 79 N. W. 875. **Va.** *Marye v. Diggs*, 98 Va. 749, 37 S. E. 315, 51 L. R. A. 902. **W. Va.**—*Board of Education v. Old Dominion I. M. & Mfg. Co.*, 18 W. Va. 441.

Compare 18 STANDARD PROC. 995.

37. *Holt v. Achi*, 18 Hawaii 170; *McInerney v. Reed*, 23 Iowa 410.

38. **Ala.**—*Winter v. Montgomery*, 79 Ala. 481. **Colo.**—*Dobbins v. Colorado & S. R. Co.*, 19 Colo. App. 257, 75 Pac. 156. **Tenn.**—*State v. Duncan*, 3 Lea 679, where tax liens for various taxes covering many different years were involved.

See 18 STANDARD PROC. 996, note 35.

39. **Ark.**—*St. Louis, I. M. & S. Ry. Co. v. State*, 47 Ark. 323, 1 S. W. 556. **Ill.**—*Clark v. Zaleski*, 253 Ill. 63, 97 N. E. 272; *Biggins v. People*, 106 Ill. 270. **Neb.**—*Merrill v. Ijams*, 58 Neb. 706, 79 N. W. 734; *Lancaster v. Rush*, 35 Neb. 119, 52 N. W. 837. **Ore.** *Hoskins v. Dwight*, 69 Ore. 558, 139 Pac. 922. **Tenn.**—See *State v. Duncan*, 3 Lea 679. **Tex.**—*Henrietta v. Eustis*, 87 Tex. 14, 26 S. W. 619; *Mote v. Thompson* (Tex. Civ. App.), 156 S. W. 1105.

40. See cases in preceding notes.

As to foreclosure proceedings in other somewhat similar cases, see the titles "Liens;" "Mortgages."

[a] An antecedent administrative sale is not required. *Burr v. Finch*, 91 Neb. 417, 136 N. W. 72.

[b] Seizure and sale of personal property which is subject to a general lien for taxes assessed against the owner, is not required prior to maintenance of the action to foreclose the lien on real property. *McMahan v. State* (Tex. Civ. App.), 147 S. W. 714.

[c] A demand for payment need not be made. *Hart v. Tiernan*, 58 Conn. 521, 21 Atl. 1007.

[d] **Jurisdiction.**—A justice of the peace has no jurisdiction over such actions. *Buford v. Moore* (Mo.), 177 S. W. 865; *Southwest Land & Orchard Co. v. Barnett*, 240 Mo. 370, 144 S. W. 780.

[e] **Venue.**—The action should be brought in the county in which the land is situated. *Gwin v. Freese*, 90 Neb. 15, 132 N. W. 736, 36 L. R. A. (N. S.) 1060. See *State v. Baker*, 129 Mo. 482, 31 S. W. 924, and the title "Venue."

[f] **Joinder.**—(1) Liens of several distinct taxes due different public corporations may be foreclosed in one action. *Hart v. Tiernan*, 59 Conn. 521, 21 Atl. 1007. (2) A tax lien on several parcels of property cannot be enforced against one of them alone. *Hellman v. Burritt*, 62 Conn. 438, 26 Atl. 473. And see *Whitney v. Morton*, 73 Kan. 502, 85 Pac. 530, holding that a consolidation of the actions would be proper. (3) But separate liens against different parcels of land cannot be foreclosed in one action (*State v. Baker*, 49 Tex. 763. Compare *Whatcom v. Fairhaven Land Co.*, 7 Wash. 101, 34 Pac. 563), though (4) a consolidation of such actions will be permitted. *Whitney v. Morton*, 73 Kan. 502, 85 Pac. 530.

[g] A strict foreclosure proceeding cannot be maintained. *Park v. Hetherington*, 9 Kan. App. 309, 61 Pac. 328, affirmed, 62 Kan. 868, 64 Pac. 1115.

41. See the statutes and *Bleirdorn v. Abel*, 6 Iowa 5; *Davis v. Rocks Coal & Coke Co.*, 39 Pa. Co. Ct. 597.

[a] Statutory provisions regulating the procedure must be strictly followed. *Charles v. Waugh*, 35 Ill. 315; *Clifford v. Hyde County*, 24 S. D. 237, 123 N. W. 872.

[b] The proceeding is one in rem in some states. *People v. Chicago, B. & Q. R. Co.*, 256 Ill. 353, 100 N. E. 231.

42. See the statutes and *Gilliland v. Armstrong*, 196 Ala. 513, 71 So. 700, the probate court.



**2. Process.**—Process must be served,<sup>43</sup> or notice given of the institution of the action,<sup>44</sup> in accordance with the requirements of the particular statute involved.<sup>45</sup> Process may be served by publication, where the conditions prescribed by statute for such service exist.<sup>46</sup>

**3. Parties.**—The action should be brought by the person authorized to maintain it,<sup>47</sup> ordinarily the tax collector,<sup>48</sup> or the state municipal corporation levying the tax<sup>49</sup> against the record owner of the property.<sup>50</sup>

43. See *Bagley v. Bloch*, 83 Ore. 607, 163 Pac. 425; *Rowland v. Klepper* (Tex. Civ. App.), 189 S. W. 1033.

44. **Ark.**—*Fiddymatt v. Bateman*, 97 Ark. 76, 133 S. W. 192; *Foohs v. Bilby*, 83 Ark. 234, 103 S. W. 386 (a warning order must be entered on the records of the court); *Gregory v. Bartlett*, 55 Ark. 30, 17 S. W. 344. **Tex.**—*Kenson v. Gage*, 34 Tex. Civ. App. 547, 79 S. W. 605, setting out the statutory form of notice. **Wash.**—*Whatecom County v. Black*, 90 Wash. 280, 155 Pac. 1071; *Rockwood v. Turner*, 89 Wash. 356, 154 Pac. 465; *Wehr v. Craver*, 87 Wash. 214, 151 Pac. 502; *Radcliff v. Hughes*, 82 Wash. 167, 143 Pac. 980 (notice need only be given to those who appear as owners in the certificate of delinquency and not to subsequent purchasers); *Noland v. Arnold*, 77 Wash. 363, 137 Pac. 801; *Rowland v. Eskland*, 40 Wash. 253, 82 Pac. 599.

45. *Glos v. Woodard*, 202 Ill. 480, 67 N. E. 3; *Noland v. Arnold*, 77 Wash. 363, 137 Pac. 801 (discussing the form of notice required); *Old Republic Min. Co. v. Ferry County*, 69 Wash. 600, 125 Pac. 1018; *Silverstone v. Harn*, 66 Wash. 440, 120 Pac. 109.

[a] **A writ of scire facias** issues in some states upon a claim for taxes filed in the court. *Davis v. Rocks Coal & Coke Co.*, 39 Pa. Co. Ct. 597.

[b] **Notice of Intention To Apply for Judgment.**—(1) A notice of intention to apply for judgment is provided for, by some statutes. *Smith v. Cox*, 115 Ala. 503, 22 So. 78; *In re Delinquent Tax Roll*, 4 Alaska 721. (2) The notice must describe with certainty the land involved (*Hook v. People*, 177 Ill. 632, 52 N. E. 1036), must (3) state the amount of taxes due and the year for which they were levied and assessed (*Fisher v. People*, 84 Ill. 491), and (4) that an order of sale of the property will be requested. *Charles v. Waugh*, 35 Ill. 315.

[c] **Publication of the notice of delinquency** and of the delinquent tax list, is the process provided for by some statutes. **Minn.**—*Bonham v. Weymouth*, 39 Minn. 92, 38 N. W. 805. **N. D.**—*Cruser v. Williams*, 13 N. D. 284, 100 N. W. 721. **S. D.**—*Clifford v. Hyde County*, 24 S. D. 237, 123 N. W. 872.

[d] **A mistake in the name of the owner** in the summons is immaterial if the property is correctly described, in a general tax foreclosure proceeding by a county. *Patterson v. Toler*, 71 Wash. 535, 129 Pac. 107.

46. *Glos v. Woodard*, 202 Ill. 480, 67 N. E. 3.

[a] **Service by publication** (1) is permitted against non-resident owners (*Cole v. Shelp*, 98 Mich. 56, 56 N. W. 1052; *Burr v. Finch*, 91 Neb. 417, 136 N. W. 72; *Claypool v. Robb*, 90 Neb. 193, 133 N. W. 178), (2) unknown heirs (*Page v. Bresee*, 92 Neb. 241, 138 N. W. 138), or (3) against the land, where the owner is unknown. *Gwin v. Freese*, 90 Neb. 15, 132 N. W. 736, 36 L. R. A. (N. S.) 1060. See generally the title "Service of Process and Papers." (4) As to the sufficiency of proceedings for such service see the following cases: *Todd v. Supper* (Mo.), 184 S. W. 1143 (use of defendant's initials); *Organ v. Bunnell* (Mo.), 184 S. W. 102; *Harvey v. Gregg* (Mo.), 177 S. W. 593; *Armstrong v. Griffith*, 94 Neb. 515, 143 N. W. 461.

47. See the statutes and *Hills v. Chicago*, 60 Ill. 86.

48. *Hart v. Tiernan*, 59 Conn. 521, 21 Atl. 1007.

49. *Ward v. Alton*, 23 Ill. App. 475; *Grant v. Bartholomew*, 57 Neb. 673, 78 N. W. 314, 58 Neb. 839, 80 N. W. 45; *Lancaster v. Trimble*, 34 Neb. 752, 52 N. W. 711, a county may bring the action.

50. **Ky.**—*City of Louisville v. Sonne*, 148 Ky. 394, 146 S. W. 739, the person against whom the tax is assessed.

**4. Pleadings.**—The complaint should allege the levy and assessment of the tax,<sup>51</sup> its non-payment,<sup>52</sup> should describe the property upon which it is a lien,<sup>53</sup> and the ownership of it by the defendant;<sup>54</sup> should ask for a decree ordering its sale,<sup>55</sup> and should otherwise comply with the statutes.<sup>56</sup>

**Mo.**—*Keaton v. Jorndt*, 259 Mo. 179, 168 S. W. 734; *Ohlmann v. Clarkson*, 222 Mo. 62, 120 S. W. 1155, 133 Am. St. Rep. 506, 28 L. R. A. (N. S.) 432; *State v. Clymer*, 81 Mo. 122 (although he is not the real owner); *Bell v. Ham*, 188 Mo. App. 71, 173 S. W. 744. **Wash.**—*Sparks v. Standard Lumb. Co.*, 92 Wash. 584, 159 Pac. 812, the owner of record in the tax certificate.

[a] **Where the owner is unknown** (1) the bond itself may be made the defendant. *Gwin v. Freese*, 90 Neb. 15, 132 N. W. 736, 36 L. R. A. (N. S.) 1060; *Leigh v. Green*, 64 Neb. 533, 90 N. W. 255, 101 Am. St. Rep. 592. (2) But if the owner is known a proceeding against "unknown owners" will be invalid. *Pearson v. Branch* (Tex. Civ. App.), 87 S. W. 222.

[b] **After the death of the record owner**, an action cannot be maintained against him. *Wengler v. McComb* (Mo.), 188 S. W. 76.

[c] **A judgment lien holder** is not a necessary party defendant. *Jenkins v. Newman*, 122 Ind. 99, 23 N. E. 683.

[d] **The wife** is not a necessary party to an action to foreclose a tax lien on a homestead. *People v. Weber*, 164 Ill. 412, 45 N. E. 723; *Collins v. Ferguson*, 22 Tex. Civ. App. 552, 56 S. W. 225.

[e] **Failure to join all persons owning an interest in the property** does not affect the jurisdiction of the court. **Ill.**—*Clark v. Zaleski*, 253 Ill. 63, 97 N. E. 272. **Mo.**—*Williams v. Hudson*, 93 Mo. 524, 6 S. W. 261; *Gitchell v. Kreidler*, 84 Mo. 472. **Tex.**—*Adams v. West Lumber Co.* (Tex. Civ. App.), 162 S. W. 974.

[f] **Contingent remaindermen** need not be joined in order that the fee of the property may be sold. *Davies' Exr. v. City of Louisville*, 171 Ky. 663, 188 S. W. 911.

[g] **The devisees under a will** need not be made parties where the executor is given power to sell real property. *Davies' Exr. v. City of Louisville*, 171 Ky. 663, 188 S. W. 911.

51. *Miami v. Miami Realty, etc.*

*Co.*, 57 Fla. 366, 49 So. 55; *Shanks v. Stephens*, 6 Ky. L. Rep. 526; *Newport v. Newport & C. Bridge Co.*, 13 Ky. Op. 496, an allegation that the tax was duly and regularly imposed is insufficient.

**Stating facts creating lien**, see 18 STANDARD PROC. 997.

[a] **A general averment** that a special tax was legally levied is insufficient where the tax could be legally levied only upon property within a limited area. *Mix v. People*, 116 Ill. 265, 4 N. E. 783; *Miller v. Crawford Ind. School Dist.*, 26 Tex. Civ. App. 495, 63 S. W. 894.

52. *Mix v. People*, 122 Ill. 641, 14 N. E. 209.

53. **Ill.**—*People v. Chicago, B. & Q. R. Co.*, 256 Ill. 353, 100 N. E. 231, a defective description may be cured by amendment. **Mich.**—*Hayward v. O'Connor*, 145 Mich. 52, 108 N. W. 366; *Jackson v. Mason*, 143 Mich. 355, 106 N. W. 1112. **Mo.**—*Brown v. Chaney*, 256 Mo. 219, 165 S. W. 335; *Dunavant v. Pemiscot Land & C. Co.*, 188 Mo. App. 83, 173 S. W. 747. **Tenn.**—*Colligan v. Cooney*, 107 Tenn. 214, 64 S. W. 31. **Tex.**—*Pearson v. Branch* (Tex. Civ. App.), 87 S. W. 222. **Wash.**—*Old Republic Min. Co. v. Ferry County*, 69 Wash. 600, 125 Pac. 1018.

**Compare** 18 STANDARD PROC. 997; 19 STANDARD PROC. 950.

[a] **An express allegation of ownership of the property by defendant** is not required. *Whatcom v. Fairhaven Land Co.*, 7 Wash. 101, 34 Pac. 563.

[b] **An insufficient description** is not cured by a sufficient description in the judgment. *Colligan v. Cooney*, 107 Tenn. 214, 64 S. W. 31.

54. *State v. Mantooth*, 20 Tex. Civ. App. 396, 49 S. W. 683.

55. *Auditor General v. Stiles*, 83 Mich. 460, 47 N. W. 241.

56. See the statutes and *State v. Seidell* (Tex. Civ. App.), 194 S. W. 1118.

[a] **If the state is made a party defendant to the action as claiming**

An answer must clearly state the grounds upon which the invalidity of the tax proceedings is attacked and raise an issue thereon.<sup>57</sup> If defendant desires to have affirmative relief by having the lien set aside he must ask it by appropriate cross-complaint.<sup>58</sup>

**5. Judgment.**—Judgment may be rendered by default where no answer is filed.<sup>59</sup> Any statutory requirements must be substantially observed.<sup>60</sup> Thus statutory provisions as to the time at which,<sup>61</sup> or the manner in which,<sup>62</sup> the judgment shall be rendered and entered must be strictly followed. Where the proceeding is purely statutory the judgment should contain a recital of all jurisdictional facts.<sup>63</sup> It should correctly describe the property,<sup>64</sup> determine the amount of taxes and penalties due,<sup>65</sup> decree a foreclosure and direct the sale of

an interest in the land, the particular nature of the interest claimed must be described, where a statute requires it in such suits against the state. *Lippmann v. Meade*, 154 App. Div. 464, 139 N. Y. Supp. 298.

[b] A statute requiring the complaint to be verified is directory only. *Todd v. State*, 63 Tex. Civ. App. 647, 134 S. W. 761.

[c] Substantial compliance with a form provided by the statute will be sufficient. *Connecticut Mut. Life Ins. Co. v. Wood*, 115 Mich. 444, 74 N. W. 656; *Auditor General v. Sloman*, 84 Mich. 118, 47 N. W. 565.

**57. Conn.**—*Union School District v. Bishop*, 76 Conn. 695, 58 Atl. 13, 66 L. R. A. 989. **Mich.**—*Auditor General v. Stiles*, 83 Mich. 460, 47 N. W. 241, if fraud in the assessment is relied upon specific allegations must be made with reference to it. **Neb.**—*Kyner v. Whittemore*, 90 Neb. 188, 133 N. W. 197.

[a] Amendments to objections to the application for judgment may be allowed in the discretion of the court. *People v. Huey*, 277 Ill. 561, 115 N. E. 739.

[b] Verification of the answer is required under some statutes. *Scott v. Ward*, 79 Minn. 362, 72 N. W. 686.

**58. Union School Dist. v. Bishop**, 76 Conn. 695, 58 Atl. 13, 66 L. R. A. 989. Compare 19 STANDARD PROC. 963.

**59. McChesney v. People**, 178 Ill. 542, 53 N. E. 356.

**60. McChesney v. People**, 178 Ill. 542, 53 N. E. 356; *Goodell v. Auditor General*, 143 Mich. 240, 106 N. W. 890, 114 Am. St. Rep. 646, form in which judgment should be entitled discussed.

**61. Goodell v. Auditor General**, 143 Mich. 240, 106 N. W. 890, 114 Am. St. Rep. 646; *Muirhead v. Bergland*, 111 Mich. 655, 70 N. W. 143, decree must be rendered during the term in which the petition was filed.

[a] Rendition prior to time authorized by statute (1) makes the judgment void. *Bending v. Auditor General*, 137 Mich. 500, 100 N. W. 777; *Aztec Copper Co. v. Auditor General*, 128 Mich. 615, 87 N. W. 895; *Clifford v. Hyde County*, 24 S. D. 237, 123 N. W. 872, judgment cannot be rendered until thirty days after publication of delinquent list. (2) A valid judgment may be substituted for one which has been entered prematurely. *Wilkin v. Keith*, 121 Mich. 66, 79 N. W. 887.

**62. See the statutes and Wilkin v. Keith**, 121 Mich. 66, 79 N. W. 887; *Muirhead v. Sands*, 111 Mich. 487, 69 N. W. 826; *Security Inv. Co. v. Buckler*, 72 Minn. 251, 75 N. W. 107.

**63. Gilliland v. Armstrong**, 196 Ala. 513, 71 So. 700; *Smith v. Cox*, 115 Ala. 503, 22 So. 78.

**64. Ill.**—*Chiniquy v. People*, 78 Ill. 570. **Mich.**—But see *Barnum v. Barnes*, 118 Mich. 264, 76 N. W. 406, description of property unnecessary where under a statute which incorporates the tax records in the judgment by reference. **Minn.**—*Connecticut Mut. Life Ins. Co. v. Ingarrison*, 75 Minn. 429, 78 N. W. 10; *Gribble v. Livermore*, 72 Minn. 517, 75 N. W. 710. **Ore.**—*Hoskins v. Dwight*, 69 Ore. 558, 139 Pac. 922. **Tex.**—*Pearson v. Branch* (Tex. Civ. App.), 87 S. W. 222. Compare 19 STANDARD PROC. 992.

**65. Ill.**—*Pittsburgh, Ft. W. & C. Ry. Co. v. Chicago*, 53 Ill. 80. **Mich.**—*Morgan v. Tweddle*, 119 Mich. 350, 73



the premises.<sup>66</sup> A personal judgment against the owner of the land cannot be entered.<sup>67</sup>

Affirmative relief to the defendant by setting aside the lien, cannot be granted where it has not been asked for by cross-complaint.<sup>68</sup>

The judgment is conclusive upon the parties to the suit and those in privity with them,<sup>69</sup> but is not binding upon those holding an interest in the premises who were not made parties;<sup>70</sup> it is not subject to collateral attack.<sup>71</sup> After the rendition of the judgment the court retains jurisdiction to make such further orders as may be necessary to carry it into effect.<sup>72</sup>

**6. Sale.**—The general principles regulating judicial sales<sup>73</sup> apply to the sale,<sup>74</sup> which must, of course, follow any statutory provisions gov-

N. W. 121. **Minn.**—Fagan v. Huntress & Brown Lumb. Co., 80 Minn. 441, 83 N. W. 382. **Tex.**—Cave v. Houston, 65 Tex. 619.

[a] The amount due for different years need not be separately stated. Miller v. Keaton, 236 Mo. 694, 139 S. W. 158.

**66.** McChesney v. People, 174 Ill. 46, 50 N. E. 1110; Mix v. People, 116 Ill. 265, 4 N. E. 783. Compare 19 STANDARD PROC. 990, et seq.; 18 STANDARD PROC. 898.

[a] A sale in parcels should be ordered, unless this is shown to be impracticable. Richcreek v. Russell, 34 Ind. App. 217, 72 N. E. 617.

[b] Where different tax liens on separate parcels of land are sought to be foreclosed, the decree should be separable as to each parcel of land. Mix v. People, 116 Ill. 265, 4 N. E. 783; Whatecom v. Fairhaven Land Co., 7 Wash. 101, 34 Pac. 563.

[c] Separate orders of sale may be entered as to the sale of homestead and other property subject to the same lien. Bean v. Brownwood (Tex. Civ. App.), 43 S. W. 1036.

[d] A decree barring only the equity of redemption does not necessarily affect the statutory right of redemption. Logan v. McKinley-Lanning L. & T. Co., 70 Neb. 406, 101 N. W. 991.

**67.** Auditor General v. Stiles, 83 Mich. 460, 47 N. W. 241.

**68.** Union School Dist. v. Bishop, 76 Conn. 695, 58 Atl. 13, 66 L. R. A. 989.

**69. Ill.**—Clark v. Zaleski, 253 Ill. 63, 97 N. E. 272. **Mich.**—Hall v. Mann, 118 Mich. 201, 76 N. W. 314; Ball v. Ridge Copper Co., 118 Mich. 7, 76 N.

W. 130, as to the validity of the assessment. **Tex.**—Adams v. West Lumber Co. (Tex. Civ. App.), 162 S. W. 974.

See generally the title "Res Judicata."

[a] A grantee of the record owner whose deed has not been recorded is bound by the judgment. Bell v. Ham, 188 Mo. App. 71, 173 S. W. 744.

**70. Ind.**—Grigsby v. Akin, 128 Ind. 591, 28 N. E. 180. **Mo.**—Russ v. Sims, 261 Mo. 27, 169 S. W. 69. **Tex.**—Adams v. West Lumber Co. (Tex. Civ. App.), 162 S. W. 974.

**71. Ill.**—Clark v. Zaleski, 253 Ill. 63, 97 N. E. 272. **Ind.**—Bliss v. Gallagher, 60 Ind. App. 454, 109 N. E. 215. **Mich.**—Munroe v. Winegar, 128 Mich. 309, 87 N. W. 396; Wilkin v. Keith, 121 Mich. 66, 79 N. W. 887. **Minn.**—McNamara v. Fink, 71 Minn. 66, 73 N. W. 649. **Mo.**—Kansas City & A. Ry. Co. v. Smith, 156 Mo. 608, 57 S. W. 555.

As to collateral attack on judgments generally, see the title "Judgments," and also *infra*, VIII, E, 1.

[a] The fact that the taxes had been paid prior to the action does not affect the jurisdiction of the court, and cannot be urged collaterally. Purcell v. Farm Land Co., 13 N. D. 327, 100 N. W. 700.

**72.** Clark v. Zaleski, 253 Ill. 63, 97 N. E. 272.

**73.** See the title "Judicial Sales." Sales on execution, see the title "Judgments and Decrees, Enforcement of."

Mortgage foreclosure sales, see the title "Mortgages."

**74.** See Bliss v. Gallagher, 60 Ind. App. 454, 109 N. E. 215.

erning it.<sup>75</sup>

7. **Redemption.**—A bill to redeem from the foreclosure sale may be maintained under proper circumstances.<sup>76</sup>

D. **ACTIONS TO COLLECT TAXES.**—1. **In General.**—An action at law cannot ordinarily be maintained for the collection of delinquent taxes,<sup>77</sup> though where the tax when payable is regarded as a debt,<sup>78</sup> or where the statute imposes a tax but provides no remedy for its enforcement, an ordinary action at law to recover the tax may be main-

75. See the statutes.

76. **Ill.**—Clark *v.* Zaleski, 253 Ill. 63, 97 N. E. 272. **Neb.**—Henze *v.* Mitchell, 93 Neb. 278, 140 N. W. 149, Ann. Cas. 1914C, 108 (right of wife holding a dower interest to redeem); Smith *v.* Potter, 92 Neb. 39, 137 N. M. 854, 138 N. W. 1135; Herman *v.* Barth, 85 Neb. 722, 124 N. W. 135. **Ore.**—See Bagley *v.* Bloch, 83 Ore. 607, 163 Pac. 425.

**Redemption from tax sales** generally, see *infra*, VI, B.

**Redemption from judicial sales** generally, see the title "Judicial Sales."

**Redemption from execution sales**, see 16 STANDARD PROC. 223, et seq.

**Redemption from mortgage foreclosure**, see the title "Mortgages."

[a] **The tax, interest and penalties** must be tendered as a condition to maintenance of such a suit. Bagley *v.* Bloch, 83 Ore. 607, 163 Pac. 425.

[b] **Laches** constitute a good defense to such an action. Paxton *v.* Fix (Mo.), 190 S. W. 328.

77. **U. S.**—Midland Guaranty & Tr. Co. *v.* Douglas County, 217 Fed. 358, 133 C. C. A. 274 (applying law of Nebraska); Coy *v.* Title Guarantee & Tr. Co., 212 Fed. 520, applying the law of Oregon. **Ga.**—State *v.* Western & A. R. Co., 136 Ga. 619, 71 S. E. 1055; Du Bignon *v.* Brunswick, 106 Ga. 317, 32 S. E. 102. **Ia.**—Shearer *v.* Citizens' Bank, 129 Iowa 564, 105 N. W. 1025. **Kan.**—Comrs. of Stafford County *v.* First Nat. Bank, 48 Kan. 561, 30 Pac. 22. **Neb.**—Richards *v.* Clay County, 40 Neb. 45, 58 N. W. 594, 42 Am. St. Rep. 650. **N. Y.**—Rochester *v.* Bloss, 185 N. Y. 42, 77 N. E. 794, 6 L. R. A. (N. S.) 694. **N. D.**—Hanson *v.* Franklin, 19 N. D. 259, 123 N. W. 386. **Ore.**—Marion County *v.* Woodburn Mercantile Co., 60 Ore. 367, 119 Pac. 487. **S. D.**—Brule *v.* King, 11 S. D. 294, 77 N. W. 107. **Vt.**—Shaw *v.* Peckett, 26 Vt. 482. **Wis.**—State *v.* Chicago & N. W. Ry.

Co., 128 Wis. 449, 108 N. W. 594.

See *supra*, V, B, 1; V, C, 1.

[a] **A Tax Is Not a Debt.**—"The power to tax is wholly statutory. A tax roll is not a judgment roll, and a tax thereon does not partake of the nature of a judgment, except as to its validity and amount and the manner in which it can be proven. The authority for the tax and its binding effect upon the person taxed rests upon the authority given to the taxing officers by the legislature. When the taxing officers have jurisdiction their action cannot be attacked collaterally, and to that extent the tax is in the nature of a judgment. The tax, however, does not become a debt within the meaning of such word as commonly used. Taxes do not rest upon contract, express or implied. They are obligations imposed upon citizens to pay the expenses of government. They are forced contributions, and in no way dependent upon the will or contract, express or implied, of the persons taxed." Rochester *v.* Bloss, 185 N. Y. 42, 47, 77 N. E. 794. And see People *v.* Dummer, 274 Ill. 637, 113 N. E. 934.

[b] **Where no personal liability** exists for payment of a tax upon personal property, and such property is removed beyond the jurisdiction of the court, the state is without a remedy. Marion County *v.* Woodburn Mercantile Co., 60 Ore. 367, 119 Pac. 487, 41 L. R. A. (N. S.) 730.

78. **U. S.**—United States *v.* Chamberlin, 219 U. S. 250, 31 Sup. Ct. 155, 55 L. ed. 204, stamp tax. **Ark.**—State *ex rel.* Norwood *v.* New York Life Ins. Co., 119 Ark. 314, 171 S. W. 871, 173 S. W. 1099. **Nev.**—State *v.* Northern Belle M. & M. Co., 15 Nev. 385. **Tenn.**—State *ex rel.* Bonner *v.* Andrews, 131 Tenn. 554, 175 S. W. 563; State *v.* Duncan, 3 Lea 679. **Tex.**—Cave *v.* Houston, 65 Tex. 619.

tained.<sup>79</sup> A special remedy provided by statute for enforcing the payment of a tax is in many states regarded as exclusive of an action to collect the tax,<sup>80</sup> unless such a remedy is clearly inadequate, or has been invoked without success.<sup>81</sup> But in some states, statutory remedies are not treated as exclusive of an action to recover the amount of a tax,<sup>82</sup> and in other states the right to maintain an action at law to recover all or particular classes of taxes is given by statute.<sup>83</sup>

[a] "A tax may or may not be a 'debt' under a particular statute, according to the sense in which the word is found to be used. But whether the government may recover a personal judgment for a tax depends upon the existence of the duty to pay, for the enforcement of which another remedy has not been made exclusive. Whether an action of debt is maintainable depends not upon the question who is the plaintiff or in what manner the obligation was incurred, but it lies whenever there is due a sum either certain or readily reduced to certainty." *United States v. Chamberlin*, 219 U. S. 250, 262, 31 Sup. Ct. 155, 55 L. ed. 204.

79. *Ala.*—*Huntsville v. Madison County*, 166 *Ala.* 389, 52 So. 326, 139 *Am. St. Rep.* 45. *Ill.*—*People v. Dummer*, 274 *Ill.* 637, 113 N. E. 934. *Md.* *Baltimore v. Howard*, 6 *Har. & J.* 383.

[a] "If no specific remedy is directly given, the presumption that a remedy by suit is intended is reasonable." *People v. Dummer*, 274 *Ill.* 637, 646, 113 N. E. 934.

80. *U. S.*—*Midland Guaranty & Tr. Co. v. Douglas County*, 217 *Fed.* 358, 133 *C. C. A.* 274, applying law of Nebraska. *Ga.*—*State v. Western & A. R. Co.*, 136 *Ga.* 619, 71 S. E. 1055. *Ia.*—*Plymouth v. Moore*, 114 *Iowa* 700, 87 N. W. 662. *N. C.*—*Berry v. Davis*, 158 N. C. 170, 73 S. E. 900. But see *State v. Georgia Co.*, 112 N. C. 34, 17 S. E. 10, 19 L. R. A. 485. *Ore.*—*Marion County v. Woodburn Mercantile Co.*, 60 *Ore.* 367, 119 *Pac.* 487, 41 L. R. A. (N. S.) 730. *S. D.*—*Hanson v. Gray*, 12 S. D. 124, 80 N. W. 175, 76 *Am. St. Rep.* 591.

See *supra*, V, C, 1, and 22 *STANDARD PROC.* 715.

Summary remedy exclusive, see *supra*, V, B, 1.

[a] The tax collector cannot replevy personal property under ordinary circumstances, where the statute merely provides for seizure and sale. *Berry*

*v. Davis*, 158 N. C. 170, 73 S. E. 900.

81. *Colo.*—*Pinnacle Gold Min. Co. v. People*, 58 *Colo.* 86, 143 *Pac.* 837.

*Ill.*—*Ryan v. Gallatin*, 14 *Ill.* 73. *N. C.* *State v. Georgia Co.*, 112 N. C. 34, 17 S. E. 10, 19 L. R. A. 485. See *Berry v. Davis*, 158 N. C. 170, 73 S. E. 900.

82. *Ala.*—*Greil Bros. Co. v. Montgomery*, 182 *Ala.* 291, 62 So. 692, *Ann. Cas.* 1915D, 738; *Anniston v. Southern Ry. Co.*, 112 *Ala.* 557, 20 So. 915. But see *Huntsville v. Madison County*, 166 *Ala.* 389, 52 So. 326, 139 *Am. St. Rep.* 45. *Ark.*—*State ex rel. Norwood v. New York Life Ins. Co.*, 119 *Ark.* 314, 171 S. W. 871, 173 S. W. 1099, collection of corporation occupation tax. *N. M.*—*Glasgow v. Peyton*, 22 N. M. 97, 159 *Pac.* 670, an action by attachment rather than the statutory action may be maintained.

As to summary remedy, see *supra*, V, B, 1, note 16.

[a] An action of assumpsit may be maintained for taxes notwithstanding a statutory remedy is available. *Greil Bros. Co. v. Montgomery*, 182 *Ala.* 291, 62 So. 692, *Ann. Cas.* 1915D, 738.

83. *U. S.*—*United States v. Chamberlin*, 219 U. S. 250, 31 Sup. Ct. 155, 55 L. ed. 204, collection of stamp tax. *Ark.*—*State v. Bodcaw Lumb. Co.*, 128 *Ark.* 505, 194 S. W. 692. *Cal.*—See *San Bernardino v. Southern Pacific R. R.* *Co.*, 137 *Cal.* 659, 70 *Pac.* 782. *Haw.* *Keola v. Landgraf*, 20 *Hawaii* 584; *Keola v. Maui Auto Co.*, 20 *Hawaii* 575. *Ill.*—*People v. Hibernian Bank Assn.*, 245 *Ill.* 522, 92 N. E. 305, tax on property of a deceased person. *Ky.*—*Campbell v. Newport & C. Bridge Co.*, 112 *Ky.* 659, 66 S. W. 526. *Me.*—*Curtis v. Potter*, 114 *Me.* 487, 96 *Atl.* 786. *Minn.* *State v. United States Exp. Co.*, 114 *Minn.* 346, 131 N. W. 489, 37 L. R. A. (N. S.) 1127. *Miss.*—*Yazoo & M. V. R. Co. v. West*, 78 *Miss.* 789, 29 So. 475. *Neb.*—*Hoover v. Eagles*, 63 *Neb.* 688, 88 N. W. 869, tax on personal property. *N. H.*—See *Winchester v. Stockwell*, 76 N. H. 193, 81 *Atl.* 526.



In equity, a tax lien may sometimes be foreclosed,<sup>84</sup> but payment of a delinquent tax will not be enforced,<sup>85</sup> unless some general ground of equitable jurisdiction exists,<sup>86</sup> or the equitable remedy is expressly conferred by statute.<sup>87</sup>

**2. Conditions Precedent.**—Any requirements of the statute as to the performance of acts which are made a condition precedent to maintenance of the action must be complied with.<sup>88</sup> A demand for payment

**N. M.**—*Glasgow v. Peyton*, 22 N. M. 97, 159 Pac. 670. **N. Y.**—*Charlotte v. Keon*, 207 N. Y. 346, 100 N. E. 1116, Ann. Cas. 1914C, 338, 46 L. R. A. (N. S.) 135, village taxes. **Wis.**—*Superior v. Allouez Bay Dock Co.*, 156 Wis. 177, 145 N. W. 656.

[a] **Corporation license and franchise taxes** may be collected by action, in some states. *Pinnacle Gold Min. Co. v. People*, 58 Colo. 86, 143 Pac. 837; *State v. Queen City Fire Ins. Co.*, 114 Minn. 471, 131 N. W. 628, retaliation taxes.

[b] **An attachment** may be levied upon the property, under some statutes. *Glasgow v. Peyton*, 22 N. M. 97, 159 Pac. 670. See *supra*, V, B, 5.

[c] **Form of Action.**—(1) An action to recover taxes may be indebt (*Curtis v. Potter*, 114 Me. 487, 96 Atl. 786; *Inhabitants Sandy River Plantation v. Lewis*, 109 Me. 472, 84 Atl. 995), or (2) in some states, in assumption. (**Ill.**—*People v. Dummer*, 274 Ill. 637, 113 N. E. 934. **Mich.**—*Putman v. Fife Lake*, 45 Mich. 125, 7 N. W. 699. **Vt.**—*Wheeler v. Wilson*, 57 Vt. 157), or (3) case (*Franklin v. Warwick & C. Water Co.*, 24 R. I. 224, 52 Atl. 988), and (4) in states where common law forms of action have been abolished, an ordinary civil action may be employed. *Wason v. Bigelow*, 11 Colo. App. 120, 52 Pac. 636.

84. See *supra*, V, C, 1.

85. **U. S.**—*Thompson v. Allen County*, 115 U. S. 550, 6 Sup. Ct. 140, 29 L. ed. 472. **Ala.**—*Greil Bros. Co. v. Montgomery*, 182 Ala. 291, 62 So. 692, Ann. Cas. 1915D, 738. **Ga.**—*State v. Western & A. R. Co.*, 136 Ga. 619, 71 24, 17 S. E. 10, 19 L. R. A. 485. And *Murphy*, 107 N. C. 36, 12 S. E. 122. **Wash.**—*Pierce County v. Merrill*, 19 Wash. 175, 52 Pac. 854.

86. *People v. Detroit*, G. H. & M. R. Co., 169 Mich. 72, 135 N. W. 87, tax fraudulently withheld for many years.

[a] **A creditor's bill** may be main-

tained, in some states, where a delinquent tax is treated as a judgment debt. *State v. Georgia Co.*, 112 N. C. 34, 17 S. E. 10, 19 L. R. A. 485. And see, *Darnell v. State*, 174 Ind. 143, 90 N. E. 769; *Supervisors v. Durant*, 9 Paige Ch. (N. Y.) 182. See generally the title "**Creditor's Bills.**"

[b] **Where property** has been fraudulently conveyed in order that it can not be reached in satisfaction of a judgment for taxes, a suit in equity to set aside the conveyance and collect the taxes may be maintained. *Darnell v. State*, 174 Ind. 143, 90 N. E. 769. And see *Adams v. Stonewall Mfg. Co.*, 80 Miss. 94, 31 So. 544.

[c] **Where the legal remedy is inadequate** a suit in equity may be maintained, as where money has been invested in personal property which is not subject to distraint. *Supervisors v. Durant*, 9 Paige Ch. (N. Y.) 182.

[d] **Where a railroad is in the hands of a receiver** the court in the equity proceedings against it may consider whether previous assessments against it for taxes due the state and villages are so erroneous or fraudulent as to be excessive, and direct that only the proper amount be paid. *Spencer v. Babylon R. Co.*, 233 Fed. 803.

87. See the statutes and *People v. Detroit*, G. H. & M. R. Co., 169 Mich. 72, 135 N. W. 87.

88. See the statutes.

[a] **Return and filing of the delinquent list** is a condition precedent to action in some states. See *Township of Deep River v. Van Antwerp*, 174 Mich. 19, 140 N. W. 531; *Northwestern Cooperage & Lumb. Co. v. Scott*, 123 Mich. 357, 82 N. W. 76.

[b] **Authorization of the suit** by a particular court or officer is sometimes required. *Rockland v. Farnsworth*, 111 Me. 315, 89 Atl. 65. See *State v. Cage* (Tex. Civ. App.), 176 S. W. 928.

is usually,<sup>89</sup> though not always,<sup>90</sup> required to be made.

**3. Jurisdiction and Venue.**—The statutes usually prescribe the courts in which actions for the recovery of taxes may be maintained.<sup>91</sup> Where a tax is not regarded as a debt,<sup>92</sup> an action to recover it cannot be maintained in a court having jurisdiction only of actions on contract express or implied.<sup>93</sup> An action to recover taxes is not ordinarily maintainable in the courts of a jurisdiction other than that in which the tax was levied,<sup>94</sup> nor does it generally involve any grounds for removal to the federal courts.<sup>95</sup>

**Venue.**—The action is subject to the general rules and principles governing venue.<sup>96</sup> The right to a change of venue depends upon the local statute.<sup>97</sup>

**4. Joinder of Actions.**—The right to recover taxes levied and assessed on the same property for different years constitutes different causes of action.<sup>98</sup> Such causes of action may be joined,<sup>99</sup> but must be separately stated.<sup>1</sup> Taxes due different governmental bodies under

89. *Curtis v. Potter*, 114 Me. 487, 96 Atl. 786; *State v. Cage* (Tex. Civ. App.), 176 S. W. 928.

[a] A personal demand (1) for payment must be made in some states (*Parks v. Cressey*, 77 Me. 54), unless (2) such a demand cannot in view of the circumstances of the case, be made. *Curtis v. Potter*, 114 Me. 487, 96 Atl. 786 (tax payer out of the state).

90. *New York v. Watts*, 40 Misc. 595, 83 N. Y. Supp. 23.

91. See the statutes and *R. I. Tripp v. Torrey*, 17 R. I. 359, 22 Atl. 278. *S. C.*—*State v. Cheraw & D. R. Co.*, 54 S. C. 564, 32 S. E. 691. *Wis.* *Superior v. Allouez Bay Dock Co.*, 156 Wis. 177, 145 N. W. 656, the action may be brought in a justice's court or in a circuit court.

[a] Where special jurisdiction in tax actions is conferred upon a court, a limitation upon the amount in controversy in actions over which it has general jurisdiction, is inapplicable. *Tripp v. Torrey*, 17 R. I. 359, 22 Atl. 278.

92. See *supra*, V, D. 1.

93. *People v. Dummer*, 274 Ill. 637, 113 N. E. 934. And see *Crabtree v. Madden*, 54 Fed. 426, 4 C. C. A. 408.

94. *Crabtree v. Madden*, 54 Fed. 426, 4 C. C. A. 408.

[a] **Extraterritorial Recognition of Debt.**—Liability for a tax assessed in a jurisdiction in which a tax is treated as a debt and may be recovered as such, cannot be enforced in a state in

which a tax is not treated as a debt. *Baltimore v. Turner*, 75 Misc. 9, 132 N. Y. Supp. 173.

95. See *Darnell v. State*, 174 Ind. 143, 90 N. E. 769, and the title "Removal of Causes."

96. See the title "Venue."

[a] Where personal property taxes are sought to be recovered the action may be maintained at the place of residence of the defendant. See *Wason v. Bigelow*, 11 Colo. App. 120, 52 Pac. 636; *Harrold v. State*, 30 Tex. Civ. App. 524, 71 S. W. 407.

[b] An action to recover taxes is not an action on contract to be instituted where the taxes are payable. *Wason v. Bigelow*, 11 Colo. App. 120, 52 Pac. 636.

[c] An action to recover real property taxes should be instituted in the county in which the land taxed is situated. See *Mason v. Belfast Hotel Co.*, 89 Me. 384, 36 Atl. 624.

97. See *Wason v. Bigelow*, 11 Colo. App. 120, 52 Pac. 636 (right admitted); *State v. Shaw*, 21 Nev. 222, 29 Pac. 321, right denied.

98. *Pinnacle Gold Min. Co. v. People*, 58 Colo. 86, 143 Pac. 837; *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220.

99. *Pinnacle Gold Min. Co. v. People*, 58 Colo. 86, 143 Pac. 837.

1. *Pinnacle Gold Min. Co. v. People*, 58 Colo. 86, 143 Pac. 837; *State v. Tittman*, 103 Mo. 553, 15 S. W. 936. Compare, *Wheeler v. Wilson*, 57 Vt. 157.

the same assessment, may be recovered in one action.<sup>2</sup>

**5. Parties.** — The tax collector,<sup>3</sup> or in some jurisdictions, the state,<sup>4</sup> or municipal corporation to which the tax is payable,<sup>5</sup> or its treasurer,<sup>6</sup> is the proper party to maintain the action.

**Defendants.** — The person to whom the tax was assessed<sup>7</sup> is the proper defendant.

**6. Process.** — Process may be served as in other classes of actions.<sup>8</sup>

**7. Pleadings.** — a. *Declaration or Complaint.* — The declaration or complaint should follow the general rules elsewhere discussed,<sup>9</sup> and where a statutory form is prescribed, a complaint substantially complying with it is sufficient.<sup>10</sup> Otherwise it should show compliance with any conditions precedent to maintenance of the action,<sup>11</sup> including a demand for payment of the tax,<sup>12</sup> where that is necessary,<sup>13</sup> the levy<sup>14</sup>

2. *Los Angeles v. Ballerino*, 99 Cal. 593, 32 Pac. 581, 34 Pac. 329. But see *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303; *Ottawa Gas Light & C. Co. v. People*, 138 Ill. 336, 27 N. E. 924; *Dalby v. People*, 124 Ill. 66, 16 N. E. 224. Compare *State v. Adler*, 123 Ala. 87, 26 So. 502, and *supra*, V, C, 1, a.

3. *Rockland v. Farnsworth*, 111 Me. 315, 89 Atl. 65 (defacto tax collector may maintain the action); *Bresnahan v. Sherwin-Burrill Soap Co.*, 108 Me. 124, 79 Atl. 376; *Wheeler v. Wilson*, 57 Vt. 157.

4. Ill.—*Dalby v. People*, 124 Ill. 66, 16 N. E. 224. Ind.—*Darnell v. State*, 174 Ind. 143, 90 N. E. 769. N. M.—*United States Trust Co. v. Territory*, 10 N. M. 416, 62 Pac. 987, *affirmed*, 183 U. S. 535, 22 Sup. Ct. 172, 46 L. ed. 315.

[a] The attorney general of the state, as its law officer, may institute the action in the name of the state, without special statutory authorization. *State ex rel. Norwood v. New York Life Ins. Co.*, 119 Ark. 314, 171 S. W. 871, 173 S. W. 1099.

5. *People v. Ballerino*, 99 Cal. 598, 34 Pac. 330; *Ottawa Gas Light & C. Co. v. People*, 138 Ill. 336, 27 N. E. 924.

6. *Wason v. Bigelow*, 11 Colo. App. 120, 52 Pac. 636; *Mortensen v. West Point Mfg. Co.*, 12 Neb. 197, 10 N. W. 714.

7. See *Topsham v. Blondell*, 82 Me. 152, 19 Atl. 93.

[a] The personal representative of a deceased person to whom property was assessed, is a proper defendant in

some states. *People v. Hibernian Bank Assn*, 245 Ill. 522, 92 N. E. 305; *Orion v. Oxford*, 112 Mich. 179, 70 N. W. 417.

8. See *infra*, this note and the titles "Corporations," "Service of Process and Papers."

Compare *supra*, V, C, 2.

[a] A state insurance commissioner who is under statute, an attorney in fact, authorized to accept service of legal process for foreign insurance companies, is not the agent of the state in such a sense as to disqualify him from accepting service of process in an action by the state to recover taxes. *State v. Queen City Fire Ins. Co.*, 114 Minn. 471, 131 N. W. 628.

9. See the title "Declaration and Complaint," and other titles dealing with particular sorts of actions or aspects of pleading.

[a] In an action against a corporation, the fact and place of its incorporation must be alleged. *People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303.

10. U. S.—*McKnight v. Dudley*, 103 Fed. 918. R. I.—*Franklin v. Warwick & C. Water Co.*, 24 R. I. 224, 52 Atl. 988. Vt.—*Wheeler v. Wilson*, 57 Vt. 157.

11. *Charleston v. Lawry*, 89 Me. 582, 36 Atl. 1103.

See generally the title "Suits and Actions."

12. *McLean v. Manhattan Med. Co.*, 22 Jones & S. 371, 5 N. Y. St. 805.

13. See *supra*, V, D, 2.

14. Cal.—*People v. Central Pac. R. Co.*, 83 Cal. 393, 23 Pac. 303. Ky.—*Com. v. Chesapeake, O. & S. W. Ry. Co.*, 141 Ky. 633, 133 S. W. 559; *Mc-*



and assessment of the tax, its amount,<sup>15</sup> the description of the property assessed,<sup>16</sup> defendant's ownership of it,<sup>17</sup> and his liability to pay the tax,<sup>18</sup> and the date when it became payable.<sup>19</sup> A copy of the tax bill is required to be pleaded under some statutes.<sup>20</sup> Where a tax is not regarded as a contract either express or implied, a promise to pay the amount of it need not be alleged.<sup>21</sup>

b. *Answer*.—The answer must raise an issue upon the material allegations of the complaint,<sup>22</sup> or specially plead some affirmative defense.<sup>23</sup>

c. *Counterclaim and Set-Off*.—No set-off or counterclaim can be pleaded in an action of this character.<sup>24</sup>

Arthur v. Dayton, 12 Ky. Op. 297.  
N. D.—Swenson v. Greenland, 4 N. D. 532, 62 N. W. 603. S. C.—State v. Cheraw & D. R. Co., 54 S. C. 564, 32 S. E. 691.

[a] The year in which it was levied must be stated. State *ex rel.* Norwood v. New York Life Ins. Co., 119 Ark. 314, 171 S. W. 871, 173 S. W. 1099; Board of Mississippi Levee Comrs. v. Yazoo & M. V. R. Co. (Miss.), 25 So. 664.

[b] Allegation of a demand for payment is not the equivalent of an allegation of the assessment of the tax. Thornburg v. Cardell, 123 Iowa 313, 95 N. W. 239, 98 N. W. 791.

15. Ark.—State *ex rel.* Norwood v. New York Life Ins. Co., 119 Ark. 314, 171 S. W. 871, 173 S. W. 1099. Ill. Ottawa Gas Light & C. Co. v. People, 138 Ill. 336, 27 N. E. 924, the amount due for each of several years should be specified. Miss.—Board of Mississippi Levee Comrs. v. Yazoo & M. V. R. Co., 25 So. 664.

16. Carrington v. People, 195 Ill. 484, 63 N. E. 163; Glasgow v. Peyton, 22 N. M. 97, 159 Pac. 670. Compare, Franklin v. Warwick & C. Water Co., 24 R. I. 224, 52 Atl. 988, and *supra*, V, C, 1, d.

17. Cal.—People v. Central Pac. R. Co., 83 Cal. 393, 23 Pac. 303. Ill. People v. Winkelman, 95 Ill. 412. Ky. Kentucky Central R. Co. v. Pendleton, 8 Ky. L. Rep. 517, 2 S. W. 176.

18. Ottawa Gas Light & C. Co. v. People, 138 Ill. 336, 27 N. E. 924; Vassalboro v. Smart, 70 Me. 303.

19. Board of Mississippi Levee Comrs. v. Yazoo & M. V. R. Co. (Miss.), 25 So. 664.

20. Arizona Copper Co. v. State, 15 Ariz. 9, 137 Pac. 417.

21. People v. Dummer, 274 Ill. 637, 113 N. E. 934.

22. See State v. Sadler, 21 Nev. 13, 23 Pac. 799.

[a] A general denial is insufficient to prevent judgment on the pleadings where a copy of the tax bill is set out in the complaint, and is by statute made prima facie evidence of the amount of taxes due. Arizona Copper Co. v. State, 15 Ariz. 9, 137 Pac. 417.

23. See generally the title "Confession and Avoidance" and other titles dealing with particular matters of defense.

[a] If fraud is in the assessment relied upon, the facts constituting the fraud must be set out specifically. Arizona Copper Co. v. State, 15 Ariz. 9, 137 Pac. 417.

24. Peirce v. Boston, 3 Metc. (Mass.) 520; Charlotte v. Keon, 207 N. Y. 346, 100 N. E. 1116, Ann. Cas. 1914C, 338, 46 L. R. A. (N. S.) 135.

[a] Reason for the Rule.—"The amount of the annual tax levy in villages and the various purposes for which taxes are imposed are fixed and defined in advance of the levy and the money raised must be expended for the purposes so defined. If the taxpayer can properly refuse to pay his tax when called upon by the collector because he has a claim for services against the village which is not included in the tax levy, it is plain that some legitimate and necessary village expenditure must be curtailed. If the taxpayer's claim is disputed the collection of the tax must await and abide the result of a lawsuit and meanwhile the financial affairs of the village will be thrown into great confusion.

Therefore, public policy requires that taxes be paid and that claims

d. *Trial*.—The general principles governing the practice in the trial of civil actions apply to actions for the collection of taxes.<sup>25</sup>

E. CRIMINAL LIABILITY.—Failure to pay some classes of taxes is occasionally made a crime subject to prosecution by indictment.<sup>26</sup>

F. REMEDIES FOR ILLEGAL COLLECTION.—Taxes illegally collected may, under certain circumstances, be recovered in an action for money had and received, from the governmental body receiving the tax,<sup>27</sup> or from the tax collector.<sup>28</sup> An action for damages may be maintained against the tax collector if he has acted illegally or negligently,<sup>29</sup> and if property has been illegally seized, an action of trover and conversion,<sup>30</sup> or trespass,<sup>31</sup> may be maintained. If the property has been sold to enforce payment, the owner may waive the tort and sue in assumpsit for the money received at the sale.<sup>32</sup> While an action of replevin may be maintained to recover possession of property seized as the property of the tax payer but not belonging to him,<sup>33</sup> such an action cannot be maintained, in many states, by a tax payer who is contesting the validity of the tax.<sup>34</sup>

G. INJUNCTIONS AGAINST COLLECTION.—1. In General.—Courts of equity do not favor an interference with the administrative branch of the government in the collection of taxes,<sup>35</sup> and relief in equity will not be granted unless the case is brought within some recognized head

against the village be collected in independent proceedings." Village of Charlotte v. Keon, 207 N. Y. 346, 100 N. E. 1116.

25. See the title "Trial," and titles dealing with particular phases of a trial.

[a] A material variance between the pleadings and proof as to the amount of the tax rate will defeat a recovery. City of Santa Barbara v. Eldred, 95 Cal. 378, 30 Pac. 562. See generally the title "Variance and Failure of Proof."

[b] Jury Trial.—Disputed questions of fact are to be passed upon by a jury. Ovid v. Haire, 133 Mich. 353, 94 N. W. 1060; Bristol v. Bristol R. Co., 91 Vt. 223, 100 Atl. 37. See Bixby v. Roscoe, 85 Vt. 105, 81 Atl. 255. See the title "Juries and Jurors."

26. See the statutes and Ill.—Draves v. People, 97 Ill. App. 151, failure to pay poll tax. Ky.—Louisville Water Co. v. Com., 132 Ky. 311, 116 S. W. 711, failure to pay corporation tax. N. C.—State v. Jones, 121 N. C. 616, 28 S. E. 347.

27. See *infra*, VII.

28. Florida Packing & Ice Co. v. Carney, 51 Fla. 190, 41 So. 190.

29. See *supra*, IV, C.

30. Veit v. Graff, 37 Ind. 253; Rob-

inson v. Youngblood, 54 Ind. App. 669, 103 N. E. 347. See generally the title "Trover and Conversion."

31. N. H.—Walker v. Cochran, 8 N. H. 166. R. I.—Crandall v. James, 6 R. I. 144. Tex.—Wright v. Jones, 14 Tex. Civ. App. 423, 38 S. W. 249. Vt. Braley v. Burnham, 47 Vt. 717.

See generally the title "Trespass."

32. Albertville v. Hooper, 196 Ala. 642, 72 So. 258; Ware v. Percival, 61 Me. 391, 14 Am. Rep. 565.

[a] It is no defense to such an action that the property was subject to taxation. Albertville v. Hooper, 196 Ala. 642, 72 So. 258.

33. Pioneer Fuel Co. v. Molloy, 131 Mich. 465, 91 N. W. 750; Travers v. Inslee, 19 Mich. 98; Hallock v. Rumsey, 22 Hun (N. Y.) 89.

34. Ind.—Andrews v. Sellers, 11 Ind. App. 301, 38 N. E. 1101. Mich.—Boyce v. Cutter, 70 Mich. 539, 38 N. W. 464; Hill v. Wright, 49 Mich. 229, 13 N. W. 528. Wis.—Bonnin v. Zuehlke, 122 Wis. 128, 99 N. W. 445.

35. U. S.—Dalton Add. Machine Co. v. Virginia, 236 U. S. 699, 35 Sup. Ct. 480, 59 L. ed. 797. Colo.—Kendrick v. A. Y. Minnie Min. & Mill. Co., 164 Pac. 1161; Walsh v. Sprankle, 21 Colo. App. 129, 121 Pac. 951. Conn.—New London v. Perkins, 87 Conn. 229, 87

of equitable jurisdiction.<sup>36</sup> An action to enjoin collection of a tax by state or county officers is not an action against the state,<sup>37</sup> of which a federal court cannot take jurisdiction,<sup>38</sup> or which can be maintained only with the consent of the state.<sup>39</sup>

**2. Adequacy or Inadequacy of Legal Relief.**—a. *Generally.* Except where the statute expressly authorizes an injunction against an illegal tax,<sup>40</sup> the mere illegality of the tax does not warrant injunctive relief without regard to the adequacy of legal relief or other substantive ground of equitable jurisdiction;<sup>41</sup> and if the taxpayer has an adequate remedy at law, injunction to restrain the collection of the tax will not issue.<sup>42</sup> There is, however, authority apparently to the

Atl. 724. Ga.—Decker v. McGowan, 59 Ga. 805. Mass.—Welch v. Boston, 208 Mass. 326, 94 N. E. 271, 35 L. R. A. (N. S.) 330.

[a] State taxes are interfered with with more reluctance than municipal taxes. Bismarck Water Supply Co. v. Barnes, 30 N. D. 555, 153 N. W. 454, L. R. A. 1916A, 965.

[b] Issuance of an injunction rests within the discretion of the court and will be denied where it would be unreasonable or result in injustice. Bow v. Farrand, 77 N. H. 451, 92 Atl. 926; Sioux Falls Sav. Bank v. Minnehaha County, 29 S. D. 146, 135 N. W. 689, Ann. Cas. 1914D, 910.

36. U. S.—Hannewinkle v. Georgetown, 15 Wall. 547, 21 L. ed. 231; Stonebraker v. Hunter, 215 Fed. 67, 131 C. C. A. 375. Ala.—Patterson v. Pitts, 180 Ala. 100, 60 So. 390; Montgomery v. Sayre, 65 Ala. 564. Colo.—Nile Irr. District v. English, 60 Colo. 406, 153 Pac. 760. Fla.—Crawford v. Bradford, 23 Fla. 404, 2 So. 782. Ind.—Delphi v. Bowen, 61 Ind. 29. N. D.—Bismarck Water Supply Co. v. Barnes, 30 N. D. 555, 153 N. W. 454, L. R. A. 1916A, 965. W. Va.—Douglass v. Harrisville, 9 W. Va. 162, 27 Am. Rep. 548.

[a] The fact that a taxpayer has a debt or claim against the public corporation levying the tax, does not entitle him to an injunction. Conn.—New London v. Perkins, 87 Conn. 229, 87 Atl. 724. Fla.—Finnegan v. Fernandina, 15 Fla. 379, 21 Am. Rep. 292. W. Va. Ohio Fuel Oil Co. v. Price, 77 W. Va. 207, 87 S. E. 202.

37. See generally the title "States and Territories."

38. Nevada-California Power Co. v. Hamilton, 235 Fed. 317.

39. Porter v. Langley (Tex. Civ. App.), 155 S. W. 1042.

40. See *infra*, V, G, 7.

41. U. S.—Dows v. City of Chicago, 11 Wall. 108, 20 L. ed. 65; City Council v. Timmerman, 233 Fed. 216, 147 C. C. A. 222; Western Union Tel. Co. v. Trapp, 186 Fed. 114, 108 C. C. A. 226. Colo.—Highlands v. Johnson, 24 Colo. 371, 51 Pac. 1004. D. C.—Burgdorf v. District of Columbia, 7 App. Cas. 405. Mo.—McPike v. Pew, 48 Mo. 525. N. Y.—Campbell v. Seaman, 63 N. Y. 582, 20 Am. Rep. 567. N. D. Merchants' State Bank v. McHenry County, 31 N. D. 108, 153 N. W. 386; Farrington v. New England Inv. Co., 1 N. D. 102, 45 N. W. 191. R. I. Greene v. Mumford, 5 R. I. 472, 73 Am. Dec. 79. W. Va.—West Virginia Nat. Bank v. Spencer, 71 W. Va. 678, 77 S. E. 269; Williams v. Grant County Court, 26 W. Va. 488, 53 Am. Rep. 94.

[a] The claim that a tax is unconstitutional is not sufficient ground for injunctive relief. U. S.—Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. ed. 1288; Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. ed. 273. Colo.—People v. District Court, 29 Colo. 182, 68 Pac. 242. Okla.—Black v. Geissler, 58 Okla. 335, 159 Pac. 1124.

But see, Adams Exp. Co. v. Poe, 61 Fed. 470, relief granted on ground of preventing multiplicity of suits.

42. Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. ed. 1288; Boise Artesian Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. ed. 796. Ala.—Patterson v. Pitts, 180 Ala. 100, 60 So. 390. Ill.—Herschbach v. Kaskaskia I. Sanitary Dist., 265 Ill. 388, 106 N. E. 942. D. C.—Dodge v. Osborn, 43 App. Cas. 144, collection of income tax. N. D.—Bismarck Water



contrary, or<sup>43</sup> at least where there is no law authorizing the tax.<sup>44</sup> But where there is no remedy at law,<sup>45</sup> or where the legal remedy is inadequate to afford the relief required,<sup>46</sup> the court may issue an injunction. Collection of a personal property tax will not ordinarily be enjoined,<sup>47</sup> unless the property seizure of which is threatened has a peculiar value to the owner,<sup>48</sup> the legal remedy being considered adequate to afford all necessary relief. If a state statute makes adequate provision for a judicial determination of a claim that a tax as levied is in violation of the federal constitution, a federal court will not enjoin the collection of the tax.<sup>49</sup>

Supply Co. v. Barnes, 30 N. D. 555, 153 N. W. 454, L. R. A. 1916A, 965. Okla. Perry v. Carson, 161 Pac. 175. Tex. Cole v. Porto (Tex. Civ. App.), 155 S. W. 350.

[a] "If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection *sua sponte*, and in other cases it is treated as waived if not presented by the defendant in limine." Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. ed. 1288.

[b] Right to recover the amount, if paid under protest, in an action at law, constitutes an adequate remedy. U. S.—Dalton Add. Machine Co. v. Virginia, 236 U. S. 699, 35 Sup. Ct. 480, 59 L. ed. 797; Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. ed. 1288; Tennessee v. Sneed, 96 U. S. 69, 24 L. ed. 610; City Council v. Timmerman, 233 Fed. 216, 147 C. C. A. 222; Union Pac. R. R. Co. v. Board of Comrs., 217 Fed. 540, 133 C. C. A. 392. Colo.—Kendrick v. A. Y. Minnie Min. & Mill. Co., 164 Pac. 1161; Tallon v. Vindicator C. G. M. Co., 59 Colo. 316, 149 Pac. 108. N. D.—Merchants' State Bank v. McHenry County, 31 N. D. 108, 153 N. W. 386. Okla.—Black v. Geissler, 58 Okla. 335, 159 Pac. 1124. S. C. National Loan & Exch. Bank v. Jones, 103 S. C. 80, 87 S. E. 482.

[c] A portion of the tax goes to the state, against which no action for its recovery can be maintained there is no adequate remedy at law. King County v. Northern Pac. Ry. Co., 196 Fed. 323, 116 C. C. A. 143.

[d] A right of action against the tax collector for damages for illegally selling property in satisfaction of the tax, is an adequate remedy. Jacksonville v. Massey Business College, 47 Fla. 339, 36 So. 432.

43. See Baldwin v. Hewett, 88 Ky. 673, 11 S. W. 803; Baldwin v. Shine, 84 Ky. 502, 2 S. W. 164.

44. Drainage Comrs. v. Kinney, 233 Ill. 67, 84 N. E. 34.

[a] Where a court of law has acquired jurisdiction of the subject matter, an injunction will not issue. St. Louis Merchants' Bridge Co. v. Eisele, 263 Ill. 50, 104 N. E. 1013.

45. Gates v. Barrett, 79 Ky. 295.

46. U. S.—Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; Nevada-California Power Co. v. Hamilton, 235 Fed. 317. Cal.—Dewitt v. Hays, 2 Cal. 463, 56 Am. Dec. 352. Miss.—McDonald v. Murphree, 45 Miss. 705. N. M.—First National Bank v. McBride, 20 N. M. 381, 149 Pac. 353.

[a] The mere fact that the remedy in equity would be more expeditious is not sufficient to render the legal remedy inadequate. Union Pac. R. Co. v. Board of Comrs., 217 Fed. 540, 133 C. C. A. 392.

[b] Where irreparable injury would be inflicted upon the tax payer, injunction will issue. Detroit, G. H. & M. Ry. Co. v. Fuller, 205 Fed. 86.

47. Fla.—Odlin v. Woodruff, 31 Fla. 160, 12 So. 227, 22 L. R. A. 699. N. D. Bismarck Water Supply Co. v. Barnes, 30 N. D. 555, 153 N. W. 454, L. R. A. 1916A, 965; First Nat Bank v. Steenson, 146 N. W. 1061. Wis.—Judd v. Fox Lake, 28 Wis. 583.

[a] Where the enforcement of the levy will interfere with the exercise of a valuable franchise, an injunction will issue. Detroit v. Donovan, 127 Mich. 604, 86 N. W. 1032.

48. Baldwin v. Tucker, 16 Fla. 258; Henry v. Gregory, 29 Mich. 68.

49. Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. ed. 651; City Council v. Timmerman, 233 Fed. 216, 147 C. C. A. 222; Union

b. *Where Legal Methods of Review Provided.* — A court of equity will ordinarily refuse relief where a property owner may exercise his statutory privilege to have an assessment of his property reviewed by a board of equalization,<sup>50</sup> may take an appeal to the courts from the assessment,<sup>51</sup> may maintain an action to set it aside or correct it,<sup>52</sup> or have it reviewed on certiorari proceedings,<sup>53</sup> or where the statute specifically provides a method for recovering taxes illegally exacted,<sup>54</sup> except in those jurisdictions where the statute provides for injunction regardless of a remedy at law.<sup>55</sup>

3. *Multiplicity of Suits.* — In order to avoid a multiplicity of suits, a court of equity will sometimes enjoin the collection of a tax.<sup>56</sup> But

Pac. R. Co. v. Board of Comrs., 222 Fed. 651, 138 C. C. A. 175; Baldwin Tool Works v. Blue, 240 Fed. 202. *Compare.* Western Union Tel. Co. v. Trapp, 186 Fed. 114, 108 C. C. A. 226.

[a] But where a complaint under a state statute would not necessarily show that a federal question was involved, and there could be no removal of the cause to the federal courts the remedy under the statute will be held to be inadequate. Nevada-California Power Co. v. Hamilton, 235 Fed. 317.

50. *U. S.*—Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. ed. 651; McDougal v. Mudge, 233 Fed. 235, 147 C. C. A. 241. *Ill.*—Humphreys v. Nelson, 115 Ill. 45, 4 N. E. 637. *Ind.*—Small v. Lawrenceburgh, 128 Ind. 231, 27 N. E. 500. *Ia.*—Reed v. Cedar Rapids, 138 Iowa 366, 116 N. W. 140. *Miss.*—Noxubee v. Ames, 3 So. 37. *Neb.*—Burlington & M. R. R. Co. v. Seward County, 10 Neb. 211, 4 N. W. 1016. *N. M.*—First National Bank v. McBride, 20 N. M. 381, 149 Pac. 353. *N. C.*—Wilson v. Green, 135 N. C. 343, 47 S. E. 469. *N. D.*—Bismarck Water Supply Co. v. Barnes, 30 N. D. 555, 153 N. W. 454; First Nat. Bank v. Steenson, 146 N. W. 1061. *Okla.*—East v. Rogers, 30 Okla. 289, 119 Pac. 241. *S. D.*—Bagley Elevator Co. v. Butler, 24 S. D. 429, 123 N. W. 866. *Tex.*—Houston & Texas C. R. Co. v. Presidio, 53 Tex. 518. *W. Va.*—Island Creek Fuel Co. v. Harshbarger, 73 W. Va. 397, 80 S. E. 504; West Virginia Nat. Bank v. Spencer, 71 W. Va. 678, 77 S. E. 269. *Wyo.*—Wyoming Central Irr. Co. v. Farlow, 19 Wyo. 68, 114 Pac. 635, 116 Pac. 1021.

51. *U. S.*—McLaughlin v. St. Louis, S. W. Ry. Co., 232 Fed. 579, 146 C. C. A. 537. *Okla.*—Weatherly v. Saw-

yer, 163 Pac. 717; Board of Comrs. v. Field, 162 Pac. 733; Perry v. Carson, 161 Pac. 175. *Pa.*—Delaware, L. & W. R. Co. v. Luzerne County Comrs., 245 Pa. 515, 91 N. E. 889.

Appeals from assessments, generally, see, *supra*, II, E.

52. Cole v. Forto (Tex. Civ. App.), 155 S. W. 350.

53. Sioux Falls Sav. Bank v. Minnehaha County, 29 S. D. 146, 135 N. W. 689, Ann. Cas. 1914D, 910. But see, Alexander v. Henderson, 105 Tenn. 431, 58 S. W. 648.

Certiorari to review assessments, see, *supra*, II, E, 3.

54. Black v. Geissler, 58 Okla. 335, 159 Pac. 1124, statute providing for payment under protest and requiring segregation of taxes so paid for thirty days in which suit to recover them may be instituted.

55. See *infra*, V, G, 7.

56. Holland v. Baltimore, 11 Md. 186, 69 Am. Dec. 195. See Drainage Comrs. v. Kinney, 233 Ill. 67, 84 N. E. 34; Baldwin v. Shine, 84 Ky. 502, 2 S. W. 164, and generally the title "Multiplicity of Suits."

[a] "Where the bill seeks not only to restrain the collection of a void tax but also to enjoin other threatened levies, the expenditure of money already collected or the sale of bonds issued without authority of law, then equity will take jurisdiction to restrain such acts on the ground that the remedy at law is inadequate and to prevent a multiplicity of suits." Herschbach v. Kaskaskia I. Sanitary Dist., 265 Ill. 388, 106 N. E. 942.

[b] Where the tax if collected would be divided and paid to different public corporations, (1) against each of which a separate action would be required, an injunction may issue.

the mere possibility that numerous suits might result is not sufficient to confer equitable jurisdiction,<sup>57</sup> and the fact that successive appeals to superior administrative bodies may be necessary does not create a case of threatened multiplicity of suits.<sup>58</sup>

**4. Cloud Upon Title.**—When an illegality in a tax is not apparent upon the face of the proceedings, and a cloud upon the title to real property would result, the court may restrain the collection of the tax,<sup>59</sup> and the same rule is applicable when a tax deed is made prima facie or conclusive evidence of title.<sup>60</sup> If, however, an adequate remedy at law exists, relief in equity will be denied.<sup>61</sup>

**5. Fraud or Mistake.**—Since fraud, accident or mistake constitute grounds of equitable jurisdiction, relief may, under proper circumstances, be had from tax proceedings in which either of these elements exist.<sup>62</sup>

*Western Union Tel. Co. v. Trapp*, 186 Fed. 114, 108 C. C. A. 226; *Railroad & Tel. Cos. v. Board of Equalizers*, 85 Fed. 302. (2) But if the entire amount paid could be recovered from the tax collector even after he had made distribution of the tax among the various bodies entitled to it, no ground for equitable relief exists. *Union Pac. R. Co. v. Board of Comrs.*, 217 Fed. 540, 133 C. C. A. 392.

[c] Where a large number of taxpayers are entitled to complain of the same illegality or defect an injunction may issue. *Houston v. Baker*, (Tex. Civ. App.), 178 S. W. 820; *Porter v. Langley* (Tex. Civ. App.), 155 S. W. 1042; *Williams v. Grant County Court*, 26 W. Va. 488, 53 Am. Rep. 94.

[d] If a tax on holders of stocks and bonds of a corporation is made payable by the corporations, the latter may maintain a suit in equity against its collection since, if it paid the tax, it would be subject to a suit by each stockholder or bondholder. *Detroit, G. H. & M. Ry. Co. v. Fuller*, 205 Fed. 86. Compare *Merchants' State Bank v. McHenry County*, 31 N. D. 108, 153 N. W. 386.

57. *City Council v. Timmerman*, 233 Fed. 216, 147 C. C. A. 222.

[a] After a tax law has been construed by the courts it will not be presumed that a former improper construction of the law by tax officers will be followed. *Tallon v. Vindicator C. G. M. Co.*, 59 Colo. 316, 149 Pac. 108.

58. *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. ed. 651.

59. *U. S.—Ogden City v. Armstrong*, 163 U. S. 224, 18 Sup. Ct. 98, 42 L. ed. 444; *Detroit, G. H. & M. Ry. Co. v. Fuller*, 205 Fed. 86. *Ark.—Hare v. Carnell*, 39 Ark. 196. *Md.—Holland v. Baltimore*, 11 Md. 186, 69 Am. Dec. 195.

[a] Where the invalidity of the proceeding is apparent upon their face, no cloud is created and an injunction will not issue. *U. S.—Hannewinkle v. Georgetown*, 15 Wall. 547, 21 L. ed. 231; *City Council v. Timmerman*, 233 Fed. 216, 147 C. C. A. 222. *Cal. Hollister v. Sherman*, 63 Cal. 38, tax on property plainly exempt. *W. Va. Powell v. Parkersburg*, 28 W. Va. 698.

[b] An illegal and discriminatory system of taxation has been held to cast a cloud upon land titles. *Houston v. Baker* (Tex. Civ. App.), 178 S. W. 820.

60. *U. S.—Nevada-California Power Co. v. Hamilton*, 235 Fed. 317. *Cal. Woodruff v. Perry*, 103 Cal. 611, 37 Pac. 526. *Mich.—Marquette, H. & O. R. Co. v. Marquette*, 35 Mich. 504. *N. J. Cahill v. Harrison*, 87 N. J. Eq. 524, 100 Atl. 625.

61. *Union Pac. R. Co. v. Board of Comrs.*, 217 Fed. 540, 133 C. C. A. 392. See *supra*, V, G, 2.

62. See *Felsenthal v. Johnson*, 104 Ill. 21, and 8 STANDARD PROC. 416, et seq.

Relief as affected by character of illegality or irregularity, see *infra*, V, G. 6.

[a] Failure to give notice of an increase in the assessment, while illegal, does not constitute either fraud, accident or mistake justifying the en-



**6. Right to Relief as Affected by Character of Illegality or Irregularity.**—If the levy<sup>63</sup> or assessment<sup>64</sup> is wholly without warrant of law, and therefore void, injunctive relief against the tax may be obtained. But mere defects or irregularities either in the levy,<sup>65</sup> the assessment,<sup>66</sup> or the collection proceedings,<sup>67</sup> do not authorize equitable interposition by injunction. To the extent that a levy is in excess of that authorized by law, its collection may be enjoined.<sup>68</sup>

Mere overvaluation of property resulting in an excessive assessment and tax is no ground for relief,<sup>69</sup> but an arbitrary or fraudulent over-

joining of the collection of the tax. *Singer Sewing Machine Co. v. Benedict*, 229 U. S. 481, 33 Sup. Ct. 942, 57 L. ed. 1288.

**63. Ill.**—*Drainage Comrs. v. Kinney*, 233 Ill. 67, 84 N. E. 34. **1a.**—*Goold v. Lyon*, 74 Iowa 95, 36 N. W. 906. **Mont.** *Barnard Realty Co. v. City of Butte*, 50 Mont. 159, 145 Pac. 946. **Neb.**—*Union Pac. R. Co. v. Troupe*, 99 Neb. 73, 155 N. W. 230. **Pa.**—*Appeal of St. Clair School Board*, 74 Pa. 252. **Utah.** *Mercur Gold Min. & M. Co. v. Spry*, 16 Utah 222, 52 Pac. 382.

[a] **Where the order levying the tax has been rescinded**, its collection will be enjoined. *Rhodes v. Robinson*, 109 Miss. 114, 67 So. 899, 68 So. 145.

**64. Ill.**—*Chicago & M. Elec. Ry. Co. v. Vollman*, 213 Ill. 609, 73 N. E. 360. **Ky.**—*Negley v. Henderson Bridge Co.*, 107 Ky. 414, 54 S. W. 171. **Mont.** *Montana Ore-Pur. Co. v. Maher*, 32 Mont. 480, 81 Pac. 13. **N. C.**—*Middle Canal Co. v. Whitley*, 172 N. C. 100, 90 S. E. 1. **Wash.**—*Northwestern Lumb. Co. v. Chehalis*, 24 Wash. 626, 64 Pac. 787. **W. Va.**—*Clarksburg Northern R. Co. v. Morris*, 76 W. Va. 777, 86 S. E. 893.

[a] **Where an assessment upon specific property is made without authority of law**, equity will grant relief. *Clarksburg Northern R. Co. v. Morris*, 76 W. Va. 777, 86 S. E. 893.

[b] **"A tax extended against a person upon an assessment of property which he does not own is illegal and levied without authority of law, and its collection will be enjoined."** *Moline Water Power Co. v. Cox*, 252 Ill. 348, 96 N. E. 1044.

**65. Ill.**—*Drainage Comrs. v. Kinney*, 233 Ill. 67, 84 N. E. 34. **Ind.**—*Morton C. Hunter Stone Co. v. Woodard*, 152 Ind. 474, 53 N. E. 947. **N. D.**—*Minneapolis, St. P. & S. S. M. Ry. Co. v. Dickey*, 11 N. D. 107, 90 N. W. 260.

**Wis.**—*Chicago & N. W. Ry. Co. v. Forest*, 95 Wis. 80, 70 N. W. 77.

**66. U. S.**—*King County v. Northern Pac. Ry. Co.*, 196 Fed. 323, 116 C. C. A. 143. **Ga.**—*Burke v. Speer*, 59 Ga. 353. **Ind.**—*McCrary v. O'Keefe*, 162 Ind. 534, 70 N. E. 812. **1a.**—*Saar v. Carson*, 145 Iowa 525, 124 N. W. 204. **Kan.** *Kansas Pac. Ry. Co. v. Russell*, 8 Kan. 558. **Neb.**—*Rothwell v. Knox*, 62 Neb. 50, 86 N. W. 903. **Tex.**—*Cole v. Forto* (Tex. Civ. App.), 155 S. W. 350.

[a] **Errors induced by the conduct of the taxpayer** cannot be urged as a ground for relief. *Winfield Bank v. Nipp*, 47 Kan. 744, 28 Pac. 1015.

**67. Colo.**—*Breeze v. Haley*, 10 Colo. 5, 13 Pac. 913. **Kan.**—*Garnett Bank v. Ferris*, 55 Kan. 120, 39 Pac. 1042. **N. J.**—*Alfred W. Booth & Bro. v. Bayonne*, 85 N. J. Eq. 281, 98 Atl. 666, improper blending of taxes on real and personal property in notice of sale.

**68. Lewis v. Boguechitto**, 76 Miss. 356, 24 So. 875; *St. Louis & S. F. R. Co. v. Haworth*, 48 Okla. 132, 149 Pac. 1086; *St. Louis & S. F. R. Co. v. Tate*, 35 Okla. 563, 130 Pac. 941; *Atchison, T. & S. F. Ry. Co. v. Wiggins*, 5 Okla. 477, 49 Pac. 1019.

**Payment of valid portion as condition precedent**, see *infra*, V, G, 8.

**69. U. S.**—*Coulter v. Louisville & N. R. Co.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. ed. 615; *McLaughlin v. St. Louis S. W. Ry. Co.*, 232 Fed. 579, 146 C. C. A. 537; *Tacoma Ry. & P. Co. v. Pierce County*, 193 Fed. 90. **Ariz.**—*Cochise v. Copper Queen Consol. Min. Co.*, 8 Ariz. 221, 71 Pac. 946. **Ark.**—*Wells Fargo & Co.'s Express v. Crawford*, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371. **Idaho.**—*Northern Pac. Ry. Co. v. Clearwater County*, 26 Idaho 455, 144 Pac. 1. **Ill.**—*Sanitary District v. Gifford*, 257 Ill. 424, 100 N. E. 953; *La Salle & P. H. & D. R. Co. v. Donoghue*, 127 Ill. 27, 18 N. E. 827, 11 Am. St.

valuation,<sup>70</sup> or a valuation so grossly excessive as to be constructively fraudulent,<sup>71</sup> or the intentional and fraudulent omission from assessment or undervaluation of other property legally subject to taxation, thereby increasing the burden placed upon the plaintiff, will be relieved against,<sup>72</sup> unless the remedy at law is under all the circumstances of the case, adequate.<sup>73</sup> Collection of taxes based upon an assessment intentionally and knowingly fixing the value of the property upon an erroneous and illegal principle,<sup>74</sup> or an illegal increase in an assessment,<sup>75</sup> or a continued violation of constitutional rights which have

Rep. 90. **Kan.**—Board of County Comrs. *v.* Bullard, 77 Kan. 349, 94 Pac. 129, 16 L. R. A. (N. S.) 807. **Ky.** Royer Wheel Co. *v.* Taylor, 104 Ky. 741, 47 S. W. 876; Frankfort *v.* Mason & F. Co., 190 Ky. 48, 37 S. W. 290. **Neb.**—Darr *v.* Dawson County, 93 Neb. 93, 139 N. W. 852. **Ore.**—Southern Oregon Co. *v.* Schroeder, 39 Ore. 607, 64 Pac. 1117. **S. D.**—Duncan *v.* Corson County, 38 S. D. 623, 162 N. W. 395; Sioux Falls Sav. Bank *v.* Minnehaha County, 29 S. D. 146, 135 N. W. 889, Ann. Cas. 1914D, 910.

*Compare*, Bardrick *v.* Dillon, 7 Okla. 535, 54 Pac. 785.

70. **Ariz.**—Cochise *v.* Copper Queen Consol. Min. Co., 8 Ariz. 221, 71 Pac. 946. **Cal.**—Pacific Postal Tel. Cable Co. *v.* Dalton, 119 Cal. 604, 51 Pac. 1072. **Ore.**—Oregon & C. R. Co. *v.* Jackson, 38 Ore. 589, 627, 64 Pac. 307, 55 Pac. 369. **Tex.**—Johnson *v.* Holland, 17 Tex. Civ. App. 210, 43 S. W. 71.

[a] Action of a board of equalization in (1) disregarding uncontradicted testimony introduced before it (*Bundrett v. Lucas* [Tex. Civ. App.], 194 S. W. 613), or in (2) refusing to hear and consider evidence (*Spokane & Inland E. R. Co. v. Spokane County*, 82 Wash. 24, 143 Pac. 307), is (3) ground for an injunction, provided it further appears that the assessment was unfair. *Atchison, T. & S. F. Ry. Co. v. Board of Comrs.*, 225 Fed. 978, 141 C. C. A. 100.

71. **Idaho.**—Northern Pac. Ry. Co. *v.* Clearwater Co., 26 Idaho 455, 144 Pac. 1. **Ill.**—Sanitary District *v.* Board of Review, 258 Ill. 316, 101 N. E. 555. **Kan.**—Chicago, B. & Q. R. Co. *v.* Atchison, 54 Kan. 781, 39 Pac. 1039. **Mich.**—Merrill *v.* Humphrey, 24 Mich. 170. **Wash.**—Phillips *v.* Thurston, 35 Wash. 187, 76 Pac. 993.

72. **U. S.**—Atchison, T. & S. F. Ry. Co. *v.* Sullivan, 173 Fed. 456, 97

C. C. A. 1. **Idaho.**—Northern Pac. R. Co. *v.* Clearwater County, 26 Idaho 455, 144 Pac. 1. **Kan.**—Chicago, B. & Q. R. Co. *v.* Atchison, 54 Kan. 781, 39 Pac. 1039. **Mich.**—Walsh *v.* King, 74 Mich. 350, 41 N. W. 1080. **N. M.**—First National Bank *v.* McBride, 20 N. M. 381, 149 Pac. 353; Ute Creek Ranch Co. *v.* McBride, 20 N. M. 377, 150 Pac. 52. **Ore.**—Oregon & C. R. Co. *v.* Jackson, 38 Ore. 589, 64 Pac. 307, 65 Pac. 369; Hamblin Real-Estate Co. *v.* Astoria, 26 Ore. 599, 40 Pac. 230. **S. D.**—Sioux Falls Sav. Bank *v.* Minnehaha County, 29 S. D. 146, 135 N. W. 689, Ann. Cas. 1914D, 910. **Tex.**—Lively *v.* Missouri K. & T. R. Co., 102 Tex. 545, 120 S. W. 852; Houston *v.* Baker (Tex. Civ. App.), 178 S. W. 820; Brown *v.* First Nat. Bank (Tex. Civ. App.), 175 S. W. 1122.

[a] Unless the discrimination was made intentionally, relief in equity will be refused. *Lacy v. M'Cafferty*, 215 Fed. 352, 131 C. C. A. 494.

73. *Union Pac. R. Co. v. Board of Comrs.*, 217 Fed. 540, 133 C. C. A. 392; *Price Shoe & Clothing Co. v. McBride*, 20 N. M. 409, 149 Pac. 362. See *supra*, V, G, 2.

74. *Johnson v. Wells Fargo & Co.*, 239 U. S. 234, 36 Sup. Ct. 62, 60 L. ed. 243; *Nevada-California Power Co. v. Hamilton*, 235 Fed. 317.

75. **Ga.**—Shippen Bros. Lumb. Co. *v.* Adams, 141 Ga. 354, 80 S. E. 1009; *Gelders v. Fitzgerald*, 135 Ga. 400, 69 S. E. 569. **Ill.**—Huling *v.* Ehrlich, 183 Ill. 315, 55 N. E. 636. **Ia.**—Montis *v.* McQuiston, 107 Iowa 651, 78 N. W. 704. **Ky.**—Boske *v.* Louis Marx & Bros., 161 Ky. 460, 170 S. W. 1175. **Md.**—Mayor & City Council of Havre de Grace *v.* Lewis, 127 Md. 367, 96 Atl. 515. **Neb.**—Farmers' Co-operative C. & Sup. Co. *v.* McDonald, 100 Neb. 33, 158 N. W. 369; *Brown v. Douglas County*, 98 Neb. 299, 152 N. W. 545.

been recognized and declared by the courts,<sup>76</sup> will be enjoined. If the property against which the tax was levied<sup>77</sup> or assessed<sup>78</sup> was beyond the territorial limits in which the tax was authorized by law, or was under the law exempt from taxation,<sup>79</sup> or if the tax is sought to be enforced against one who was not the owner of the property assessed,<sup>80</sup> a court of equity will also afford relief.

**7. Statutes Authorizing or Limiting Injunction.**<sup>81</sup>—Statutes sometimes authorize injunction against illegal taxes, in which event the relief may be had regardless of other remedies and without other ground of equitable jurisdiction.<sup>82</sup> On the other hand, statutes frequently prohibit the issuance of an injunction against the collection of taxes,<sup>83</sup> or limit the grounds upon which an injunction may issue to those specifically enumerated in the statute.<sup>84</sup> The equity powers of the federal courts, however, are not limited by statutory restrictions on the equity jurisdiction of the state courts in this class of cases.<sup>85</sup>

**8. Conditions Precedent.**—Payment or tender of a void tax need not be made as a condition precedent to institution of the suit.<sup>86</sup> Where, however, the tax is merely excessive, or illegal in part only, payment or tender of the valid portion must be made,<sup>87</sup> except where it is impos-

76. *Johnson v. Wells Fargo & Co.*, 239 U. S. 234, 36 Sup. Ct. 62, 60 L. Fed. 243.

77. *Thurber v. McMinnville*, 63 Ore. 410, 128 Pac. 43.

78. **U. S.**—*Nevada-California Power Co. v. Hamilton*, 235 Fed. 317. **Neb.** *Thatcher v. Adams*, 19 Neb. 485, 27 N. W. 729. **Ore.**—*Thurber v. McMinnville*, 63 Ore. 410, 128 Pac. 43.

79. **Conn.**—*New London v. Perkins*, 87 Conn. 229, 87 Atl. 724. **Ill.**—*Moline Water-Power Co. v. Cox*, 252 Ill. 348, 96 N. E. 1044. **Mont.**—*Barnard Realty Co. v. Butte*, 50 Mont. 159, 145 Pac. 946.

80. *Ream v. Stone*, 102 Ill. 359.

81. See generally the title "**Injunctions.**"

82. *Grether v. Wright*, 75 Fed. 742, 23 C. C. A. 498 (applying law of Ohio); *Gerke v. Purcell*, 25 Ohio St. 229. See also *Rockefeller v. O'Brien*, 224 Fed. 541. *Compare Black v. Geissler*, 58 Okla. 335, 159 Pac. 1124.

83. *Burgdorf v. District of Columbia*, 7 App. Cas. (D. C.) 405; *Fourth Nat. Bank v. Greenville*, 91 S. C. 81, 74 S. E. 126.

[a] **Pending actions** are not affected by such a statute. *Duncan v. Corson County*, 38 S. D. 623, 162 N. W. 395.

84. **Ark.**—*Harrison v. Norton*, 104 Ark. 16, 148 S. W. 497. **Miss.**—*Purvis v. Robinson*, 110 Miss. 64, 69 So. 673, taxes levied without authority of law.

**Neb.**—*Peterson v. Anderson*, 100 Neb. 149, 158 N. W. 1055; *Darr v. Dawson County*, 93 Neb. 93, 139 N. W. 852.

[a] Under a statute (1) which authorizes an injunction against "illegal or unauthorized taxes," the remedy is confined to defects or errors which are jurisdictional and is not extended to defects or errors committed in the exercise of a jurisdiction conferred, as to which a plain and adequate administrative remedy exists. *M'Dougal v. Mudge*, 233 Fed. 235, 147 C. C. A. 241. (2) The statute does not enlarge the general equitable jurisdiction of the courts. *Stonebraker v. Hunter*, 215 Fed. 67, 131 C. C. A. 375; *Wilson v. Wiggins*, 7 Okla. 517, 54 Pac. 716.

85. *Western Union Tel. Co. v. Trapp*, 186 Fed. 114, 108 C. C. A. 226.

86. *Sioux City Bridge Co. v. Dakota County*, 61 Neb. 75, 84 N. W. 607; *Lewiston W. & P. Co. v. Asotin*, 24 Wash. 371, 64 Pac. 544.

87. **U. S.**—*Baldwin Tool Works v. Blue*, 240 Fed. 202, such a statutory requirement is valid. **Ark.**—*Wells Fargo & Co.'s Express v. Crawford*, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371. **Colo.**—*Breeze v. Haley*, 11 Colo. 351, 18 Pac. 551. **Ind.**—*Buck v. Miller*, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8, 62 Am. St. Rep. 436, 37 L. R. A. 384. **Kan.**—*Wilson v. Longendyke*, 32 Kan. 267, 4 Pac. 361. **Ky.**—*Thompson v. Lexington*, 104 Ky. 165, 46 S. W. 481.



sible to determine the amount of the tax legally due.<sup>88</sup>

**9. Proceedings.**—a. *Generally.*—The proceedings for injunctive relief follow the general principles elsewhere treated.<sup>89</sup>

b. *Parties.*—The parties to the proceedings are determined in accordance with the general principles discussed elsewhere in this work.<sup>90</sup> Ordinarily the person who will be forced to pay, or whose property will be taken for the non-payment of the illegal tax, is the proper party plaintiff in the action,<sup>91</sup> and one who is not thus affected cannot maintain the action.<sup>92</sup> Several taxpayers may join in the action, if the ground upon which the legality of the tax is attacked is common<sup>93</sup> to all

**La.**—*Morgan v. Louisiana & T. R. & S. S. Co. v. Aucoin*, 140 La. 768, 73 So. 859. **Miss.**—See *Lewis v. Boguechitto*, 76 Miss. 356, 24 So. 875. **Neb.**—*Hacker v. Howe*, 72 Neb. 385, 101 N. W. 255. **Okla.**—*State Nat. Bank v. Carson*, 50 Pac. 990. **Tex.**—*McMahan v. Morgan* (Tex. Civ. App.), 151 S. W. 1123. **W. Va.**—*Blue Jacket Consol. Copper Co. v. Scherr*, 50 W. Va. 533, 40 S. E. 514. **Wis.**—*Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578. **Wyo.**—*Wyoming Central Irr. Co. v. Farlow*, 19 Wyo. 68, 114 Pac. 635, 116 Pac. 1021.

**88.** *Miller v. Lincoln*, 94 Neb. 577, 143 N. W. 921.

**89.** See the title "Injunctions."

Injunction against municipal corporations and their officers, see the title "Municipal Corporations."

**90.** See the title "Parties" and 13 STANDARD PROC. 12, et seq., 29, et seq.

In proceedings against municipalities and their officers, see the title "Municipal Corporations."

**91. Kan.**—*State v. McLaughlin*, 15 Kan. 228, 2 Am. Rep. 264, the state has no direct interest in the validity of a school district tax. **La.**—*Bernstein v. Clement*, 129 La. 824, 56 So. 902. **Md.** *Baldwin v. Washington*, 85 Md. 145, 36 Atl. 764. **Ohio.**—*Bd. of Education of Hopewell v. Guy*, 64 Ohio St. 434, 60 N. E. 573. **Tex.**—*Morris v. Cummings*, 91 Tex. 618, 45 S. W. 383.

[a] Where a tax is levied upon corporate stock or bonds, the corporation (1) is not the real party in interest and cannot maintain an action to enjoin its collection. *First Nat. Bank v. Steenson* (N. D.), 146 N. W. 1061. And see *People's Nat. Bank v. Marye*, 107 Fed. 570, *modifying and affirming* 191 U. S. 272, 24 Sup. Ct. 68, 48 L. ed. 180. (2) But when the tax, if unpaid, is made a specific lien upon the property

of the corporation, the rule is otherwise. *State ex rel. M. Gas Co. v. Wisconsin Tax Com.*, 161 Wis. 111, 152 N. W. 848.

[b] **Indian Lands.**—While the United States holds title to lands in trust for Indians it may maintain an action to enjoin the collection of an illegal tax upon the lands. *United States v. Chehalis County*, 217 Fed. 281.

[c] **Lessor** of premises may maintain the action if ultimately liable under the lease. *Columbus, C. & I. C. Ry. Co. v. Grant*, 65 Ind. 427.

[d] **Mortgagor** may enjoin illegal taxes. *Flint & P. M. Ry. Co. v. Auditor General*, 41 Mich. 635, 2 N. W. 835.

**92.** *Lyle v. Jacques*, 101 Ill. 644 (partnership can not enjoin tax on individual property of partners); *Du Page v. Jenks*, 65 Ill. 275; *Wyoming Central Irr. Co. v. Farlow*, 19 Wyo. 68, 114 Pac. 635, 116 Pac. 1021.

[a] **A township** cannot maintain an action to enjoin an illegal tax on an individual's property. *Moody v. Arthur*, 16 Kan. 419.

**93. U. S.**—*Risley v. Utica*, 173 Fed. 502. **Conn.**—*Terrett v. Sharon*, 34 Conn. 105. **Ga.**—*Hewin v. Atlanta*, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795. **Ill.**—*Bd. of Supervisors v. Jenks*, 65 Ill. 275. **Ind.**—*Oliver v. Keightley*, 24 Ind. 514. **Ia.**—*Brandirff v. Harrison*, 50 Iowa 164. **Kan.**—*Gilmore v. Norton*, 10 Kan. 491. **Mich.**—*Bristol v. Johnson*, 34 Mich. 123. **Mo.**—*Steines v. Franklin*, 48 Mo. 167, 8 Am. Rep. 87. **Okla.** *Stiles v. Guthrie*, 3 Okla. 26, 41 Pac. 383. **Pa.**—*Page v. Allen*, 58 Pa. 333, 98 Am. Dec. 272. **Tex.**—*Brown v. First Nat. Bank* (Tex. Civ. App.), 175 S. W. 1122; *Porter v. Langley* (Tex. Civ. App.), 155 S. W. 1042. **Va.**—*Johnson v. Drummond*, 20 Gratt. (61 Va.) 419. **W. Va.**—*Williams v. Grant County Court*, 26 W. Va. 488, 53 Am. Rep. 94;

of them, or, under proper circumstances,<sup>94</sup> one may, according to some authorities, sue on behalf of himself and all others similarly situated.<sup>95</sup> Unless there is some general common interest in the parties however, no joinder is proper.<sup>96</sup>

**Defendants.** — Who are proper or necessary parties defendant is determined in accordance with the general principles and rules elsewhere treated.<sup>97</sup> The officer charged with the collection of the tax is ordinarily a proper and necessary defendant.<sup>98</sup> The state or municipal corporation for the benefit of which the tax was levied is usually a proper,<sup>99</sup> but not always a necessary,<sup>1</sup> defendant. Third persons for whose benefit the tax is being imposed may be proper or necessary parties.<sup>2</sup>

**c. Pleadings.** — The pleadings should be framed in accordance with the general rules and principles governing suits for equitable relief.<sup>3</sup> The complaint must allege the levy and assessment of the tax,<sup>4</sup> its amount,<sup>5</sup> the proceedings which are being taken or are threatened for

Doonan *v.* Board of Education, 9 W. Va. 246.

*Compare, Sheldon v. Centre School Dist.*, 25 Conn. 224; *Coulson v. Harris*, 43 Miss. 723.

See 13 STANDARD PROC. 24, 26; 20 STANDARD PROC. 168 and the title "Parties."

94. See 20 STANDARD PROC. 945.

95. See 20 STANDARD PROC. 947, note 76 [a], (3), and *Risley v. Utica*, 173 Fed. 502; *Williams v. County Court*, 26 W. Va. 488, 53 Am. Rep. 94. See also 20 STANDARD PROC. 168; 13 STANDARD PROC. 28.

96. *Ind.*—*Jones v. Rushville Nat. Bank*, 138 Ind. 87, 37 N. E. 338. *Kan.* *McGrath v. Newton*, 29 Kan. 364. *Mich.* *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654.

97. See 13 STANDARD PROC. 29, et seq. and the title "Parties."

**Municipality and its officers as parties defendant in injunction proceedings generally**, see 13 STANDARD PROC. 34; 20 STANDARD PROC. 173.

98. *Ga.*—*Gelders v. Fitzgerald*, 135 Ga. 400, 69 S. E. 569. *Ill.*—*Binkert v. Wabash Ry. Co.*, 98 Ill. 205. *Ia.*—*Hubbard v. Johnson*, 23 Iowa 130. *Kan.* *Cook v. Condon*, 6 Kan. App. 574, 51 Pac. 587. *Mo.*—*St. Louis I. M. & S. R. Co. v. Anthony*, 73 Mo. 431. *N. C.* *Caldwell Land & Lumb. Co. v. Smith*, 146 N. C. 199, 59 S. E. 653, *sheriff*. *Okla.*—*Rogers v. Bass & Harbour Co.*, 47 Okla. 786, 150 Pac. 706, county commissioners not necessary parties to an action against the sheriff.

See 13 STANDARD PROC. 35; 20 STANDARD PROC. 173.

99. *Ga.*—*Gelders v. Fitzgerald*, 135 Ga. 400, 69 S. E. 569, it may be made a party by amendment. *Ind.*—*State v. Clinton County*, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984; *Cummings v. Stark*, 138 Ind. 94, 34 N. E. 444. *Tex.* *Texas Co. v. Daugherty* (Tex. Civ. App.), 160 S. W. 129.

1. *Cal.*—See *Hughson v. Crane*, 115 Cal. 404, 47 Pac. 120, for a statement of which, see 13 STANDARD PROC. 35, note 96 [a]. *Okla.*—*Rogers v. Bass & Harbour Co.*, 47 Okla. 786, 150 Pac. 706. *Tex.*—*Brown v. First Nat. Bank* (Tex. Civ. App.), 175 S. W. 1122, *overruling Texas Co. v. Daugherty* (Tex. Civ. App.), 160 S. W. 129.

See 20 STANDARD PROC. 173.

2. *Thiebaud v. Tait* (Ind.), 31 N. E. 1052, beneficiaries under a trust may be brought in by defendant where the trustee is plaintiff.

[a] The political body issuing bonds to pay which the tax was levied may be made parties. *State v. Sanderson*, 54 Mo. 203. See 20 STANDARD PROC. 174. *Compare* 13 STANDARD PROC. 34.

3. See the title "Injunctions," and generally the titles "Bills and Answers;" "Equity Jurisdiction and Procedure;" "Legal Remedy;" "Multiplicity of Suits;" "Multifariousness," and other titles dealing with particular phases of pleading.

**Pleadings in actions to enjoin municipality and its officers generally**, see 20 STANDARD PROC. 175.

4. See the cases cited *infra* this section.

5. *Ky.*—*Chambers v. Adair*, 110 Ky. 942, 62 S. W. 1128. *S. D.*—*Iowa &*

its collection,<sup>6</sup> the specific ground of irregularity or illegality upon which the attack is being made,<sup>7</sup> stating the facts and not general conclusions of law,<sup>8</sup> the extent to which the taxes are claimed to be illegal,<sup>9</sup> ownership by plaintiff of the property taxed,<sup>10</sup> the nature and extent of the injury which will be suffered in order that the jurisdiction of the court over the subject matter may appear,<sup>11</sup> the facts showing that some particular ground for equitable interference exists,<sup>12</sup> and the performance by plaintiff of any conditions precedent to maintenance of the action.<sup>13</sup> The complaint seeking as it does to restrain the

Dakota Tel. Co. v. Schamber, 15 S. D. 588, 91 N. W. 78. **Tex.**—Cole v. Forto (Tex. Civ. App.), 155 S. W. 350.

6. Pugh v. Irish, 43 Ind. 415; Marion County v. Perkins Bros. Co. (Tex. Civ. App.), 171 S. W. 789. See Houston v. Baker (Tex. Civ. App.), 178 S. W. 820, and 13 STANDARD PROC. 68.

7. **U. S.**—Western Union Tel. Co. v. Trapp, 186 Fed. 114, 108 C. C. A. 226. **Cal.**—Pacific Postal Tel. Cable Co. v. Dalton, 119 Cal. 604, 51 Pac. 1072, fraud in assessment. **Idaho**—Northern Pac. Ry. Co. v. Clearwater County, 26 Idaho 455, 144 Pac. 1, illegal, fraudulent discrimination in assessment of property. **Ind.**—Delphi v. Bowen, 61 Ind. 29. **Ia.**—King v. Parker, 73 Iowa 757, 34 N. W. 451.

8. **U. S.**—Nye, Jenks & Co. v. Town of Washburn, 125 Fed. 817. **Ala.**—New Decatur v. Nelson, 102 Ala. 556, 15 So. 275. **Colo.**—Walsh v. Sprinkle, 21 Colo. App. 129, 121 Pac. 951, as to excessive valuation placed upon property. **Ill.**—Sanitary District v. Gifford, 257 Ill. 424, 100 N. E. 953, facts showing fraud in making an assessment. **Wash.**—Andrews v. King, 1 Wash. 46, 23 Pac. 409, 22 Am. St. Rep. 136.

See 13 STANDARD PROC. 51 and the title "Conclusions of Law."

9. **Fla.**—Cheney v. Jones, 14 Fla. 587. **Ill.**—Taylor v. Thompson, 42 Ill. 8. **Ia.**—McConn v. Roberts, 25 Iowa 152.

10. Bernstein v. Clement, 129 La. 824, 56 So. 902. See *supra*, V, G, 9, b, and 13 STANDARD PROC. 61, et seq.

11. Marion County v. Perkins Bros. Co., (Tex. Civ. App.), 171 S. W. 789, "this is usually the value of the property seized." See 13 STANDARD PROC. 72.

12. Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. ed. 651, irreparable injury. See *supra*, V, G, 2 to 7, and 13 STANDARD PROC. 73, 82;

allowed. Cahill v. Harrison, 87 N. J. Eq. 524, 100 Atl. 625. See generally 4 STANDARD PROC. 185, et seq.; 13 STANDARD PROC. 100.

13. See *supra*, V, G, 8 and 13 STANDARD PROC. 72, 84.

[a] **Tender of that portion of a tax which is admitted to be legal, (1) must be pleaded.** **Colo.**—Nile Irr. Dist. v. English, 60 Colo. 406, 153 Pac. 760; Walsh v. Sprinkle, 21 Colo. App. 129, 121 Pac. 951. **Ore.**—Richards v. Mohr, 73 Ore. 57, 143 Pac. 1102. **Wash.**—Spokane & Inland E. R. Co. v. Spokane County, 82 Wash. 24, 143 Pac. 307. (2) But where it is claimed that the entire tax is void or where facts are alleged showing that it is impossible to segregate the valid portion of the tax, an averment of tender need not be made. Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. ed. 761; Ritterbusch v. Atchison, T. & S. F. Ry. Co., 198 Fed. 46, 154 C. C. A. 154.

[b] **Application to the proper administrative bodies having power to** 18 STANDARD PROC. 865; 20 STANDARD PROC. 81.

[a] **"Equity requires complete, clear and distinct allegations of issuable facts to justify the injunction in this class of cases, and it must definitely appear by proper averments that great and irreparable injury will result, either because of a multiplicity of suits or otherwise, before equity will lend its extraordinary aid."** Nile Irr. Dist. v. English, 60 Colo. 406, 153 Pac. 760.

[b] **Threatened multiplicity of suits is not shown where the complaint is merely entitled in the name of a single landowner "and others similarly situated."** Nile Irrigation District v. English, 60 Colo. 406, 153 Pac. 760.

[c] **Amendments curing defective allegations of this character, may be**



performance of his duty by a public officer, will be strictly construed.<sup>14</sup>

The answer must be responsive to the allegations in the complaint,<sup>15</sup> but if it shows that a part at least if not all of the tax objected to is legally due, it will be sufficient.<sup>16</sup>

d. *Relief*. — (I.) *Temporary*. — A temporary injunction may be granted where the tax collection proceedings will otherwise be consummated to the injury of the plaintiff and there is reasonable doubt as to the legality of the tax.<sup>17</sup>

(II.) *Final*. — The general rule that a court of equity having acquired jurisdiction will grant any relief that the circumstances of the case require, applies to suits to enjoin the collection of taxes.<sup>18</sup> Upon payment of the tax pending the action, the cause will be dismissed.<sup>19</sup> If a tax as levied and assessed is found to be excessive in amount, collection of the excess amount only will be enjoined,<sup>20</sup> and the court may impose such terms as to payment of interest as may, in its discretion, seem advisable.<sup>21</sup> Collection of a tax against any person who is not a party to the action cannot be enjoined.<sup>22</sup> A judgment against an officer restraining the collection of a tax is binding upon the administrative body levying and assessing the tax.<sup>23</sup>

**VI. REDEMPTION FROM TAX SALES.** — A. **FORECLOSURE OF RIGHT TO REDEEM.** — 1. **In General.** — In some states an action may be maintained by the purchaser at a tax sale to foreclose the right of

review and correct the errors and irregularities of which complaint is made, and a failure to obtain relief from them must be pleaded. *First National Bank v. McBride*, 20 N. M. 381, 149 Pac. 353. See *supra*, II, E; V, G, 2, b.

[c] A complaint which shows on its face a failure to invoke a legal remedy, fails to state a cause of action. *Fast v. Rogers*, 30 Okla. 289, 119 Pac. 241; *Higgins v. Wood*, 43 Okla. 554, 143 Pac. 662.

14. *Marion County v. Perkins Bros. Co.* (Tex. Civ. App.), 171 S. W. 789. See 13 STANDARD PROC. 96.

[a] An essential averment will not be supplied by inference from other averments unless it must logically and necessarily be so inferred. *Weatherly v. Sawyer*, (Okla.), 163 Pac. 717.

15. *Louisville & N. R. Co. v. Wright*, 190 Fed. 252. See the title "Bills and Answers," and 13 STANDARD PROC. 113.

16. *Louisville & N. R. Co. v. Wright*, 190 Fed. 252.

17. *Savannah F. & W. Ry. Co. v. Morton*, 71 Ga. 24; *Moore v. Sugg*, 112 N. C. 233, 17 S. E. 72.

As to preliminary injunctions see 13 STANDARD PROC. 146, 177.

18. *Cahill v. Harrison*, 87 N. J. Eq. 524, 100 Atl. 625; *Mercersburg College v. Mercersburg Borough*, 53 Pa. Super. 388. See 13 STANDARD PROC. 198.

[a] Where the only warrant for a tax was a vote in favor of it at a special election the court in proceedings to enjoin its collection may annul the result of the election for fraud or mistake. *Harrison v. Norton*, 104 Ark. 16, 148 S. W. 497.

19. *Belier v. Wilson*, 62 Colo. 553, 163 Pac. 861; *Brown v. First Nat. Bank* (Tex. Civ. App.), 175 S. W. 1122.

20. *Cottle v. Union Pac. R. Co.*, 201 Fed. 39, 119 C. C. A. 371.

21. *Cottle v. Union Pac. R. Co.*, 201 Fed. 39, 119 C. C. A. 371 (a statutory penalty for delinquency will not be enforced); *Ritterbusch v. Atchison, T. & S. F. Ry. Co.*, 198 Fed. 46, 154 C. C. A. 154.

22. *Wyandotte & K. C. Bridge Co. v. Wyandotte*, 10 Kan. 326.

But as to suit by one on behalf of all others, see *supra*, V, G, 9, b.

23. *State v. Klinginsmith*, 97 Kan. 574, 155 Pac. 945, judgment against a county treasurer is binding upon the state tax commission.

redemption remaining in the former owner of the property.<sup>24</sup> The action can be maintained only within such limits as to time as are prescribed by the various statutes.<sup>25</sup> Payment of any taxes upon the premises which are due, is a condition to maintenance of the action.<sup>26</sup>

**2. Process.**—Process must be in the form prescribed by statute.<sup>27</sup> Service, if by publication, must closely follow the statutory requirements.<sup>28</sup>

**3. Parties.**—The purchaser at the tax sale is the proper party to maintain the action.<sup>29</sup> The holder of legal title,<sup>30</sup> or in some states the person in whose name the property is listed upon the tax proceedings,<sup>31</sup> is the proper defendant. If the owners are unknown the action may be brought against "unknown owners," the action being in fact against the land.<sup>32</sup> The holders of inferior liens upon the property may properly be joined as parties defendant.<sup>33</sup>

**4. Pleadings.**—The complaint should state the facts which under

**24.** See the statutes and *Ia.*—Fuller v. Unknown Owner, 9 Iowa 430. *N. J.* Mitsch v. Owens, 82 N. J. Eq. 404, 89 Atl. 292. *N. Y.*—Rochester v. Rochester R. Co., 109 App. Div. 638, 96 N. Y. Supp. 152.

[a] In West Virginia the tax purchaser may, on giving notice to a person claiming the right to redeem from a tax sale, require the latter to appear in court and prove his claim. *Bumgarner v. First Nat. Bank*, 70 W. Va. 787, 74 S. E. 996.

**25.** *Atkins v. Paige*, 50 Iowa 666; *Valley v. Milford*, 70 Neb. 313, 97 N. W. 310.

[a] Until the time for voluntary redemption has expired, the action cannot be maintained. *Iodence v. Peters*, 64 Neb. 425, 89 N. W. 1041; *Goffe v. Bond*, 69 Wis. 366, 34 N. W. 236.

[b] Redemption pending suit ousts the court of its jurisdiction. *Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131.

**26.** *Trumbull v. Bruce*, 64 Wash. 644, 117 Pac. 472.

**27.** *Luff v. Gowan*, 38 Wash. 504, 80 Pac. 766 (unnecessary statements will be treated as surplusage); *William v. Pittock*, 35 Wash. 271, 77 Pac. 385. See generally the title "Process."

**28.** *Gaylord v. Scarff*, 6 Iowa 179; *Callison v. Smith*, 44 Wash. 202, 87 Pac. 120. See the title "Service of Process and Papers."

**29.** See the statutes.

[a] The assignee of the purchaser may bring the action. *Matter of An-*

*derson*, 79 Hun 170, 29 N. Y. Supp. 476.

[b] The equitable owner of the tax sale certificate may maintain the action. *Leavitt v. Bell*, 55 Neb. 57, 75 N. W. 524.

[c] The public corporation which bid in the property for the taxes upon it may maintain the action. See *Rochester v. Rochester R. Co.*, 109 App. Div. 638, 96 N. Y. Supp. 152; *Chehalis County v. France*, 44 Wash. 282, 87 Pac. 353.

**30.** See *infra*, this note.

[a] A purchaser whose deed is unrecorded need not be made a defendant. *Clark v. Connor*, 28 Iowa 311.

**31.** *Allen v. Peterson*, 38 Wash. 599, 80 Pac. 849.

**32.** *Butler v. Copp*, 5 Neb. (Unof.) 161, 97 N. W. 634; *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385.

[a] If the owner was in fact known or could have been discovered in the exercise of reasonable diligence, proceeding against "unknown owners" are not binding upon the owner. *Pyatt v. Hegquist*, 45 Wash. 504, 88 Pac. 933.

**33.** *Byington v. Walsh*, 11 Iowa 27, purchaser of the property at an execution sale.

[a] A mortgagee is not a necessary party to the foreclosure of a tax lien on the property. *Hall v. Moore*, 75 Neb. 693, 106 N. W. 785.

[b] Equitable owners of the property need not be joined. *Plumb v. Dyas*, 38 Wash. 240, 80 Pac. 432.

the statute authorize the special relief sought.<sup>34</sup> The answer may set up any matter constituting a defense to the action.<sup>35</sup>

**5. Judgment.**—If foreclosure of the right to redeem is decreed, a strict foreclosure and not a foreclosure and sale will be ordered,<sup>36</sup> though in some jurisdictions the practice is to order a sale of the premises.<sup>37</sup> The judgment cannot be attacked collaterally.<sup>38</sup> If a foreclosure of the right of redemption is denied, the action must be dismissed, and general equitable relief cannot be awarded.<sup>39</sup>

**B. ACTIONS TO REDEEM.**—**1. In General.**—Redemption from a tax sale is to be made in accordance with the requirements of the statute regulating the subject.<sup>40</sup> The owner of land cannot, ordinarily, resort to a court of equity to make a redemption, where he has failed to avail himself of his statutory remedy.<sup>41</sup> But where the purchaser at the tax sale refuses to accept a redemption,<sup>42</sup> or fraud, accident or mistake, or hardship, exists,<sup>43</sup> or the tax sale purchaser has failed to comply with statutory requirements incident to the purchase at the

<sup>34.</sup> See the statutes and *infra*, this note.

[a] The amount which is due must be specifically alleged. *River Realty Co. v. Blumenheim*, 77 N. J. Eq. 291, 78 Atl. 675.

[b] Where a tax certificate of sale is *prima facie* evidence of title, the proceedings culminating in the sale of the premises need not be set out. *Byington v. Robertson*, 17 Iowa 562; *Mansseau v. Edwards*, 53 Wis. 457, 1 N. W. 554; *Durbin v. Platto*, 47 Wis. 484, 3 N. W. 30. And see *Port Townsend v. Trumbull*, 40 Wash. 386, 82 Pac. 715, matters of public record equally accessible to both parties need not be set out.

[c] An allegation that no action at law has been had to recover the amount of the taxes paid, is unnecessary. *Carman v. Harris*, 61 Neb. 635, 85 N. W. 848.

<sup>35.</sup> *Solberg v. Baldwin*, 46 Wash. 196, 89 Pac. 561, payment of the taxes.

<sup>36.</sup> *Mitsch v. Owens*, 82 N. J. Eq. 404, 89 Atl. 292.

<sup>37.</sup> *Logan v. McKinley-Lanning Loan & Tr. Co.*, 70 Neb. 399, 97 N. W. 642; *Warner v. Miner*, 41 Wash. 98, 82 Pac. 1033.

<sup>38.</sup> *Logan v. McKinley-Lanning Loan & Tr. Co.*, 70 Neb. 399, 97 N. W. 642.

<sup>39.</sup> *Trumbull v. Bruce*, 64 Wash. 644, 117 Pac. 472.

[a] "A tax foreclosure is a special proceeding, under a special statute,

for a special purpose; and when it fails, the court cannot retain jurisdiction to grant general relief or establish an equitable lien for taxes paid." *Trumbull v. Bruce*, 64 Wash. 644, 117 Pac. 472.

<sup>40.</sup> See the statutes.

[a] "Accurately speaking, there is no such thing as an action at law or in equity to redeem from a tax sale. Though an action may be required after payment or tender to recover possession or quiet title, the issue is whether a redemption has taken place, not whether the party is entitled to redeem. In absence of agreement, the right of redemption under discussion does not exist except as prescribed by statute and can be exercised only as the statute prescribes." *Gibson v. Pekarek*, 27 S. D. 423, 131 Pac. 728.

<sup>41.</sup> *Barker v. Mackay*, 168 Mass. 76, 46 N. E. 412. See also preceding note.

<sup>42.</sup> *Colo.*—See *Eliason v. White*, 23 Colo. App. 213, 128 Pac. 887. *Mich.* *Wilson v. Sauble*, 181 Mich. 406, 148 N. W. 165. *Neb.*—*Bundy v. Wills*, 88 Neb. 554, 130 N. W. 273, Ann. Cas. 1912B, 900; *Douglas v. Hayes County*, 82 Neb. 577, 118 N. W. 114. *N. J.* *Culver v. Watson*, 28 N. J. Eq. 548.

<sup>43.</sup> *Nisbett v. Milner*, 159 Mich. 337, 124 N. W. 22; *Ayres v. Dozier* (Tenn.), 52 S. W. 662, where the tax purchaser misled the owner as to the time within which a statutory redemption could be made.



tax sale,<sup>44</sup> or where the right is expressly conferred by statute,<sup>45</sup> a suit in equity to redeem from the tax sale may be maintained,<sup>46</sup> or, in some states a writ of entry may be brought.<sup>47</sup>

**2. Parties.**—The action to redeem should be brought by the owner of the property, or of an interest in it which under the statute gives him a right to redeem,<sup>48</sup> against the purchaser at the tax sale,<sup>49</sup> and parties claiming title of record under such purchaser.<sup>50</sup>

**3. Pleadings.**—The complaint should contain the allegations similar to those in other classes of actions for the redemption of land from judicial sales.<sup>51</sup> Ownership by plaintiff of an interest in the land entitling him to make a redemption must be alleged,<sup>52</sup> and facts showing that the action is commenced within the time permitted by law, must be set forth.<sup>53</sup>

**4. Judgment.**—A decree for the plaintiff should declare the right to redeem and fix the time within which a redemption may be made, and the amount to be paid by the redemptioner,<sup>54</sup> and afford such

44. *Davidson v. Stafford*, 210 Mass. 145, 96 N. E. 63, failure to register the purchase.

45. *Glazier v. Everett*, 224 Mass. 184, 112 N. E. 1009; *Union Trust Co. v. Reed*, 213 Mass. 199, 99 N. E. 1093; *Barker v. Mackay*, 168 Mass. 76, 46 N. E. 412 (jurisdiction exists in the supreme court but not in the superior court); *Culver v. Watson*, 28 N. J. Eq. 548.

[a] **After execution of a deed to the purchaser**, an action to redeem (1) is authorized in some states (See the statutes. *Compare Kahn v. Thorpe*, 43 Wash. 463, 86 Pac. 855), especially (2) in favor of persons whose interest in lands was sold during their minority (*Ristine v. Johnson*, 143 Ind. 44, 41 N. E. 538, 42 N. E. 310; *Macy v. Lindley*, 54 Ind. App. 157, 99 N. E. 790; *Witt v. Mewhirter*, 57 Iowa 545, 10 N. W. 890), or (3) other disability. *Hawley v. Griffin*, 121 Iowa 667, 92 N. W. 113, 97 N. W. 86.

46. See *infra*, this note.

[a] **Possession of the property** is not essential to maintenance of the action. *Glos v. Evanston & North Cook County Bldg. & L. Assn.*, 186 Ill. 586, 58 N. E. 374.

[b] **Repayment of all taxes upon the property** paid by the purchaser including those levied and assessed subsequent to the purchase, will be required as a condition to relief in equity. *Smith v. Specht*, 58 N. J. Eq. 47, 42 Atl. 599. And see *Waterman v. Irby*, 76 Ark. 551, 89 S. W. 844; *Ayres v. Dozier* (Tenn.), 52 S. W. 662.

47. *Barker v. Mackay*, 175 Mass. 485, 56 N. E. 614.

48. **Ark.**—*Hodges v. Harkleroad*, 74 Ark. 343, 85 S. W. 779, holder of a remainder interest, vested or contingent. **Ia.**—*White v. Smith*, 68 Iowa 313, 25 N. W. 115, 27 N. W. 250. **N. J.** *Culver v. Watson*, 28 N. J. Eq. 548.

*Compare* 19 STANDARD PROC. 1081.

49. *Memphis Land & Timber Co. v. Clark* (Ark.), 11 S. W. 765; *O'Day v. Bowker*, 143 Mass. 59, 9 N. E. 16.

[a] **The action is regarded as one in rem against the land** in some states. *Plumb v. Robinson*, 13 Ohio St. 298.

50. *Van Gorder v. Hanna*, 72 Iowa 572, 34 N. W. 332, the assignee of a mortgage executed by the tax purchaser, whose assignment is not of record, need not be joined.

51. See generally 19 STANDARD PROC. 1085; 16 STANDARD PROC. 833.

52. *Pearsons v. American Inv. Co.*, 83 Iowa 358, 49 N. W. 853.

[a] **Where plaintiffs claim to be the sole heirs of the deceased owner of the land**, it need not be alleged that the deceased owner died intestate. *Allen v. Gates*, 145 Ga. 652, 89 S. E. 821.

53. *Langley v. Jones*, 43 N. J. Eq. 404, 4 Atl. 308.

54. *Waterman v. Irby*, 76 Ark. 551, 89 S. W. 844 (a sale of the premises in aid of redemption should not be ordered); *Brady v. McGinley*, 94 Neb. 761, 144 N. W. 780.

[a] **The time within which a redemption may be made**, (1) may be changed, although an appeal has been taken from the judgment, since the

other relief as the circumstances may require.<sup>55</sup>

**VII. RECOVERY OF TAXES.** — **A. IN GENERAL.** — When taxes illegally assessed have been involuntarily paid, under protest, an action for money had and received may be maintained for their recovery,<sup>56</sup> or any special statutory remedy which exists may be employed.<sup>57</sup> If, however, the taxpayer could have obtained relief by employing a remedy afforded him in the ordinary course of the tax proceedings, he cannot ordinarily maintain the action,<sup>58</sup> as where the tax was merely excessive;<sup>59</sup> this rule, however, is subject to some

court retains jurisdiction over matters merely affecting the enforcement of its judgment. *Swan v. Harvey*, 123 Iowa 192, 98 N. W. 641. (2) The time within which a redemption may be made is fixed by statute in some states. *Waterman v. Irby*, 76 Ark. 551, 89 S. W. 844.

55. See *infra*, this note.

[a] Rents and profits received by the purchaser while in possession of the land, will be charged against him. *Hintrager v. McElhinny*, 112 Iowa 325, 82 N. W. 1008, 83 N. W. 1063.

[b] Credits to which the purchaser is entitled will be allowed. *Hintrager v. McElhinny*, 112 Iowa 325, 82 N. W. 1008, 83 N. W. 1063.

[c] Execution of a deed by the purchaser may be ordered. *Simonds v. Towne*, 4 Gray (Mass.) 603; *Culver v. Watson*, 28 N. J. Eq. 548.

56. Conn.—*Bailey v. Goshen*, 32 Conn. 546, 87 Am. Dec. 191. Ill.—*Chicago v. Klinkert*, 94 Ill. App. 524. Ind.—*Hennel v. Vanderburgh*, 132 Ind. 32, 31 N. E. 462. Mass.—*Dow v. Inhabitants of First Parish*, 5 Metc. 73. Mich.—*Michigan Sanitarium & Ben. Assn. v. Battle Creek*, 138 Mich. 676, 101 N. W. 855. Nev.—*Wells, Fargo & Co. v. Dayton*, 11 Nev. 161. S. C.—*Fourth Nat. Bank v. Greenville*, 91 S. C. 81, 74 S. E. 126. Utah.—*Neilson v. San Pete County*, 40 Utah 560, 123 Pac. 334. Wis.—*Montreal Min. Co. v. State*, 155 Wis. 245, 144 N. W. 195, recovery of income tax.

[a] A suit in equity for the recovery of the taxes paid cannot be maintained. Ala.—*Bower v. American Lumb. & Export Co.*, 195 Ala. 572, 71 So. 100. Miss.—*Louisville v. Armstrong*, 113 Miss. 385, 74 So. 285. Pa.—*Shenango Furnace Co. v. Fairfield Township*, 229 Pa. 357, 78 Atl. 937, a prayer for an accounting does not confer jurisdiction where such relief would be merely incidental.

[b] The amount in controversy recovery of which is sought, will determine the court which will have jurisdiction of the action. *Burbank v. Beaufort*, 92 N. C. 257. See generally the title "Jurisdiction."

57. *Western Ranches v. Custer*, 28 Mont. 278, 72 Pac. 659; *Adams v. Monroe*, 154 N. Y. 619, 49 N. E. 144.

58. *Clarke v. Board of Comrs.*, 66 Minn. 304, 69 N. W. 25.

[a] Application to a board of equalization for an abatement of the tax, affords an adequate remedy. See *Board of Comrs. v. Tincer Motor Car Co.*, 56 Ind. App. 49, 104 N. E. 876; *Detroit River Sav. Bank v. Detroit*, 114 Mich. 81, 72 N. W. 14. Compare *Puget Realty Co. v. King County*, 50 Wash. 349, 97 Pac. 226.

[b] Judicial proceedings to review an assessment by appeal or certiorari, are also adequate remedies. *United States Trust Co. v. New York*, 144 N. Y. 483, 39 N. E. 383.

[c] Mandamus proceedings to correct errors in the assessment (1) constitute a sufficient remedy. *Winter v. Montgomery*, 65 Ala. 403. In some states (2) a writ of mandamus will issue to require an auditor to issue a warrant for the refund of taxes paid under a void statute. *Smith v. Tennessee Coal, I. & R. Co.*, 192 Ala. 129, 68 So. 865. And see *Everly v. Jasper*, 72 Iowa 149, 33 N. W. 609; *Eureka Pipe Line Co. v. Riggs*, 75 W. Va. 353, 83 S. E. 1020, Ann. Cas. 1918A, 995. *Contra, Couty v. Bosworth*, 160 Ky. 312, 169 S. W. 742.

[d] An action to vacate or set aside an assessment should be employed in some states. *Sears v. Inhabitants of Nahant*, 221 Mass. 435, 109 N. E. 373; *Norcross v. Milford*, 150 Mass. 237, 22 N. E. 892.

59. *Stanley v. Bd. of Supervisors*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. ed. 1000; *Nevada-California Power Co.*

exceptions.<sup>60</sup> The action cannot be maintained after the taxes collected have been disbursed in the regular course of business,<sup>61</sup> or paid over to other political subdivisions of the government.<sup>62</sup>

A demand for repayment of the taxes must first be made in some states,<sup>63</sup> but elsewhere this is not necessary.<sup>64</sup>

**B. PARTIES.—Plaintiffs.**—The action may be maintained by any person entitled to restitution of the taxes paid,<sup>65</sup> even though the recovery would be for the benefit of another.<sup>66</sup> Several taxpayers cannot join as parties and seek the recovery in one action of the taxes paid by each.<sup>67</sup> A taxpayer may, in some states, institute the action for himself and all other taxpayers similarly interested.<sup>68</sup>

**Defendants.**—The tax collector to whom the money was paid is the proper party defendant;<sup>69</sup> but after he has disbursed the tax money in the due course of his official duties the action cannot be maintained

*v. Hamilton*, 235 Fed. 317. But see *infra*, VII, D.

60. *Horlick v. Mt. Pleasant*, 161 Wis. 366, 154 N. W. 375, recovery of illegal income tax not dependent upon appeal to state tax commission.

[a] Where the assessment is void and not merely irregular or voidable, the action may be maintained without applying to taxing bodies for relief. *Board of Comrs. v. Lattas Creek Coal Co.* (Ind. App.), 96 N. E. 633; *Second Nat. Bank v. New York*, 213 N. Y. 457, 107 N. E. 1039.

[b] When the tax was on property not legally subject to taxation, it may be recovered although no resort was had to the taxing authorities. *Brenner v. Los Angeles*, 160 Cal. 72, 116 Pac. 397, *overruling Henne v. Los Angeles*, 129 Cal. 297, 61 Pac. 1081.

61. *Hawkins v. Nicholas County*, 28 Ky. L. Rep. 479, 89 S. W. 484. *Compare Loudon v. East Saginaw*, 41 Mich. 18, 2 N. W. 182.

62. *Cleveland, C. C. & St. L. R. Co. v. Board of Comrs.*, 19 Ind. App. 58, 49 N. E. 51; *Meacham v. Newport*, 70 Vt. 264, 40 Atl. 729.

63. **Ia.**—*Bibbins v. Clark*, 90 Iowa 230, 57 N. W. 884, 59 N. W. 290, 29 L. R. A. 278. **N. C.**—*Richmond & D. R. Co. v. Reidsville*, 109 N. C. 494, 13 S. E. 865. **Wyo.**—*Carton v. Board of Comrs.*, 10 Wyo. 416, 69 Pac. 1013.

[a] A demand which specifies the taxes sought to be recovered, states the ground upon which recovery is sought and makes a direct request for their return, is sufficient. *Custer v. Chicago, B. & Q. R. Co.*, 62 Neb. 657, 87 N. W. 341.

[b] **Non-action by the municipality upon a demand for repayment**, for an unreasonable length of time is equivalent to a rejection and a writ of mandate to compel action need not be sought. *Otis v. San Francisco*, 170 Cal. 98, 148 Pac. 933.

64. **U. S.**—*Western Ranches v. Custer*, 89 Fed. 577. **Colo.**—*Board of Comrs. v. Cutter*, 3 Colo. 349. **Ind.**—*Newsom v. Bartholomew*, 103 Ind. 526, 3 N. E. 163. **Kan.**—*Greenabaum v. King*, 4 Kan. 284, 96 Am. Dec. 172. **N. Y.** *People ex rel. Am. Exch. N. Bk. v. Purdy*, 199 N. Y. 51, 92 N. E. 232. **Utah.**—*Centennial Eureka Min. Co. v. Juab*, 22 Utah 395, 62 Pac. 1024. But see *Neilson v. San Pete County*, 40 Utah 560, 123 Pac. 334.

65. *Schultze v. Mayor*, 103 N. Y. 307, 8 N. E. 528.

66. *Van Antwerp v. State*, 170 App. Div. 98, 155 N. Y. Supp. 694, *affirmed*, 218 N. Y. 422, 113 N. E. 497, tax paid by broker and charged to his customers; action by the broker proper. See 20 STANDARD PROC. 896, 899.

[a] A bank paying taxes on stock of its stockholders may maintain the action. *People v. Purdy*, 196 N. Y. 270, 89 N. E. 838; *State Nat. Bank v. Memphis*, 116 Tenn. 641, 94 S. W. 606, 7 L. R. A. (N. S.) 663.

67. *Louisville v. Armstrong*, 113 Miss. 385, 74 So. 285. See 20 STANDARD PROC. 931, and the title "Joinder of Actions."

68. *Shoemaker v. Grant*, 36 Ind. 175; *Whaley v. Com.*, 110 Ky. 154, 61 S. W. 35.

69. *Fiscal Court, Owen County v. Cox Co.*, 132 Ky. 738, 117 S. W. 296,



against him and the public corporation for whose benefit the taxes were levied and collected is the proper defendant.<sup>70</sup>

C. PLEADINGS.<sup>71</sup>—The complaint should clearly allege the payment of the tax,<sup>72</sup> that payment was involuntary and the result of coercion or duress,<sup>73</sup> the particular facts which rendered the tax illegal,<sup>74</sup> willingness to pay that portion of the tax, if any, which may be valid,<sup>75</sup> and the making of a proper demand for repayment before the institution of the action, where this is a condition precedent to the right of recovery.<sup>76</sup> Where the action is against the municipality, there must be alleged that it received from the tax collector the money illegally collected.<sup>77</sup>

21 L. R. A. (N. S.) 83. *Compare Powers v. Rockwell*, 171 Mich. 655, 137 N. W. 512, where the action was statutory and held to lie against the municipality only.

[a] The town treasurer is not a proper party defendant where the money still remains in the hands of the tax collector. *Lindsay v. Allen*, 19 B. L. 721, 36 Atl. 840.

70. *Kelley v. Rhoads*, 7 Wyo. 237, 51 Pac. 593, 75 Am. St. Rep. 904, 39 L. R. A. 594. *Compare Bank of Tustin v. Township of Burdell*, 184 Mich. 131, 150 N. W. 367; *First Nat. Bank v. Watkins*, 21 Mich. 483.

[a] After disbursement of the taxes collected, the tax collector is not personally liable for the moneys collected. *Hartford Fire Ins. Co. v. Jordan*, 168 Cal. 270, 142 Pac. 839; *Craig v. Boone*, 146 Cal. 718, 81 Pac. 22; *State ex rel. Am. Mfg. Co. v. Reynolds*, 270 Mo. 589, 194 S. W. 878.

[b] A county cannot be sued in some states. *Fiscal Ct. Owen County v. Cox Co.*, 132 Ky. 738, 117 S. W. 296, 21 L. R. A. (N. S.) 83. *Contra, Kelley v. Rhoads*, 7 Wyo. 237, 51 Pac. 593, 75 Am. St. Rep. 904, 39 L. R. A. 594.

[c] **State Officers.**—(1) An action against a state treasurer to recover taxes illegally collected is not, in some states, treated as an action against the state. *Scottish Union & Nat. Ins. Co. v. Herriott*, 109 Iowa 606, 80 N. W. 665, 77 Am. St. Rep. 548. *Compare Smith v. Rackliffe*, 87 Fed. 964, 31 C. C. A. 328. And see the title "States and Territories." (2) In some states, statutes expressly authorize the maintenance of the action. See the statutes; and see *Smith v. Rackliffe*, 87 Fed. 964, 31 C. C. A. 328, construing the California statute. (3) In other states, relief can only be obtained by

application to the legislature. See *Shoemaker v. Grant*, 36 Ind. 175; *State ex rel. Am. Mfg. Co. v. Reynolds*, 270 Mo. 589, 194 S. W. 878.

71. Form of complaint, see 9 STAND-ARD PROC. 1196.

72. *Centennial Eureka Min. Co. v. Juab*, 22 Utah 395, 62 Pac. 1024.

73. *Ala.*—*Singer Sewing Mach. Co. v. Teasley*, 73 So. 969. *Mo.*—*State ex rel. Am. Mfg. Co. v. Reynolds*, 270 Mo. 589, 194 S. W. 878; *American Mfg. Co. v. Alt* (Mo. App.), 184 S. W. 1167. *Wash.*—*Wyckoff v. King*, 18 Wash. 256, 51 Pac. 379.

[a] An allegation that plaintiff was "compelled" to pay the tax is insufficient. *Singer Sewing Mach. Co. v. Teasley* (Ala.), 73 So. 969.

74. *Ala.*—*Singer Sewing Mach. Co. v. Teasley*, 73 So. 969. *Cal.*—*Bakersfield & Fresno Oil Co. v. Kern*, 144 Cal. 148, 77 Pac. 892. *Ind.*—*Riggs v. Board of Comrs.*, 181 Ind. 172, 103 N. E. 1075. *N. C.*—*Pocomoke Guano Co. v. New Bern*, 172 N. C. 258, 90 S. E. 202. *Ohio.*—*Pelton v. Bemis*, 44 Ohio St. 51, 4 N. E. 714. *Okla.*—*Choctaw Lbr. Co. v. Coleman*, 56 Okla. 377, 156 Pac. 222.

[a] Fraud if relied upon, must be pleaded specifically. *Kern Valley Water Co. v. Kern*, 137 Cal. 511, 70 Pac. 476.

75. *Cincinnati, R. & Ft. W. R. Co. v. Wayne Township*, 55 Ind. App. 533, 102 N. E. 865.

76. *Richmond & D. R. Co. v. Reidsville*, 109 N. C. 494, 13 S. E. 865. See *Otis v. City & County of San Francisco*, 170 Cal. 98, 148 Pac. 933, complaint shows non-action of municipality upon a demand, for an unreasonable length of time, is sufficient.

77. *Burbank v. Beaufort*, 92 N. C. 257.

The answer should place in issue those matters relied upon in defense.<sup>78</sup>

D. RELIEF.—The recovery to be allowed plaintiff is limited to the amount which was illegally or unjustly collected from him.<sup>79</sup> Interest upon the amount recovered from the date of payment or demand may also be allowed.<sup>80</sup>

**VIII. TAX DEEDS AND TITLES.**—A. INJUNCTION AGAINST ISSUANCE.—The issuance of a tax deed will be enjoined where the deed would create a cloud upon the title,<sup>81</sup> and the tax proceedings are illegal and the deed if executed would be invalid.<sup>82</sup> Any person having an interest in the property may maintain the action.<sup>83</sup> The purchaser at the tax sale and the officer who is to execute the deed should be joined as defendants.<sup>84</sup> A tender of the amount which may be legally due is a condition precedent to the obtaining of

78. *Clark v. Greene*, 23 R. I. 118, 52 Atl. 889; *Murdock v. Murdock*, 38 Utah 373, 113 Pac. 330.

79. Ill.—*Farmers' & Merchants' Bank v. Vandalia*, 57 Ill. App. 681. Ind.—*Indianapolis v. Morris*, 25 Ind. App. 409, 58 N. E. 510. Mich.—*Fletcher Paper Co. v. Alpena*, 160 Mich. 462, 125 N. W. 405. Vt.—*Spear v. Braintree*, 24 Vt. 414.

[a] **Basis of Rule.**—"This action for money had and received is an equitable action, in which a plaintiff can only recover so much money as he can show the defendant *ex aequo bono* ought not to retain." *Farmers' & Merchants' Bank v. Vandalia*, 57 Ill. App. 681, 687.

80. N. H.—*Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 336, 47 Atl. 74. N. Y.—*People ex rel. Am. Exch. N. Bk. v. Purdy*, 199 N. Y. 51, 92 N. E. 232; *People ex rel. Eckerson v. Board of Education*, 126 App. Div. 414, 110 N. Y. Supp. 769. Utah.—*Neilson v. San Pete County*, 40 Utah 560, 123 Pac. 334.

*Compare Savings & Loan Soc. v. San Francisco*, 131 Cal. 356, 63 Pac. 665.

81. Cal.—*San Diego Realty Co. v. Cornell*, 150 Cal. 637, 89 Pac. 603. D. C.—*Luchs v. Christman*, 42 App. Cas. 326. N. H.—*Brooks v. Howland*, 58 N. H. 98. N. J.—*Morris Canal & Banking Co. v. Jersey City*, 12 N. J. Eq. 227. S. D.—*Brink v. Dann*, 33 S. D. 81, 144 N. W. 734. Wis.—*Siegel v. Outagamie*, 26 Wis. 70.

[a] If the defect in the tax proceedings appears on their face, no cloud would be created by the tax

deed. *Howell v. Buffalo*, 2 Abb. Dec. (N. Y.) 412.

82. Ark.—*Hare v. Carnall*, 39 Ark. 196. Cal.—*Axtell v. Gerlach*, 67 Cal. 488, 8 Pac. 34. Colo.—*See Bottom v. Young*, 52 Colo. 533, 125 Pac. 500.

[a] An assessment which is so inequitable and unjust as to amount to fraud will be ground for relief. *Brink v. Dann*, 33 S. D. 81, 144 N. W. 734; *Anderson v. Douglas*, 98 Wis. 393, 74 N. W. 109.

[b] Mere irregularities in the tax proceedings working no injustice, afford no ground for an injunction. *Kan. Challiss v. Atchison*, 15 Kan. 49. *Neb. Hallo v. Helmer*, 12 Neb. 87, 10 N. W. 568. N. D.—*Powers v. First Nat. Bank of Bottineau*, 15 N. D. 466, 109 N. W. 361. Wis.—*Warden v. Fon du Lac*, 14 Wis. 618.

[c] Defects and irregularities in the tax sale may be ground for an injunction. *Glos v. Swigart*, 156 Ill. 229, 41 N. E. 42; *Gage v. Graham*, 57 Ill. 144, fraudulent combination among bidders.

[d] Fraudulent conduct by the purchaser at the tax sale, may be ground for an injunction. *Holt v. King*, 54 W. Va. 441, 47 S. E. 362, misleading owner as to his right of redemption.

83. *Johnson v. Brett*, 64 Iowa 162, 19 N. W. 895; *Horn v. Garry*, 49 Wis. 464, 5 N. W. 897, the grantor who has bound himself to pay and cancel tax certificates.

[a] The mortgagee has sufficient interest to maintain the suit. *Horn v. Garry*, 49 Wis. 464, 5 N. W. 897.

84. *Siegel v. Outagamie*, 26 Wis. 70.

relief,<sup>86</sup> unless the amount is uncertain.<sup>86</sup> If an injunction is refused, the court may properly fix a reasonable time within which the owner may redeem from the tax sale.<sup>87</sup>

B. MANDAMUS TO COMPEL ISSUANCE.—Mandamus proceedings may be prosecuted to compel the issuance of a tax deed, where the right to a deed is clear.<sup>88</sup>

C. RECOVERY OF POSSESSION OF LAND.—1. By Purchaser at Tax Sale.—a. *In General*.—If peaceable possession of the premises is not given to the purchaser at a tax sale, when he becomes entitled thereto,<sup>89</sup> possession may be recovered in an action of ejectment,<sup>90</sup> or by some other possessory remedy,<sup>91</sup> if the action is instituted within

85. Cal.—*Grant v. Cornell*, 147 Cal. 565, 82 Pac. 193, 109 Am. St. Rep. 173. Colo.—*Bottom v. Young*, 52 Colo. 533, 125 Pac. 500. Ill.—*Moore v. Wayman*, 107 Ill. 192. Ind.—*Logansport v. Case*, 124 Ind. 254, 24 N. E. 88.

86. *Brink v. Dann*, 33 S. D. 81, 144 N. W. 734; *Anderson v. Douglas*, 98 Wis. 393, 74 N. W. 109.

87. *Brink v. Dann*, 33 S. D. 81, 144 N. W. 734.

88. Ala.—*Purifoy v. Lamar*, 112 Ala. 123, 20 So. 975. Fla.—*State v. Bradshaw*, 39 Fla. 137, 22 So. 296. S. C.—*State v. Lancaster*, 46 S. C. 282, 24 S. E. 198. Wash.—*State v. Cranney*, 30 Wash. 594, 71 Pac. 50.

[a] If the right to a deed is not clearly established the writ will not issue. *Griner v. State*, 183 Ind. 175, 108 N. E. 514.

[b] If notice to redeem has not been given by the tax purchaser, as required by statute, the writ will not issue. *State v. Gayhart*, 34 Neb. 192, 51 N. W. 746.

[c] A corrected deed (1) may be required to be executed where the original deed was defective, owing to the error or mistake of the officer executing it. Ia.—*McCready v. Sexton & Son*, 29 Iowa 356, 4 Am. Rep. 214. Kan.—*Bryson v. Spaulding*, 20 Kan. 427; *Clippinger v. Tuller*, 10 Kan. 377. Wis.—*State v. Winn*, 19 Wis. 304, 88 Am. Dec. 689. (2) But if the mistake was due to the acts of the purchaser execution of a corrected deed will not be required. *Klokke v. Stanley*, 109 Ill. 192.

[d] The owner of the land is properly joined with the county treasurer, whose duty it is to execute the deed, as a defendant. *State v. Cranney*, 30 Wash. 594, 71 Pac. 50.

[e] The right to have the deed executed may be stated in general terms; the particular facts need not be set out. *Kidder v. Morse*, 26 Vt. 74.

[f] Where the validity of the tax proceedings is being litigated in another action, a writ of mandate will not issue. *State v. Patterson*, 11 Neb. 266, 9 N. W. 82.

Procedure in mandamus generally, see the title "Mandamus."

89. *Steltz v. Morgan*, 16 Idaho 368, 101 Pac. 1057, 28 L. R. A. (N. S.) 398.

[a] Forcible taking possession of the premises over the resistance of the former owner, is unauthorized. *Malet v. Haney*, 98 Kan. 20, 157 Pac. 386.

[b] Voluntary delivery of possession is not essential nor does it add anything to a valid tax title. *Martin v. Langenstein*, 43 La. Ann. 789, 9 So. 507.

90. *Duff v. Hall*, 158 Mich. 513, 123 N. W. 11; *Abbott v. Coates*, 62 Neb. 247, 86 N. W. 1058. See generally the title "Ejectment."

[a] The plaintiff must recover (1) upon the strength of his tax title (*McCoy v. Michew*, 7 Watts & S. [Pa.] 386), even though (2) the defendant's title is also a tax title. *Taylor v. Taylor*, 228 Pa. 424, 77 Atl. 663.

[b] Until the tax deed is properly recorded ejectment cannot be maintained. *Hewitt v. Week*, 59 Wis. 444, 18 N. W. 417.

91. *Com. v. Three Forks Coal Co.*, 95 Ky. 273, 25 S. W. 3, a statutory action.

[a] The facts showing a compliance with the statutory requirements essential to the passing of a valid title to the plaintiff, must be set forth. *McKee v. Walker*, 11 Ky. Op. 111.



the time allowed by law.<sup>92</sup>

b. *Summary Remedies*.—By statute, in some states, summary remedies for the recovery of possession of premises acquired at a tax sale may be employed;<sup>93</sup> in the absence of such a statute, summary proceedings cannot be employed.<sup>94</sup>

2. *By Former Owner*.—Ejectment may be maintained by the former owner of the premises against the purchaser at the tax sale in possession, to recover possession and to determine the validity of the tax proceedings.<sup>95</sup>

D. *CONFIRMATION OF TAX TITLES*.—Both under general principles of equitable jurisdiction,<sup>96</sup> and by virtue of express statutory authority, in some states,<sup>97</sup> the purchaser at a tax sale<sup>98</sup> may invoke the aid of

92. *Frontron v. Bentley*, 97 Kan. 403, 155 Pac. 933.

93. *La.*—See *Fischel v. Mercier*, 32 La. Ann. 704. *N. Y.*—*In re Cary*, 37 App. Div. 631, 56 N. Y. Supp. 6. *S. C.* *State v. Morrison*, 44 S. C. 470, 22 S. E. 605, by ordering sheriff to place purchaser in possession.

[a] *A writ of assistance* may be employed. *Cal.*—*People v. Grant*, 45 Cal. 97. *Mich.*—*Chiodo v. Williams*, 180 Mich. 367, 147 N. W. 492 (homestead lands); *Beck v. Finn*, 122 Mich. 21, 80 N. W. 785. *N. J.*—*Belmar v. Kennedy*, 53 N. J. Eq. 466, 32 Atl. 1058.

[b] *A writ of possession* is issued in some states. *Pate v. Burnside*, 129 La. 104, 55 So. 729; *Bloomstein v. Brien*, 3 Tenn. Ch. 55, the writ must be issued within one year.

[c] *Forcible entry and detainer proceedings* may be maintained in some jurisdictions. *Leavenworth v. Crittenden*, 62 Miss. 573; *Abbott v. Coates*, 62 Neb. 247, 86 N. W. 1058. *Contra, Kan.*—*Lewis v. Wall*, 84 Kan. 662, 114 Pac. 856, against one in possession under contract to purchase. *Mich.* *Duff v. Hall*, 158 Mich. 513, 123 N. W. 11. *Ohio.*—*Kelley v. Hunter*, 12 Ohio 216.

94. *Duff v. Hall*, 158 Mich. 513, 123 N. W. 11.

95. *Ark.*—*Harvey v. Douglass*, 73 Ark. 221, 83 S. W. 946. *Mich.*—*McRae v. Barber*, 171 Mich. 111, 136 N. W. 1118. *N. Y.*—*Meehan v. Dobson*, 131 N. Y. Supp. 37. *Wis.*—*Wisconsin River Land Co. v. Paine Lumb Co.*, 130 Wis. 393, 110 N. W. 220.

[a] *The recovery must be based on the strength of plaintiff's title, not on the weakness of the defendant's title.* *Meehan v. Dobson*, 131 N. Y. Supp. 37.

[b] *Actual possession* of the premises must ordinarily exist in order that the action may be maintained. *Kreamer v. Voneida*, 213 Pa. 74, 62 Atl. 518; *Lombard v. Culbertsen*, 59 Wis. 433, 18 N. W. 399.

[c] But where the lands are wild or unoccupied, the recording of the tax deed works a constructive possession, under which ejectment may be maintained, in some states. *Mich.*—*Tillotson v. Webber*, 96 Mich. 144, 55 N. W. 837; *Anderson v. Courtright*, 47 Mich. 161, 10 N. W. 183. *Mo.*—*Vastine v. Laclede Land & Imp. Co.*, 135 Mo. 145, 36 S. W. 374. *Wis.*—*Hewitt v. Butterfield*, 52 Wis. 384, 9 N. W. 15.

[d] *A statute requiring such actions to be brought within a specified time* must be pleaded, if relied upon. *Victor Land Co. v. Winters*, 59 Ore. 420, 116 Pac. 1070.

[e] *A mortgagee, claiming the right to redeem, is not entitled to intervene in the action brought by the mortgagor.* *Slade v. Rose*, 188 Fed. 749.

96. *Bardon v. Land & River Imp. Co.*, 157 U. S. 327, 15 Sup. Ct. 650, 39 L. ed. 719. And see *Wendell v. Whitaker*, 28 Kan. \*690.

97. See the statutes and *Tabor v. Cook*, 15 Mich. 322; *Brown v. Ford*, 112 Miss. 678, 73 So. 722.

[a] *Titles acquired by mesne conveyances through a tax title, cannot be confirmed under such statutes.* *Fitzmaurice v. Warren*, 134 La. 164, 63 So. 862.

98. *Bardon v. Land & River Imp. Co.*, 157 U. S. 327, 15 Sup. Ct. 650, 39 L. ed. 719.

[a] *A person having the equitable title under a tax deed, may maintain the action.* *Ingram v. Sherwood's Heirs*, 75 Ark. 176, 87 S. W. 435.

a court of equity to confirm and quiet his tax title,<sup>99</sup> or to prevent or remove the placing of a cloud upon it.<sup>1</sup> Plaintiff must be in possession of the premises in order to be entitled to maintain the action,<sup>2</sup> unless the land is wild and unoccupied.<sup>3</sup> The defendant is required in some states, to deposit in court, as a condition to his right to impeach the validity of the tax proceedings, the amount of the taxes and costs.<sup>4</sup> The judgment of confirmation does not operate to vest any new title in the plaintiff,<sup>5</sup> but is conclusive upon the owner of the property.<sup>6</sup> If the tax title is found to be invalid, the court may, under some statutes, establish the lien of the purchaser for the taxes and penalties he has paid, and order its foreclosure.<sup>7</sup>

**E. IMPEACHMENT OF TAX TITLES. — 1. In General.** — A tax title cannot be attacked collaterally,<sup>8</sup> but its validity may be directly ques-

[b] **The grantee of the purchaser** may also maintain the action. *Long v. Boast*, 153 Ala. 428, 44 So. 955.

**99. La.**—*Fitzmaurice v. Warren*, 134 La. 164, 63 So. 862. **Mich.**—*Heethuis v. Kerr*, 194 Mich. 689, 161 N. W. 910. **Miss.**—*Central Trust Co. v. Haynes*, 110 Miss. 119, 69 So. 663; *Peterson v. Kittredge*, 65 Miss. 33, 3 So. 65, 5 So. 824. **N. J.**—*White v. Cadmus*, 84 N. J. Eq. 86, 92 Atl. 940. **Wash.**—*Hanson v. Carr*, 66 Wash. 81, 118 Pac. 927.

See generally the title "Quieting Title."

[a] **A bill quia timet** or bill of peace, may be maintained. *Langdon v. Templeton*, 61 Vt. 119, 17 Atl. 839. And see *Belcher v. Mhoon*, 47 Miss. 613.

[b] **A bill to foreclose** the rights of the former owner is authorized in some jurisdictions. *Finney v. Ford*, 22 Wis. 173. Compare *supra*, V, C, 1.

[c] **Notice to the former owner of the time for and his right to redeem** must, in some states, be shown to have been given in accordance with the provisions of the statute. *Heethuis v. Kerr*, 194 Mich. 689, 161 N. W. 910.

[d] **Until the deed has issued to the tax purchaser** he cannot maintain the action. *Sharpe v. Dillman*, 77 Ind. 280; *Boardman v. Boozewinkel*, 121 Mich. 320, 80 N. W. 37.

[e] **If the time for redemption of an owner under disability** has not expired, the action cannot be maintained. *Figgins v. Figgins*, 53 Ind. App. 43, 101 N. E. 110.

[f] **The invalidity of the tax title** can be urged in defense even though the defendant has no direct interest in the property since the plaintiff is en-

titled to recover only upon the strength of his own title. *Parker v. Vaughn*, 85 Kan. 324, 85 Pac. 882.

[g] **A curator ad hoc** is appointed in some states to represent a non-resident or unknown owner. *Folger v. St. Paul*, 130 La. 1082, 58 So. 890.

[h] **Devisees of the deceased owner of the property**, are necessary defendants. *Vincent v. Evans*, 165 Mich. 695, 127 N. W. 760.

[i] **The Petition Need Not Be Verified.**—*Hamburger v. Purcell*, 139 La. 456, 71 So. 765.

**Right to jury trial**, see 16 STANDARD PROC. 891, 892, note 2 [a].

1. *Rogers v. Nichols*, 186 Mass. 440, 71 N. E. 950.

2. *Goodman v. Nester*, 64 Mich. 662, 31 N. W. 575. But see *Tabor v. Cook*, 15 Mich. 322.

[a] **In Kansas** the plaintiff must allege and prove actual possession or plead in detail the facts upon which his claim is based. *Parker v. Vaughn*, 85 Kan. 324, 85 Pac. 882.

3. *St. Louis Refrigerator & W. G. Co. v. Thornton*, 74 Ark. 383, 86 S. W. 852.

4. See the statutes and *Carter v. Hadley*, 59 Miss. 130; *Vicker v. Byrne*, 155 Wis. 281, 143 N. W. 186.

5. *Roussel v. Railways Realty Co.*, 132 La. 379, 61 So. 409, 833, the judgment is in personam.

6. *Hamburger v. Purcell*, 139 La. 456, 71 So. 765.

7. *Bliss v. Gallagher*, 60 Ind. App. 454, 109 N. E. 215. And see *infra*, VIII, F, 2.

8. *Hoffman v. Flint Land Co.*, 144 Mich. 564, 108 N. W. 356; *White v. Cadmus*, 84 N. J. Eq. 86, 92 Atl. 940;

tioned in various classes of actions.<sup>9</sup> Only a person having an interest in the property at the time of its sale for taxes, or one claiming through such a person, will be allowed to attack the validity of the tax deed,<sup>10</sup> ownership of the fee title is not, however, essential.<sup>11</sup>

The action must be instituted within the time limited by the par-

Walton v. American Baptist Pub. Soc., 78 N. J. Eq. 263, 79 Atl. 435. See 15 STANDARD PROC. 409.

Collateral attack generally, see 15 STANDARD PROC. 377, et seq.

9. See *infra*, this note.

[a] In a statutory action to determine adverse claims a tax title may be impeached, in some states. Cal.—Campbell v. Canty, 162 Cal. 382, 123 Pac. 266. N. Y.—Schermmerhorn v. Albany Syndicate, 93 Misc. 597, 158 N. Y. Supp. 553 (the action is not one in equity to remove a cloud on title and may be maintained although the tax deed appears to be void on its face); Shepard v. Kusch, 89 Misc. 112, 151 N. Y. Supp. 436, 438, the remedy being purely statutory must be prosecuted within the time limited by the statute and pleading the bar of the statute is not necessary. S. D.—Decory v. Nelson, 38 S. D. 53, 159 N. W. 887; Berry v. Howard, 33 S. D. 447, 146 N. W. 577.

Actions to set aside tax deeds, see *infra*, VIII, E, 2.

Ejectment to recover possession of premises sold for taxes, see *supra*, VIII, C, 2.

Removal of clouds upon title caused by tax deeds, see *infra*, VIII, E, 3.

10. Kan.—Parker v. Vaughn, 85 Kan. 324, 85 Pac. 882; Ordway v. Cowles, 45 Kan. 447, 25 Pac. 862. N. Y.—Andrus v. Wheeler, 22 App. Div. 596, 48 N. Y. Supp. 118. W. Va.—Lawson v. Pocahontas etc. Coal Co., 73 W. Va. 296, 81 S. E. 583.

[a] Where the tax deed is illegal and void this rule has been held to be inapplicable. Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337.

[b] Title under a valid tax deed is sufficient. McQuitty v. Doudna, 101 Iowa 144, 70 N. W. 99.

[c] The holder of a tax deed void upon its face, under which possession has not been taken have no standing to attack a subsequent tax deed. Hetzer v. Burberry, 88 Kan. 805, 129 Pac. 1127.

[d] The holder of a quitclaim deed may maintain the action. Beck v.

State Finance Co., 192 Fed. 25, 112 C. C. A. 413.

[e] Prior and subsequent grantees of a portion of the premises need not be joined in the action. Lefever v. Thomas, 69 W. Va. 88, 70 S. E. 1095.

[f] Holder of a judgment lien upon the property has no right to attack a tax sale, unless expressly authorized by statute. Bank of University v. Athens Sav. Bank, 107 Ga. 246, 33 S. E. 34.

[g] By Statute.—St. Louis Refrigerator & W. G. Co. v. Thornton, 74 Ark. 383, 86 S. W. 852 (or title subsequently acquired from the state or United States); Hintrager v. Kiene, 62 Iowa 605, 15 N. W. 568, 17 N. W. 910.

11. See preceding note and *infra*, this note.

[a] A mortgagee has sufficient interest to maintain an action attacking a tax title. Ill.—Glos v. Evanston & North Cook County Bldg. & L. Assn., 186 Ill. 586, 58 N. E. 374. Ia.—Blumenthal v. Culver, 116 Iowa 326, 89 N. W. 1116. S. D.—Rhombert v. Bender, 28 S. D. 609, 134 N. W. 805. Wash. Sparks v. Standard Lumber Co., 92 Wash. 584, 159 Pac. 812.

[b] A vendor retaining a vendor's lien upon the premises, may attack the tax sale. Brown v. Lyon, 81 Miss. 438, 33 So. 284.

[c] A person holding an equitable interest in the land may maintain the action. Munson v. Marks, 52 Colo. 553, 124 Pac. 187; McManus v. Morgan, 38 Wash. 528, 80 Pac. 786, holder of certificate of purchase at mortgage foreclosure sale.

[d] A person claiming title to only a part of the land covered by the tax deed, may impeach it. Taylor v. Adams, 89 Kan. 716, 132 Pac. 1002; Gibson v. Boynton, 89 Kan. 712, 132 Pac. 1002.

[e] Any person who would be entitled to redeem from the tax sale has sufficient interest to maintain the action. South Chicago Brewing Co. v. Taylor, 205 Ill. 132, 68 N. E. 732.

[f] A person whose title has been sold for taxes cannot attack the validity of a subsequent tax sale. Quaker



ticular statute under which the action is brought.<sup>12</sup>

**2. Actions To Set Aside Tax Sales.**—An action in equity to set aside a tax sale and cancel the tax deed may be maintained,<sup>13</sup> where the taxes as levied and assessed were illegal,<sup>14</sup> where there has been fraud or irregularities in the tax sale,<sup>15</sup> or where the taxes were in fact paid prior to the sale.<sup>16</sup> In a few states provision is made for the cancellation of invalid tax deed by various administrative officers,<sup>17</sup> and this right may be enforced in a proper case, by mandamus.<sup>18</sup>

**3. Actions To Quiet Title or To Remove Clouds on Titles.**<sup>19</sup>—An action to quiet title or remove the cloud upon the title cast by an invalid tax deed,<sup>20</sup> or to establish the fact that a tax purchaser has lost his rights in the land,<sup>21</sup> or that plaintiff's title is superior<sup>22</sup> to the

Realty Co. *v.* Labasse, 131 La. 996, 60 So. 661, Ann. Cas. 1914A, 1073.

12. Board of Comrs. *v.* Concordia Land & Timber Co., 141 La. 247, 74 So. 921; Wengler *v.* McComb (Mo.), 188 S. W. 76.

[a] A tax deed void upon its face is not within the provisions of a statute fixing the time within which an action to set aside a tax deed may be maintained. Horsky *v.* McKennan, 53 Mont. 50, 162 Pac. 376.

[b] A statute limiting the time for maintenance of an action to recover land sold for taxes has no application to an action for the removal of a cloud upon the title. Munson *v.* Marks, 52 Colo. 553, 124 Pac. 187.

13. Ky.—Anderson *v.* Daugherty, 169 Ky. 308, 183 S. W. 545. Mo.—Zweigart *v.* Reed, 221 Mo. 33, 119 S. W. 960. S. C.—Pool *v.* Evans, 57 S. C. 78, 35 S. E. 436. Wash.—Loving *v.* Maltbie, 64 Wash. 336, 116 Pac. 1086.

[a] If an adequate remedy at law exists, a court of equity will not take jurisdiction. Roe *v.* Jersey City, 82 N. J. Eq. 641, 91 Atl. 740.

[b] The state is not (1) a necessary party to the action (Rowland *v.* Klepper [Tex. Civ. App.], 189 S. W. 1033), unless (2) it became the purchaser at the tax sale, in which event it is insufficient to make the tax collector alone, defendant. Quaker Realty Co. *v.* Labasse, 131 La. 996, 60 So. 661, Ann. Cas. 1914A, 1073.

14. Bismarck Water Supply Co. *v.* Burleigh County, 36 N. D. 191, 161 N. W. 1009.

15. Fix *v.* Gray, 26 Idaho 19, 140 Pac. 771; Logsdon *v.* Hodges, 84 Kan. 456, 114 Pac. 854.

16. Koen *v.* Martin, 110 La. 242, 34 So. 429; Burns *v.* Ford, 124 Mich. 274, 82 N. W. 885.

17. See the statutes.

18. People *ex rel.* Staples *v.* Sohmer, 150 App. Div. 8, 134 N. Y. Supp. 543.

19. See generally the title "Quiet-ing Title."

20. See *infra*, this note.

[a] A tax deed void upon its face does not (1) constitute a cloud upon the title. Allen *v.* Ozark Land Co., 55 Ark. 549, 18 S. W. 1042. (2) But where the action is based upon a statute giving the right to have adverse claims adjudicated, the fact that the tax deed is void upon its face is immaterial. Colo.—Empire Ranch & Cattle Co. *v.* Wilson, 24 Colo. App. 83, 131 Pac. 779. N. Y.—Sehermerhorn *v.* Albany Syndicate, 93 Misc. 597, 158 N. Y. Supp. 553. Ore.—Moores *v.* Clackamas, 40 Ore. 536, 67 Pac. 662. S. D.—Stokes *v.* Allen, 15 S. D. 421, 89 N. W. 1023.

[b] If a tax deed is prima facie evidence of title, by virtue of a statute, it constitutes a cloud upon the title although an examination of the tax proceedings would disclose their invalidity. Sanders *v.* Downs, 141 N. Y. 422, 36 N. E. 391; Lindgren *v.* Doughty, 32 R. I. 524, 80 Atl. 125.

21. Fontron *v.* Bentley, 97 Kan. 403, 155 Pac. 933 (loss of rights by failure to bring action for recovery of possession within two years); Cadman *v.* Smith, 15 Okla. 633, 85 Pac. 346.

22. Kuhn *v.* Glos, 257 Ill. 289, 100 N. E. 1003, where plaintiff claimed title by adverse possession.

[a] Defects in the tax title of defendant need not be pleaded where plaintiff claims a superior title. Jud-

tax title may be maintained<sup>23</sup> within the time limited by statute.<sup>24</sup> The action cannot be maintained unless the plaintiff is in possession of the premises,<sup>25</sup> though in some states a different rule prevails.<sup>26</sup>

**4. Tender.**—Under the statutes or practice in many states, a tax title cannot be impeached for irregularities and errors in the tax proceedings, unless a tender of the amount of the taxes which are a legal charge, upon the land or of the price paid by the purchaser at the tax sale is made,<sup>27</sup> or unless this amount is deposited in court before trial,<sup>28</sup> or the granting of relief will be made conditional upon the reimbursement of the tax purchaser of all sums legally paid by him.<sup>29</sup>

son *v.* Freutel, 266 Ill. 24, 107 N. E. 207; Kuhn *v.* Glos, 257 Ill. 289, 100 N. E. 1003.

**23. Colo.**—Munson *v.* Keim, 53 Colo. 576, 127 Pac. 1026; Empire Ranch & Cattle Co. *v.* Webster, 52 Colo. 207, 121 Pac. 171. **Fla.**—Hughey *v.* Winborne, 44 Fla. 601, 33 So. 249. **Ill.**—Towle *v.* Quante, 246 Ill. 568, 92 N. E. 967; Bell *v.* Johnson, 111 Ill. 374. **Ind.**—Michigan Mut. Life Ins. Co. *v.* Kroh, 102 Ind. 515, 2 N. E. 733. **Mass.**—White *v.* Gove, 183 Mass. 333, 67 N. E. 359. **Ore.**—Moore *v.* Clackamas, 40 Ore. 536, 67 Pac. 662. **S. D.**—Rhombert *v.* Bender, 28 S. D. 609, 134 N. W. 805.

[a] **The title or interest of plaintiff** in the premises must be alleged and proved. Judson *v.* Glos, 249 Ill. 82, 94 N. E. 112; Shelton *v.* Horrell, 232 Mo. 358, 134 S. W. 988, 137 S. W. 264.

[b] **If the defendant is a subsequent grantee of the tax purchaser,** notice by the defendant of irregularities in the proceedings must be alleged. Shelton *v.* Horrell, 232 Mo. 358, 134 S. W. 988, 137 S. W. 264.

[c] **The plaintiff must recover upon the strength of his own title** rather than upon the weakness of his adversary's title. Wilson *v.* Rogers, 97 Ark. 369, 134 S. W. 318.

[d] **The decree must recite sufficient facts to justify the ultimate fact found.** Ruppe *v.* Glos, 243 Ill. 414, 90 N. E. 744.

**24.** Beeler *v.* Elwell, 92 Kan. 586, 141 Pac. 551.

**25.** Clark-Ray-Johnson Co. *v.* Williford, 62 Fla. 453, 56 So. 938 (form of allegation of possession considered); Glos *v.* Davis, 216 Ill. 532, 75 N. E. 208.

**26.** Smith *v.* Jassen, 105 Miss. 227, 62 So. 172; Dolan *v.* Jones, 37 Wash. 176, 79 Pac. 640.

**27. U. S.**—Rice *v.* Jerome, 97 Fed.

719, 38 C. C. A. 388. **Ark.**—Wolf & Bailey *v.* Phillips, 116 Ark. 115, 172 S. W. 894. **Cal.**—Couts *v.* Cornell, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168. **Ia.**—Maxwell *v.* Palmer, 73 Iowa 595, 35 N. W. 659. **Mich.**—Sinclair *v.* Learned, 51 Mich. 335, 16 N. W. 672. **Neb.**—Thomas *v.* Farmers' L. & T. Co., 76 Neb. 568, 107 N. W. 589. **N. C.**—McMillan *v.* Hogan, 129 N. C. 314, 40 S. E. 63. **N. D.**—Douglas *v.* Fargo, 13 N. D. 467, 101 N. W. 919. **Ore.**—Bagley *v.* Block, 83 Ore. 607, 163 Pac. 425; Smith *v.* Dwight, 80 Ore. 1, 148 Pac. 477, 156 Pac. 573, Ann. Cas. 1918D, 563. **Wash.**—Denman *v.* Steinbach, 29 Wash. 179, 69 Pac. 751. **W. Va.**—Siers *v.* Wiseman, 58 W. Va. 340, 52 S. E. 460.

[a] **Under circumstances clearly indicating that any tender would be refused the making of a tender is waived.** Blinn *v.* Grindle, 71 Wash. 120, 127 Pac. 840. See generally the title "**Tender.**"

**28.** Decory *v.* Nelson, 38 S. D. 53, 159 N. W. 887; McKinnon *v.* Fuller, 33 S. D. 582, 146 N. W. 910. But see Berry *v.* Howard, 33 S. D. 447, 146 N. W. 577.

[a] **Division Among Different Claimants.**—The deposit should be made for division among different claimants as their interests may appear. Donham *v.* Joyce, 257 Ill. 112, 100 N. E. 524.

**29. Cal.**—Holland *v.* Hotchkiss, 162 Cal. 366, 123 Pac. 258; Johnson *v.* Canty, 162 Cal. 391, 123 Pac. 263; Campbell *v.* Canty, 162 Cal. 382, 123 Pac. 266; Squires *v.* Estey, 33 Cal. App. 287, 165 Pac. 34; McLauchlan *v.* Bonyng, 15 Cal. App. 239, 114 Pac. 798. **Colo.**—See Eliason *v.* White, 23 Colo. App. 213, 128 Pac. 887. **Idaho.** Fix *v.* Gray, 26 Idaho 19, 140 Pac. 771; Hole *v.* Van Duzer, 11 Idaho 79, 81 Pac. 109. **Ill.**—Glos *v.* Garrett, 219 Ill. 208, 76 N. E. 373. **Mich.**—McQuillan *v.*

But where the title acquired at the tax sale is attacked on the ground that the sale was illegal and void, tender or payment of the tax cannot lawfully be required.<sup>30</sup>

**5. Pleading Tax Titles or Defects Therein.**—In pleading a tax title compliance with all statutory proceedings necessary to the levy, assessment and collection of a valid tax must be specifically alleged.<sup>31</sup> Where the invalidity of the tax title is relied upon the particular facts showing the defect claimed to exist must be specifically set forth.<sup>32</sup>

**F. RIGHTS AND REMEDIES OF PURCHASER AT INVALID SALE.**—**1. In General.**—A purchaser at an invalid tax sale cannot recover from the state or municipality the taxes paid by him,<sup>33</sup> except where a right of recovery is expressly conferred by statute.<sup>34</sup> The particular defects

Ayer, 189 Mich. 566, 155 N. W. 599; Morrison v. Semer, 164 Mich. 208, 129 N. W. 1. Mo.—Mangold v. Bacon, 249 Mo. 48, 155 S. W. 393. N. D.—Murphy v. Missouri & K. L. & L. Co., 28 N. D. 519, 149 N. W. 957; Powers v. First Nat. Bank of Bottineau, 15 N. D. 466, 109 N. W. 361. Tex.—Rowland v. Klepper (Tex. Civ. App.), 189 S. W. 1033. Utah.—Oregon Short Line R. Co. v. Hallock, 41 Utah 378, 126 Pac. 394. W. Va.—James v. Piggott, 70 W. Va. 435, 74 S. E. 667.

[a] Where plaintiff claims a title superior to the tax title, the same rule applies since the application of the rule is based upon the power of a court of equity to require a person seeking relief to do equity. Kuhn v. Glos, 257 Ill. 289, 100 N. E. 1003. Compare McCrary v. Joyner, 64 Ark. 547, 44 S. W. 79.

30. Cal.—Henderson v. Ward, 21 Cal. App. 520, 132 Pac. 470; Hotchkiss v. Hansberger, 15 Cal. App. 603, 115 Pac. 957. Colo.—Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 115, 111 Pac. 1005; Empire Ranch & Cattle Co. v. Lanning, 49 Colo. 458, 113 Pac. 491; Empire Ranch & Cattle Co. v. Weldon, 26 Colo. App. 111, 141 Pac. 138; Parks v. Roth, 25 Colo. App. 296, 137 Pac. 76; Empire Ranch & Cattle Co. v. Irwin, 23 Colo. App. 206, 128 Pac. 867. Ia.—Woodbine Sav. Bank v. Tyler, 181 Iowa 1389, 162 N. W. 590. N. C.—Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337. Okla.—Holt v. Spicer, 162 Pac. 686; Davenport v. Doyle, 57 Okla. 341, 157 Pac. 110. Tex.—Eustis v. Henrietta, 91 Tex. 325, 43 S. W. 259.

31. Cal.—Russell v. Mann, 22 Cal. 131. Ky.—Durrett v. Stewart, 88 Ky. 665, 11 S. W. 773. Tenn.—Reeves v.

Brockman, 62 S. W. 50. Utah.—Bean v. Fairbanks, 46 Utah 513, 151 Pac. 338. Wis.—Comstock v. Ludington, 47 Wis. 229, 2 N. W. 283.

[a] A statute declaring a tax deed to be prima facie evidence of facts recited does not render it unnecessary to plead the facts. Ill.—Gage v. Harbert, 145 Ill. 530, 32 N. E. 543. Ind.—Skelton v. Sharp, 161 Ind. 383, 67 N. E. 535. Ky.—Durrett v. Stewart, 88 Ky. 665, 11 S. W. 773. Utah.—Bean v. Fairbanks, 46 Utah 513, 151 Pac. 338.

Pleading title generally, see the title "Title."

32. U. S.—Straus v. Foxworth, 231 U. S. 162, 34 Sup. Ct. 42, 58 L. ed. 168. Colo.—Scott v. Howell, 24 Colo. App. 155, 132 Pac. 1144. Ill.—Langlois v. People, 212 Ill. 75, 72 N. E. 28; Glos v. Kingman & Co., 207 Ill. 26, 69 N. E. 632. Miss.—Smith v. Jassen, 105 Miss. 227, 62 So. 172, payment of the taxes prior to the tax sale. Mont. Casey v. Wright, 14 Mont. 315, 36 Pac. 191. W. Va.—Hardman v. Brannon, 70 W. Va. 726, 75 S. E. 74; State v. McEl-downey, 54 W. Va. 695, 47 S. E. 650.

[a] An admission that a tax deed was executed, delivered and recorded is not an admission that it is a valid unassailable deed of conveyance. Empire Ranch & Cattle Co. v. Irwin, 23 Colo. App. 206, 128 Pac. 867.

33. Mass.—Lynde v. Melrose, 10 Allen 49. Mich.—Harding v. Auditor General, 136 Mich. 358, 99 N. W. 275. S. D. Minnesota Loan & Inv. Co. v. Beadle, 18 S. D. 431, 101 N. W. 29.

34. Ia.—First Nat. Bank v. Kelly, 159 Iowa 312, 139 N. W. 564. Minn. Fry v. Gatchell, 136 Minn. 225, 161 N. W. 511; Comstock, Ferre & Co. v. Devlin, 99 Minn. 68, 108 N. W. 888. Neb.



which rendered the tax proceedings invalid must be alleged in the complaint in such an action,<sup>35</sup> and compliance with any conditions precedent to the maintenance of the action must be averred.<sup>36</sup> Where the right to reimbursement in accordance with the provisions of a statute is clear, mandamus proceedings to enforce the right may be maintained against the officer charged with the duty of making payment.<sup>37</sup>

**Remedies Against Land Owner.** — The tax purchaser cannot obtain reimbursement from the owner of the land for the amount paid by him at the tax sale,<sup>38</sup> except where such right is given him by statute.<sup>39</sup> But where the property owner brings his action in equity to quiet his title or cancel the tax deed as a cloud upon his title, he will be required to reimburse the purchaser at the tax sale for all his legitimate expenditures in connection with the property as a condition to obtaining equitable relief,<sup>40</sup> including the taxes assessed for sub-

Norris v. Burt, 56 Neb. 295, 76 N. W. 551. N. D.—Sherwood v. Barnes County, 22 N. D. 310, 134 N. W. 38.

[a] A demand for payment made as prescribed by statute, is usually a condition precedent to the maintenance of the action. Brown v. Ford, 112 Miss. 678, 73 So. 722; Gulf Export Co. v. State, 112 Miss. 452, 73 So. 281; Sherwood v. Barnes County, 22 N. D. 310, 134 N. W. 38.

[b] Judgment cannot be confessed in such an action. Brown v. Ford, 112 Miss. 678, 73 So. 722.

[c] The statute in force at the time of the tax sale determines (1) the right to reimbursement. State ex rel. Brodie v. Krahmer, 112 Minn. 372, 128 N. W. 288. (2) The statute is not retroactive. Norris v. Burt, 56 Neb. 295, 76 N. W. 551.

[d] A purchaser from the tax sale purchaser may obtain reimbursement. State ex rel. Babcock v. County of Chisago, 115 Minn. 6, 131 N. W. 792, Ann. Cas. 1912D, 669.

35. Topeka Commercial Security Co. v. Harper, 63 Kan. 351, 65 Pac. 660.

36. Williams v. Dedham, 207 Mass. 412, 93 N. E. 696.

[a] An adjudication of the invalidity of the tax sale is required in some states. Van Nest v. Sargent, 7 N. D. 139, 73 N. W. 1083.

37. State ex rel. Babcock v. County of Chisago, 115 Minn. 6, 131 N. W. 792, Ann. Cas. 1912D, 669.

38. Cal.—Harper v. Rowe, 53 Cal. 233. Mich.—Vincent v. Evans, 165 Mich. 701, 131 N. W. 1099; Morrison v. Semer, 164 Mich. 208, 129 N. W. 1.

Mo.—Williams v. Sands, 251 Mo. 147, 158 S. W. 47.

[a] Where taxes were in fact paid by the land owner the purchaser at a tax sale subsequently held is not entitled to reimbursement. La Salle Varnish Co. v. Glos, 254 Ill. 326, 98 N. E. 538.

39. Ala.—See Street v. Doyle, 137 Ala. 332, 65 So. 775. Ind.—Stephenson v. Martin, 84 Ind. 160. Mo.—Bingham v. Birmingham, 103 Mo. 345, 15 S. W. 533.

[a] Unless a claim for relief is pleaded affirmatively the defendant is not entitled to recover an amount to reimburse him for necessary expenditures. Lippincott v. Taylor (Tex. Civ. App.), 135 S. W. 1070.

[b] Such Statutes Do Not Operate Retrospectively.—Wengler v. McComb (Mo.), 188 S. W. 76.

[c] Where the right of the tax purchaser to have his title quieted is barred by limitations he cannot recover the amount paid by him for his title. King v. Bolt, 151 Iowa 1, 130 N. W. 818.

[d] An equitable defense interposed in the action at law does not entitle the tax purchaser whose title is invalid to recover the purchase price. Williams v. Sands, 251 Mo. 147, 158 S. W. 47.

40. See supra, VIII, E, 4 and Morrison v. Semer, 164 Mich. 208, 129 N. W. 1; Williams v. Sands, 251 Mo. 147, 158 S. W. 47.

[a] The excess paid by the purchaser over the amount of the taxes, penalties and costs, is regarded as a voluntary payment and cannot be re-

sequent years and paid by the purchaser,<sup>41</sup> and the cost of improvements made upon the property.<sup>42</sup>

2. **Enforcement of Lien.**—Where by statute a lien upon the premises is given to a purchaser at a tax sale which conveys no title, for reimbursement of the moneys expended by him,<sup>43</sup> the lien may be enforced by an action in a court having jurisdiction of such matters,<sup>44</sup> or in some states, may be declared and enforced in any action in which the validity of the tax title is attacked.<sup>45</sup>

**IX. PENALTIES AND FORFEITURES.**—A. **PENALTIES.**—A penalty created by statute for non-compliance with the provisions of a taxing statute may be recovered in a penal action,<sup>46</sup> or, in an action brought to recover the taxes assessed.<sup>47</sup>

B. **FORFEITURES.**—A forfeiture of property for failure to pay taxes assessed upon it can be enforced only in an action brought for that purpose,<sup>48</sup> though it has also been held that no judicial proceedings are required to consummate a forfeiture which becomes complete upon a failure of the owner to comply with the requirements of the statute.<sup>49</sup>

covered. *O'Reilly v. All Persons*, 29 Cal. App. 49, 154 Pac. 474; *Young v. Droz*, 38 Wash. 648, 80 Pac. 810.

41. *Neb.*—*Prudential Real Estate Co. v. Battelle*, 90 Neb. 549, 134 N. W. 161. *N. D.*—*McKenzie v. Boynton*, 19 N. D. 531, 125 N. W. 1059. *Wash.*—*J. W. Wheeler Co. v. Pates*, 43 Wash. 247, 86 Pac. 625.

42. *Croskey v. Busch*, 116 Mich. 288, 74 N. W. 464.

43. See the statutes and *Ind.*—*St. Clair v. Jones*, 58 Ind. App. 280, 108 N. E. 256. *Minn.*—*Byers v. Minnesota Com. Loan Co.*, 118 Minn. 266, 136 N. W. 880. *Miss.*—*McLaran v. Moore & Co.*, 60 Miss. 376.

[a] In the absence of a statute the purchaser at a void tax sale does not acquire the lien of the state. *Croskey v. Busch*, 116 Mich. 288, 74 N. W. 464.

44. *Victoria Copper Min. Co. v. Rich*, 193 Fed. 314, 113 C. C. A. 238, it can be enforced only in equity.

[a] The grantee of the tax purchaser acquires and may enforce the lien. *J. W. Wheeler Co. v. Pates*, 43 Wash. 247, 86 Pac. 625.

45. *St. Clair v. Jones*, 58 Ind. App. 280, 108 N. E. 256.

46. See the cases cited *infra*, this note.

[a] Claims for penalties for violations of the law for different years should be separately stated. *State v. Halter*, 149 Ind. 292, 47 N. E. 665, 49 N. E. 7.

[b] **Failure To List Personal Property.**—(1) The complaint in an action to recover a penalty for failure to list personal property need not describe the property specifically (*Belknap v. Com.*, 120 Ky. 59, 85 S. W. 693), nor (2) state its value. *La Plante v. State*, 152 Ind. 80, 52 N. E. 452.

Recovery of penalties generally, see the title "Penalties, Forfeitures and Fines."

47. *Pinnacle Gold Min. Co. v. People*, 58 Colo. 86, 143 Pac. 837.

[a] Where giving of a notice is essential to the subjection of a property owner to a penalty in taxation matters, the fact that the notice was given must be pleaded. *Pinnacle Gold Min. Co. v. People*, 58 Colo. 86, 143 Pac. 837.

[b] If the penalty is not claimed in the complaint, it will not be enforced. *United States Trust Co. v. Territory*, 183 U. S. 535, 22 Sup. Ct. 172, 46 L. ed. 315.

48. *Marshall v. McDaniel*, 12 Bush (Ky.) 378. See generally the title "Penalties, Forfeitures and Fines."

[a] Procedure in actions to declare forfeitures for non-compliance with tax laws, is governed by the provisions of the particular statutes under which the forfeiture is declared. See the statutes and *Com. L. & L. Co. v. Smith*, 162 Ky. 140, 172 S. W. 88; *Com. v. Hume*, 155 Ky. 475, 159 S. W. 966.

49. *Staats v. Board*, 10 Gratt. (51 Va.) 400; *State v. Swann*, 46 W. Va.

**X. DISTRIBUTION OF TAXES.**—An action at law may be maintained by the state or one municipality against another municipality to recover taxes collected by the latter for the former but not paid over.<sup>50</sup> Apportionment of taxes by the officer or body whose legal duty it is to do so among the various public corporations entitled to them, may be enforced by mandamus,<sup>51</sup> and an erroneous apportionment may be corrected in like manner.<sup>52</sup> A tax collector having in his possession tax moneys belonging to different public corporations may be required by mandamus to make distribution of the moneys according to law.<sup>53</sup>

**XI. INCOME TAXES.**—All remedies available for the collection of personal property taxes may be employed to collect an income tax.<sup>54</sup> Ordinarily a suit in equity to enjoin the collection of an income tax cannot be maintained.<sup>55</sup>

**XII. INHERITANCE TAXES.**—An inheritance or estate tax is to be assessed in accordance with the procedure prescribed by the particular statute by which it is created,<sup>56</sup> the probate court having general jurisdiction over the matter.<sup>57</sup> A review and appeal from the assessment is commonly provided for by the statutes.<sup>58</sup> In some states the jurisdiction of the probate court over inheritance tax matters is not exclusive but actions may be maintained in other courts to determine the questions which arise.<sup>59</sup>

128, 33 S. E. 89 (*affirmed* 188 U. S. 739, 23 Sup. Ct. 848, 47 L. ed. 677); *Yokum v. Fickey*, 37 W. Va. 762, 17 S. E. 318.

50. *State v. Stanton County*, 100 Neb. 747, 161 N. W. 264; *Norfolk v. Norfolk County*, 120 Va. 379, 91 S. E. 820, taxes improperly assessed in favor of wrong municipal corporation and collected by it.

[a] A claim and demand for payment need not be presented to a county which has collected tax money belonging to the state, before an action can be maintained. *State v. Stanton County*, 100 Neb. 747, 161 N. W. 264.

51. *Md.*—Board of School Comrs. *v. Gantt*, 73 Md. 521, 21 Atl. 548. *N. J.* *Shields v. Paterson*, 55 N. J. L. 495, 27 Atl. 803. *N. Y.*—*People ex rel. Cobleskill v. Supervisors*, 140 App. Div. 769, 126 N. Y. Supp. 259.

52. *People ex rel. Kinderhook v. Supervisors*, 105 App. Div. 319, 93 N. Y. Supp. 1093.

53. *Fitzhugh v. Ashworth*, 119 Cal. 393, 51 Pac. 635; *McGregor & S. C. R. Co. v. Birdsall*, 30 Iowa 255.

54. *Superior v. Allouez Bay Dock Co.*, 156 Wis. 177, 145 N. W. 656, an action of debt. See *supra*, V, and also 14 STANDARD PROC. 135.

55. *Dodge v. Osborn*, 43 App. Cas. (D. C.) 144. See 14 STANDARD PROC. 135, 136, note 56.

Enjoining collection of taxes, generally see *supra*, V, G.

56. See the statutes.

57. *Conn.*—Appeal of *Hopkins*, 77 Conn. 644, 60 Atl. 657. *Minn.*—*State ex rel. Gage v. Probate Court*, 112 Minn. 279, 128 N. W. 18. *N. Y.*—*In re Wolfe*, 137 N. Y. 205, 33 N. E. 156 (assessment of the tax is not an extra judicial proceeding); *In re McPherson*, 104 N. Y. 306, 10 N. E. 685, 58 Am. Rep. 502.

[a] Assessment Should Be Made Only in that Form of Proceeding Designated by the Statute.—*In re Farley*, 15 N. Y. St. 727; *In re Morris' Est.*, 138 N. C. 259, 50 S. E. 682, should not be made on an appeal from an order directing executors to account.

58. See the statutes and *Cal.*—*Becker v. Nye*, 8 Cal. App. 129, 96 Pac. 333. *Mass.*—*Howe v. Howe*, 179 Mass. 546, 61 N. E. 225, 55 L. R. A. 626. *N. Y.*—*Matter of Stone's Est.*, 56 Misc. 247, 107 N. Y. Supp. 385.

59. *Ill.*—*Connell v. Crosby*, 210 Ill. 380, 71 N. E. 350. *Ky.*—*Barrett v. Continental Realty Co.*, 130 Ky. 109, 113 S. W. 66, 114 S. W. 750. *Mass.*



Collection of the tax is ordinarily made in the course of the probate proceedings in the settlement of the estates of decedents and prior to distribution of the estate and discharge of the executor or administrator;<sup>60</sup> if the tax is not paid, however, an action for its recovery may be maintained against the person from whom the tax is due.<sup>61</sup> A tax voluntarily paid cannot be recovered, although it may prove to have been illegal;<sup>62</sup> where, however, the tax was paid involuntarily and under protest, an action to recover it may be maintained,<sup>63</sup> and the statutes sometimes provide a method for obtaining repayment of an illegal tax.<sup>64</sup>

*Essex v. Brooks*, 164 Mass. 79, 41 N. E. 119. *Tenn.*—*Knox v. Emerson*, 123 Tenn. 409, 131 S. W. 972; *Harrison v. Johnston*, 109 Tenn. 245, 70 S. W. 414.

60. *In re Mahoney's Est.*, 133 Cal. 180, 65 Pac. 389, 85 Am. St. Rep. 155.

[a] Failure to deduct the tax when legacies are paid renders the executor personally liable. *Matter of Weed's Est.*, 10 Misc. 628, 32 N. Y. Supp. 777.

61. *Ill.*—*Connell v. Crosby*, 210 Ill. 380, 71 N. E. 350. *La.*—*Succession of Pargoud*, 13 La. Ann. 367. *Md.*—*Montague v. State*, 54 Md. 481, *assumpsit*. *S. D.*—*Estate of McKennan*, 27 S. D. 136, 130 N. W. 33, 33 L. R. A. (N. S.) 620.

[a] A bill in equity has been al-

lowed to be maintained. *Attorney General v. Pierce*, 59 N. C. 240.

[b] Failure of the statute to prescribe a method for the enforcement of the tax is immaterial. *Estate of McKennan*, 27 S. D. 136, 130 N. W. 33, 33 L. R. A. (N. S.) 620. and see, *Fisher v. State*, 106 Md. 104, 66 Atl. 661.

62. *Estate of Mather*, 90 App. Div. 382, 85 N. Y. Supp. 657 *affirmed*, 179 N. Y. 526, 71 N. E. 1134.

63. *Beals v. State*, 139 Wis. 544, 121 N. W. 347. See *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. ed. 969, and *supra*, VII.

64. *Matter of Skinner's Est.*, 106 App. Div. 217, 94 N. Y. Supp. 144; *In re Howard*, 54 Hun 305, 7 N. Y. Supp. 594.

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## TAXATION OF COSTS. — See Costs.

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**TECHNICAL WORDS.**—See *Indictment and Information*; *Instructions*; *Pleading*.

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**CROSS-REFERENCES:**

Electricity;	Public Service Corporations.
Freight Carriers;	

For forms, see 9 STANDARD PROC. 1197.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. CONSTRUCTION OF LINES.**—Under the laws now existing in most states and applicable to all classes of public service corporations, the determination of the necessity for and the mode and manner of construction of telephone and telegraph lines is left to the public service commissions of the various states.<sup>1</sup> A license to construct a telegraph or telephone along a public street does not justify an assault upon an abutting property owner who seeks to prevent the work.<sup>2</sup>

<p>1. See the title "Public Service Corporations."</p> <p>2. <i>Souther v. Northwestern Tel.</i></p>	<p>Exch. Co., 118 Minn. 102, 136 N. W. 571, Ann. Cas. 1913E, 472, 45 L. R. A. (N. S.) 601.</p>
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**II. REMEDIES FOR UNAUTHORIZED USE OF PRIVATE PROPERTY.**—The use of private property by a telegraph or telephone company, without the consent of the owner, may be enjoined,<sup>3</sup> and if a telegraph or telephone line is constructed over or across the property of a nonconsenting land owner ejectment may be maintained to secure its removal.<sup>4</sup>

**III. ACTIONS FOR INJURIES BY ABUTTING PROPERTY OWNERS.**—When the use by a telegraph or telephone company of a public street or highway constitutes an additional servitude upon the land of an abutting property owner, who owns the fee in the street, an action to recover the damages sustained may be maintained by him,<sup>5</sup> or he may abate the nuisance thereby created,<sup>6</sup> or he may dispossess the company by an action of ejectment,<sup>7</sup> or according to some authorities, obtain an injunction to prevent the use of the property until compensation is paid to him.<sup>8</sup> Such a company is also subject to an action for damages for trespass when it enters the premises of an abutting property owner and without his consent, cuts and mutilates shade trees, the branches of which overhang the street.<sup>9</sup> Whether a cause of action exists for an injury occasioned by the necessary trimming and cutting of trees, is not uniformly settled; under some authorities<sup>10</sup> the action

3. *American Tel. & Tel. Co. v. Pearce*, 71 Md. 535, 18 Atl. 910, 7 L. R. A. 200.

Enjoining railway, see 22 STANDARD PROC. 114.

4. *Butler v. Frontier Tel. Co.*, 186 N. Y. 486, 79 N. E. 716, 116 Am. St. Rep. 563, 11 L. R. A. (N. S.) 920. See generally the title "Ejectment."

[a] **Removal of wires over land** although no poles are placed upon the land, may be enforced by ejectment. *Butler v. Frontier Tel. Co.*, 186 N. Y. 486, 79 N. E. 716, 116 Am. St. Rep. 563, 11 L. R. A. (N. S.) 920.

5. *Neb.—Bronson v. Albion Tel. Co.*, 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426. *N. Y.—Eels v. American Tel. & Tel. Co.*, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640. *Pa.—Shinzel v. Bell Tel. Co.*, 31 Pa. Super. 221. *Va.—Western Union Tel. Co. v. Williams*, 86 Va. 696, 11 S. E. 106, 19 Am. St. Rep. 908, 8 L. R. A. 429.

6. See *Regina v. United Kingdom Elec. Tel. Co.*, 2 Best & S. 647n, 110 E. C. L. 647n, 121 Eng. Reprint 1212n, 22 STANDARD PROC. 124; and the title "Nuisance."

7. *Postal Tel.-Cable Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365, 62 Am. St. Rep. 390, 39 L. R. A. 722; *Terre Haute & S. E. R. Co. v. Rodel*, 89 Ind. 128, 46

Am. Rep. 164. See 22 STANDARD PROC. 124.

8. *Md.—Chesapeake & Potomac Tel. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219. *Minn. Willis v. Erie Tel. & Tel. Co.*, 37 Minn. 347, 34 N. W. 337. *Miss.—Stowers v. Postal Tel. Cable Co.*, 68 Miss. 559, 9 So. 356, 24 Am. St. Rep. 290, 12 L. R. A. 864. *N. J.—Broome v. New York & N. J. Tel. Co.*, 42 N. J. Eq. 141, 7 Atl. 851. *N. Y.—Gray v. York State Tel. Co.*, 41 Misc. 103, 83 N. Y. Supp. 920. *N. D.—Donovan v. Allert*, 11 N. D. 289, 91 N. W. 441, 95 Am. St. Rep. 720, 58 L. R. A. 775. *Wis.—Krueger v. Wisconsin Tel. Co.*, 106 Wis. 96, 81 N. W. 1041, 50 L. R. A. 298.

*Contra*, *Maxwell v. Central Dist. & Printing Tel. Co.*, 51 W. Va. 121, 41 S. E. 125.

*Compare* 22 STANDARD PROC. 124.

9. *Ala.—Climer v. St. Clair County Tel. Co.*, 77 So. 30. *Ill.—Western Union Tel. Co. v. Satterfield*, 34 Ill. App. 386. *Miss.—Clay v. Postal Tel. Cable Co.*, 70 Miss. 406, 11 So. 658. *Mo Reber v. Bell Tel. Co.*, 196 Mo. App. 69, 190 S. W. 612, punitive damages may be recovered.

10. *Ill.—Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453. *Miss.—Clay v. Postal Tel. Cable*

can be maintained, under others it cannot.<sup>11</sup>

**IV. ACTIONS FOR INJURIES FROM IMPROPER CONSTRUCTION OR MAINTENANCE.** — A. **IN GENERAL.**<sup>12</sup> — An action may be maintained against a telegraph or telephone company for injuries received due to negligence in the manner in which it has constructed,<sup>13</sup> or maintained, its lines.<sup>14</sup>

B. **PLEADINGS.** — The facts showing the duty owed by defendant to plaintiff, and the breach of that duty, should be clearly alleged.<sup>15</sup> Subject to the limitations elsewhere discussed,<sup>16</sup> the nature of personal injuries received,<sup>17</sup> and the negligent conduct<sup>18</sup> may be pleaded generally, or the specific acts constituting the negligence may be averred.<sup>19</sup> In most states freedom from contributory negligence need not be

Co., 70 Miss. 406, 11 So. 658. **Neb.** Bronson v. Albion Tel. Co., 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426. **Ohio.** Daily v. State, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578, 24 L. R. A. 724.

11. **Southern Bell Tel. Co. v. Francis**, 109 Ala. 224, 19 So. 1, 55 Am. St. Rep. 930, 31 L. R. A. 193; **Wyant v. Central Tel. Co.**, 123 Mich. 51, 81 N. W. 928, 81 Am. St. Rep. 155, 47 L. R. A. 497.

12. *Compare* 22 STANDARD PROC. 143.

13. **Ill.**—**Illinois Terminal R. Co. v. Thompson**, 210 Ill. 226, 71 N. E. 328. **Ky.**—**Bevis v. Vanceburg Tel. Co.**, 121 Ky. 177, 89 S. W. 126. **N. H.**—**Ela v. Postal Tel. Cable Co.**, 71 N. H. 1, 51 Atl. 281. **Utah.**—**Davidson v. Utah Independent Tel. Co.**, 34 Utah 249, 97 Pac. 124.

[a] **Negligence in failing to install devices to prevent lightning from entering houses**, see the following cases: **Me.**—**Wells v. Northeastern Tel. Co.**, 101 Me. 371, 64 N. E. 648. **Tex.**—**Southern Tel. & Tel. Co. v. Evans**, 54 Tex. Civ. App. 63, 116 S. W. 418. **Vt.** **Griffith v. New England Tel. & Tel. Co.**, 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 919.

14. **Postal Tel.-Cable Co. v. Jones**, 133 Ala. 217, 32 So. 500; **Nebraska Tel. Co. v. Jones**, 60 Neb. 396, 83 N. W. 197.

[a] **Joint Liability.**—Where a pole had decayed and broke when subjected to a strain upon the wires by a tree which was negligently caused to fall upon them by a third person, both were liable for the injuries inflicted. **Pacific Tel. & Tel. Co. v. Parmenter**, 170 Fed. 140, 95 C. C. A. 382. See 8 STANDARD PROC. 170.

[b] **If the injury is caused by a pole or wire, erected by an individual**

subscriber but connected with a main line and operated by the telephone company, both may be joined as defendants. **North Arkansas Tel. Co. v. Peters**, 103 Ark. 564, 148 S. W. 273.

15. **Postal Tel.-Cable Co. v. Jones**, 133 Ala. 217, 32 So. 500; **Warren v. Missouri & K. Tel. Co.**, 196 Mo. App. 549, 196 S. W. 1030. See the titles "Electricity;" "Injuries to Persons and Property;" "Negligence."

16. See the titles "Injuries to Persons and Property;" "Negligence."

17. **Texas Tel. & Tel. Co. v. Thompson**, 61 Tex. Civ. App. 408, 130 S. W. 705.

18. **Postal Tel.-Cable Co. v. Jones**, 133 Ala. 217, 32 So. 500; **Lafayette Tel. Co. v. Cunningham**, 63 Ind. App. 136, 114 N. E. 227.

[a] **An allegation** (1) that a telegraph pole with which plaintiff collided was negligently placed at a specified point on a designated public road where it was dangerous by reason of its close proximity to public travel, is sufficient. **Phelps v. Board of Comrs.**, 117 Md. 175, 82 Atl. 1058. (2) The place or position, in the highway, in which the pole was placed must, however, be stated. **Cumberland Tel. & Tel. Co. v. Cook**, 103 Tenn. 730, 55 S. W. 152.

19. **Cumberland Tel. & Tel. Co. v. Pierson**, 170 Ind. 543, 84 N. E. 1088.

[a] **Negligence in not making repairs within a reasonable time** is not shown by an allegation that a wire had been down for "a number of days." **Cumberland Tel. & Tel. Co. v. Pierson**, 170 Ind. 543, 84 N. E. 1088.

[b] **Pleading negligence in maintaining guy wire in too close proximity to wire of a transmission line**, see **Western Union Tel. Co. v. Jones**, 190 Ala. 70, 66 So. 691.

averred,<sup>20</sup> unless from the other facts alleged contributory negligence appears to have existed.<sup>21</sup> If breach of a duty imposed by a municipal ordinance is relied upon, the ordinance must be properly pleaded.<sup>22</sup>

It must also appear that the injury of which complaint is made was proximately caused by the negligence charged.<sup>23</sup>

C. VARIANCE. — The pleading and the proof should correspond.<sup>24</sup>

D. QUESTIONS OF LAW AND FACT. — Where the evidence is conflicting or is reasonably subject to different inferences,<sup>25</sup> it becomes a question of fact for the jury whether defendant was negligent<sup>26</sup> in allowing wire to fall or remain upon a highway,<sup>27</sup> in the manner in which it strung and stretched wires,<sup>28</sup> in maintaining wires at an unreasonably low elevation,<sup>29</sup> in maintaining a guy wire,<sup>30</sup> in the manner in which poles were placed in a public street,<sup>31</sup> in placing embankments in public streets and in allowing them to remain unguarded or to remain in existence for an unnecessarily long period of time,<sup>32</sup> and

20. See the title "Negligence." But see *Delaware & Madison Counties Tel. Co. v. Fleming*, 53 Ind. App. 555, 102 N. E. 163.

21. *Moore v. East Tenn. Tel. Co.*, 142 Fed. 965, 74 C. C. A. 227.

22. See *Cumberland Tel. & Tel. Co. v. Pierson*, 170 Ind. 543, 84 N. E. 1088, and the title "Municipal Corporations."

[a] An averment that it was the duty of a telephone company, under an ordinance, to maintain its line in a specified manner, is merely a conclusion. *Cumberland Tel. & Tel. Co. v. Pierson*, 170 Ind. 543, 84 N. E. 1088.

23. *Cumberland Tel. & Tel. Co. v. Pierson*, 170 Ind. 543, 84 N. E. 1088. See generally the title "Negligence."

24. See the title "Variance and Failure of Proof."

[a] An allegation that plaintiff was injured by an obstruction in a public street is not sustained by evidence that the obstruction was on private property. *Southern Bell Tel. & Tel. Co. v. Odom*, 9 Ga. App. 246, 70 S. E. 1116.

[b] When negligence in allowing wires to remain upon the ground an unreasonable length of time is alleged, a variance between the allegation as to what caused the wires to fall and the proof upon that matter, is harmless. *Tel. & Tel. Co. v. Hunt*, 108 Tenn. 697, 69 S. W. 729.

25. See the title "Province of Judge and Jury."

26. *U. S.—Pacific Tel. & Tel. Co. v. Parmenter*, 170 Fed. 140, 95 C. C. A. 382, in using a defective pole. *Ky. Beall v. Louisville Home Tel. Co.*, 166

*Ky.* 345, 179 S. W. 251; *Cynthiana Tel. Co. v. Asbury*, 147 Ky. 307, 143 S. W. 1050. *N. Y.—Leeds v. New York Tel. Co.*, 64 App. Div. 484, 72 N. Y. Supp. 250.

See the title "Negligence."

27. *Ia.—Crawford v. Standard Tel. Co.*, 139 Iowa 331, 115 N. W. 878. *S. D.—Snee v. Clear Lake Tel. Co.*, 24 S. D. 361, 123 N. W. 729. *Utah. Bishop v. Rocky Mountain Bell Tel. Co.*, 33 Utah 464, 94 Pac. 976.

28. *Ashbach v. Iowa Tel. Co.*, 165 Iowa 473, 146 N. W. 441.

29. *Ark.—North Arkansas Tel. Co. v. Peters*, 103 Ark. 564, 148 S. W. 273. *Ia.—Bonjour v. Iowa Tel. Co.*, 176 Iowa 63, 155 N. W. 286. *Tex.—Southwestern Tel. & Tel. Co. v. Clark* (*Tex. Civ. App.*), 192 S. W. 1077, over a railroad track.

30. *U. S.—Pacific Tel. & Tel. Co. v. Hoffman*, 208 Fed. 221, 125 C. C. A. 421. *Ind.—Lafayette Tel. Co. v. Cunningham*, 63 Ind. App. 136, 114 N. E. 227. *Ia.—Erickson v. Town of Manson*, 180 Iowa 378, 160 N. W. 276. *Ky. Raines v. East Tenn. Tel. Co.*, 150 Ky. 670, 150 S. W. 830. *Mo.—Poumeroule v. Postal Tel.-Cable Co.*, 167 Mo. App. 533, 152 S. W. 114. *Mont.—Howard v. Flathead Ind. Tel. Co.*, 49 Mont. 197, 141 Pac. 153, maintenance of guy wire on side of a highway is not negligence per se. *S. D.—Unglaub v. Farmers' Mut. Tel. Co.*, 39 S. D. 355, 164 N. W. 104.

31. *Postal Tel.-Cable Co. v. Young*, 172 Ky. 576, 189 S. W. 707.

32. *Meck v. Nebraska Tel. Co.*, 96 Neb. 539, 148 N. W. 325.



whether the instrumentality causing the injury was under the control of the defendant.<sup>33</sup>

Similarly it is for the jury to determine whether defendant had knowledge of facts sufficient, in the exercise of ordinary care, to disclose the defective condition causing the injury,<sup>34</sup> whether the plaintiff's injuries were proximately caused by the negligent act of defendant,<sup>35</sup> or whether plaintiff was guilty of contributory negligence.<sup>36</sup>

#### V. PROTECTION OF COMPANY'S PROPERTY RIGHTS.<sup>37</sup>

When a telephone or telegraph line is being lawfully maintained, an unauthorized interference with its poles or equipment may under proper circumstances, be enjoined,<sup>38</sup> or damages due to such interference can be recovered.<sup>39</sup> Malicious interference with a telegraph or

33. Ark.—North Arkansas Tel. Co. v. Peters, 103 Ark. 564, 148 S. W. 273.

Ky.—Cumberland Tel. & Tel. Co. v. Laird, 161 Ky. 800, 171 S. W. 386.

Mo.—Larkin v. Western Union Tel. Co., 82 Mo. App. 155.

34. Campbell v. Del. & A. Tel. & Tel. Co., 70 N. J. L. 195, 56 Atl. 303; Thompson v. Reed, 29 S. D. 85, 135 N. W. 679.

35. U. S.—Pacific Tel. & Tel. Co. v. Hoffman, 208 Fed. 221, 125 C. C. A. 421; Pacific Tel. & Tel. Co. v. Parmenter, 170 Fed. 140, 95 C. C. A. 382. Ky.—Beall v. Louisville Home Tel. Co., 166 Ky. 345, 179 S. W. 251. Mo.—Poumeroulie v. Postal Tel. & Cable Co., 178 Mo. App. 357, 165 S. W. 1174; Poumeroule v. Postal Tel. Cable Co., 167 Mo. App. 533, 152 S. W. 114.

36. Ala.—Dobbins v. Western Union Tel. Co., 163 Ala. 222, 50 So. 919, 136 Am. St. Rep. 69. Ia.—Wegner v. Kelley, 157 N. W. 206, in driving into a low hanging wire which he knew existed. Mass.—Longley v. New England Tel. & Tel. Co., 205 Mass. 46, 90 N. E. 1145, in failing to see a rope stretched across a street. Mich.—Balderson v. Portland Tel. Co., 173 Mich. 412, 139 N. W. 7, in driving a horse across wires about to be stretched. S. D.—Snee v. Clear Lake Tel. Co., 24 S. D. 361, 123 N. W. 729.

[a] Contributory Negligence in Running Into a Guy Wire.—Ind.—Lafayette Tel. Co. v. Cunningham, 63 Ind. App. 136, 114 N. E. 227. Ia.—Erickson v. Town of Manson, 180 Iowa 378, 160 N. W. 276. Mo.—Poumeroule v. Postal Tel. Cable Co., 167 Mo. App. 533, 152 S. W. 114. S. D.—Unglaub v. Farmers' Mut. Tel. Co., 39 S. D. 355, 164 N. W. 104. Wis.—Chant v. Clin-

ton Tel. Co., 130 Wis. 533, 110 N. W. 423.

37. See generally the title "Public Service Corporations."

38. Mich.—Kibbie Tel. Co. v. Landphere, 151 Mich. 309, 115 N. W. 244, 16 L. R. A. (N. S.) 689, by moving a building through the streets. Minn.—Northwestern Tel. Exch. Co. v. Twin City Tel. Co., 89 Minn. 495, 95 N. W. 460. S. D.—Missouri River Tel. Co. v. Mitchell, 22 S. D. 191, 116 N. W. 67.

[a] Interference and injury by the maintenance of a line for the transmission of electric power or energy (1) will be enjoined (Neb.—Nebraska Tel. Co. v. York Gas & E. L. Co., 27 Neb. 284, 43 N. W. 126. S. D.—Tri-County Mut. Tel. Co. v. Bridgewater E. P. Co., 167 N. W. 501. Vt.—Rutland Elect. Light Co. v. Marble City Elect. Light Co., 65 Vt. 377, 26 Atl. 635, 36 Am. St. Rep. 868, 20 L. R. A. 821), unless (2) the injury could be prevented by the installation of equipment by the telephone or telegraph company at much less expense than by the other party. Hudson River Tel. Co. v. Watervliet Turnpike & Ry. Co., 135 N. Y. 393, 32 N. E. 148, 31 Am. St. Rep. 838, 17 L. R. A. 674. And see Cumberland Tel. & Tel. Co. v. United Elec. R. Co., 42 Fed. 273, 12 L. R. A. 544.

39. Northwestern Tex. Exch. Co. v. Anderson, 12 N. D. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 65 L. R. A. 771, by moving a house through the streets.

[a] A change of grade of a street will not be enjoined although it necessitates the relocating of telegraph poles. Postal Tel. Cable Co. v. Delaware L. & W. R. Co. (N. J. Eq.), 104 Atl. 141.

telephone system is a crime at common law,<sup>40</sup> and under many statutes.<sup>41</sup>

**VI. SERVICE, REGULATION AND CONTROL.**—Telephone and telegraph companies, as public service corporations, are subject to regulation and control by the state and municipalities within which they do business.<sup>42</sup> The rendition of service by them, at reasonable rates and without discrimination, may be compelled by mandamus,<sup>43</sup> or by an application to the various public service commissions which now exist in most states.<sup>44</sup> A telegraph company is also liable for the damages occasioned by its improper refusal to receive and transmit a message,<sup>45</sup> and, in some states, is subject to a penalty imposed by statutes in such cases.<sup>46</sup>

### VII. ACTIONS FOR DAMAGES ARISING OUT OF SERVICE.

**A. IN GENERAL.**—Similar rules govern the liability of both telephone and telegraph companies for negligent or improper performance of their public duties,<sup>47</sup> and so far as based upon negligence and the acts of servants, the general principles governing those subjects must be followed.<sup>48</sup>

**B. WHO MAY SUE.—1. Generally.**—In some states a husband can maintain an action to recover for mental anguish<sup>49</sup> suffered by his

40. *State v. Watts*, 48 Ark. 56, 2 S. W. 342, 3 Am. St. Rep. 216.

41. See the statutes and *Ark.—St. Louis, I. M. & S. R. Co. v. Batesville & W. Tel. Co.*, 80 Ark. 499, 97 S. W. 660. *Cal.—Davis v. Pacific Tel. & Tel. Co.*, 127 Cal. 312, 57 Pac. 764, 59 Pac. 698. *Mo.—State v. Brotzer*, 245 Mo. 499, 150 S. W. 1078. *Neb.—Alt v. State*, 88 Neb. 259, 129 N. W. 432, 35 L. R. A. (N. S.) 1212.

[a] "Tapping" a private telephone wire is not within a statute prohibiting the damaging or destroying of a telephone line. *State v. Nordskog*, 76 Wash. 472, 136 Pac. 694, 50 L. R. A. (N. S.) 1216.

42. See the title "Public Service Corporations."

43. *Ind.—Central Union Tel. Co. v. State*, 123 Ind. 113, 24 N. E. 215. *Md.—Chesapeake & P. Tel. Co. v. Baltimore & O. Tel. Co.*, 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167. *Neb.—State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404.

See 21 STANDARD PROC. 898.

44. See generally, the title "Public Service Corporations."

45. *South Florida Tel. Co. v. Maloney*, 34 Fla. 338, 16 So. 280; *Vermilye v. Postal Tel. Cable Co.*, 205

Mass. 598, 91 N. E. 904, 30 L. R. A. (N. S.) 472. Compare *infra*, VII.

46. *Vermilye v. Postal Tel. Cable Co.*, 205 Mass. 598, 91 N. E. 904, 30 L. R. A. (N. S.) 472. See *infra*, VIII.

47. *McLeod v. Pacific Tel. Co.*, 52 Ore. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 16 Ann. Cas. 1239.

[a] "In considering the liability of telephone companies, we are almost exclusively confined for precedents to decisions relating to telegraph companies, and so far as the courts and text-writers have expressed themselves, they treat them as similar, in their general features, both as to duties and liabilities. Anderson's Law Dictionary says that 'telegraph' includes any apparatus for transmitting messages or other communications by means of electric signals. Under 'telephone' he says: 'A telephone is a telegraph.'" *McLeod v. Pacific Tel. Co.*, 52 Ore. 22, 28, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 16 Ann. Cas. 1239.

48. See the titles "Master and Servant;" "Negligence."

49. *Loper v. Western Union Tel. Co.*, 70 Tex. 689, 8 S. W. 600.

Actions by husband and wife, see the title "Husband and Wife."

wife. In accordance with the rules elsewhere treated,<sup>50</sup> parties can not join as plaintiffs who have no joint interest.<sup>51</sup>

2. **Sender.**<sup>52</sup>—The sender of a telegram may maintain an action to recover the damages sustained by reason of the negligence of the company in transmitting or delivering it,<sup>53</sup> or in failing to stop its transmission upon being so instructed.<sup>54</sup> When the addressee acts upon a telegram changed in the course of its transmission, the sender is, under some authorities held to be responsible to him and therefore entitled to recover from the company the damages occasioned by the mistake;<sup>55</sup> under other authorities however, no liability to the addressee arises, and no cause of action against the company exists in the sender,<sup>56</sup> except as the sender succeeds by arrangement or purchase, to the rights of the addressee.<sup>57</sup>

[a] **Damages suffered by both husband and wife** may be recovered in the same suit. *Southwestern Tel. & Tel. Co. v. Dale* (Tex. Civ. App.), 27 S. W. 1059.

50. See the title "Parties."

51. *Anderson v. Western Union Tel. Co.*, 84 Tex. 17, 19 S. W. 285, a father and son cannot join in an action for failure to deliver a message announcing the death of another son.

[a] **From the fact that both the sender and addressee** of a message may have a cause of action, it does not follow that the cause of action is a joint one. *Brockelsby v. Western Union Tel. Co.*, 148 Iowa 273, 126 N. W. 1105.

52. **Action by consignor against carrier**, see 10 STANDARD PROC. 230.

53. **Ala.**—*Western Union Tel. Co. v. Jackson Lumber Co.*, 187 Ala. 629, 65 So. 962. **Ky.**—*Western Union Tel. Co. v. Lee*, 174 Ky. 210, 192 S. W. 70, Ann. Cas. 1918C, 1026. **Miss.**—*Alexander v. Western Union Tel. Co.*, 66 Miss. 161, 5 So. 397, 14 Am. St. Rep. 556, 3 L. R. A. 71. **Tenn.**—*Gray v. Western Union Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301. **Tex.**—*Gulf, C. & S. F. Tel. Co. v. Richardson*, 79 Tex. 649, 15 S. W. 689.

And see *infra*, VII, D, 2.

54. *Bertuch v. United States & Hayti Tel. & Cable Co.*, 79 Misc. 10, 139 N. Y. Supp. 289.

55. **Ark.**—*Des Arc Oil Mill v. Western Union Tel. Co.*, 132 Ark. 335, 201 S. W. 273. **Ga.**—*Western Union Tel. Co. v. Flint River Lbr. Co.*, 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36; *Western Union Tel. Co. v. Shotter*, 71 Ga. 760, the company is the agent of the sender. **Ia.**—*Yunker v. West-*

*ern Union Tel. Co.*, 146 Iowa 499, 125 N. W. 577, where the sender selects the company as his mode of communication, it becomes his agent. **Me.**—*Ayer v. Western Union Tel. Co.*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353. **S. C.**—*Eureka Cotton Mills v. Western Union Tel. Co.*, 88 S. C. 498, 70 S. E. 1040, Ann. Cas. 1912C, 1273. **Wis.**—*Sherrerd v. Western Union Tel. Co.*, 146 Wis. 197, 131 N. W. 341.

56. **Cal.**—*Germain Fruit Co. v. Western Union Tel. Co.*, 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575, where the addressee acted with knowledge of the error. **Idaho.**—*Strong v. Western Union Tel. Co.*, 18 Idaho 389, 109 Pac. 910, Ann. Cas. 1912A, 55, 30 L. R. A. (N. S.) 409. **Ky.**—*McKee v. Western Union Tel. Co.*, 158 Ky. 143, 164 S. W. 348, 51 L. R. A. (N. S.) 439; *Postal Tel.-Cable Co. v. Schaefer*, 110 Ky. 907, 62 S. W. 1119. **Miss.**—*Western Union Tel. Co. v. William Rhett & Co.*, 50 So. 696; *Shingleur v. Western Union Tel. Co.*, 72 Miss. 1030, 18 So. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444. **N. C.**—*Pegram v. Western Union Tel. Co.*, 100 N. C. 28, 6 S. E. 770, 6 Am. St. Rep. 557. **Tenn.**—*Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S. W. 783, 10 Am. St. Rep. 699, 4 L. R. A. 660, the company is an independent contractor. **Tex.**—*Western Union Tel. Co. v. Peter* (Tex. Civ. App.), 160 S. W. 991, where the sender accepted the act of the addressee with knowledge of the error. And see *Western Union Tel. Co. v. Love* (Tex. Civ. App.), 200 S. W. 889.

**Right of action in the addressee against the telegraph company**, see *infra*, VII, B, 3.

57. *Western Union Tel. Co. v. Jack-*  
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A right of action is sometimes expressly conferred by statute upon the sender of a message.<sup>58</sup>

**3. Addressee.**<sup>59</sup>—The addressee of a telephone,<sup>60</sup> or telegraph message can recover the damages incurred by him,<sup>61</sup> by reason of a

son Lumber Co., 187 Ala. 629, 65 So. 962.

58. *Eddington v. Western U. Tel. Co.*, 115 Mo. App. 93, 91 S. W. 438; *Gray v. Western Union Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301, the sender of a telegram is a "party injured" under such a statute.

[a] The fact that the message was sent from without the state does not prevent the maintenance of the action. *Gray v. Western Union Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301.

59. Action by consignee against carrier, see 10 STANDARD PROC. 230, 235.

60. *McLeod v. Pacific Tel. Co.*, 52 Ore. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 16 Ann. Cas. 1239 (failure to call a person to answer a long distance telephone call); *Southwestern Tel. & Tel. Co. v. Jarrell* (Tex. Civ. App.), 138 S. W. 1165. And see *Central Union Tel. Co. v. Swoveland*, 14 Ind. App. 341, 42 N. E. 1035.

[a] Negligent failure of a long distance telephone line company to make connections, furnishes a cause of action. *Southwestern Tel. & Tel. Co. v. Taylor*, 26 Tex. Civ. App. 79, 63 S. W. 1076.

61. **Ala.**—*Western Union Tel. Co. v. Baker*, 14 Ala. App. 208, 69 So. 246. **Ark.**—*Western Union Tel. Co. v. Woodard*, 84 Ark. 323, 105 S. W. 579, 13 Ann. Cas. 354; *Western Union Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528. **Cal.**—*Germain Fruit Co. v. Western Union Tel. Co.*, 137 Cal. 598, 70 Pac. 658, 59 L. R. A. 575; *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678. **D. C.**—*Fererro v. Western Union Tel. Co.*, 9 App. Cas. 455, 35 L. R. A. 548. **Fla.**—*International Ocean Tel. Co. v. Saunders*, 32 Fla. 434, 14 So. 148, 21 L. R. A. 810. **Ill.**—*Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109. **Ind.**—*Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 15 N. E. 845. **Ia.**—*Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 62 N. W.

1, 57 Am. St. Rep. 294, 28 L. R. A. 72, *Herron v. Western Union Tel. Co.*, 90 Iowa 129, 57 N. W. 696. **Kan.**—*Western Union Tel. Co. v. Lawson*, 66 Kan. 660, 72 Pac. 283; *West v. Western Union Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530. **Ky.**—*Western Union Tel. Co. v. Lee*, 174 Ky. 210, 192 S. W. 70, Ann. Cas. 1918C, 1026; *Davis v. Western Union Tel. Co.*, 107 Ky. 527, 54 S. W. 849, 92 Am. St. Rep. 371; *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S. W. 880. **La.**—*Graham v. Western Union Tel. Co.*, 109 La. 1069, 34 So. 91; *De La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383. **Minn.**—*McCord v. Western Union Tel. Co.*, 39 Minn. 181, 39 N. W. 315, 12 Am. St. Rep. 636, 1 L. R. A. 143. **Miss.**—*Western Union Tel. Co. v. Allen*, 66 Miss. 549, 6 So. 461. **Mo.** *Harper v. Western Union Tel. Co.*, 92 Mo. App. 304. **Neb.**—*Western Union Tel. Co. v. Kemp*, 44 Neb. 194, 62 N. W. 451, 48 Am. St. Rep. 723. **N. Y.**—*Miliken v. Western Union Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; *Wolfskehl v. Western Union Tel. Co.*, 46 Hun 542, 12 N. Y. St. 555; *Elsey v. Postal Tel. Co.*, 15 Daly 58, 3 N. Y. Supp. 117, 20 N. Y. St. 97. **N. C.**—*Johnson v. Western Union Tel. Co.*, 175 N. C. 588, 96 S. E. 36; *Penn v. Western Union Tel. Co.*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223. **Ore.**—*McLeod v. Pacific Tel. Co.*, 52 Ore. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 16 Ann. Cas. 1239. **Pa.**—*Bailey & Co. v. Western Union Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895. **S. C.**—*Butler v. Western Union Tel. Co.*, 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893. **Tenn.** *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864. **Tex.**—*Western Union Tel. Co. v. Jones*, 81 Tex. 271, 16 S. W. 1006; *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; *Western Union Tel. Co. v. E. F. Connell Land Co.*, 61 Tex. Civ. App. 168, 128 S. W. 1162. **Va.**—*Connolly v. Western Union Tel. Co.*, 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663.

failure to deliver or deliver promptly the message sent,<sup>62</sup> or because of an error or mistake in the message transmitted.<sup>63</sup> The courts do not agree upon the basis of the liability.<sup>64</sup> The majority, perhaps, place it upon the ground that the company owes a public duty to any person beneficially interested in a message to exercise due care in its transmission and delivery.<sup>65</sup> Other authorities hold that the sender of a message is the agent of the addressee and the latter as principal can hold the company liable,<sup>66</sup> and this is sometimes the situation presented by reason of an express agreement or understanding between the addressee and the company,<sup>67</sup> or between the sender and addressee.<sup>68</sup> Some authorities declare that the telegraph company is the agent of

**Wis.**—*Fisher v. Western Union Tel. Co.*, 119 Wis. 146, 96 N. W. 545.

And see *infra*, VII, D, 3.

[a] The English authorities allow no recovery. See note 30 L. R. A. (N. S.) 1117, and *Playford v. United Kingdom Elec. Tel. Co.*, L. R. 4 Q. B. Cases 706.

[b] Damages sustained by the sender alone cannot be recovered by the addressee. *Yunker v. Western Union Tel. Co.*, 146 Iowa 499, 125 N. W. 577.

[c] In Georgia the company is regarded as the agent of the sender, and the addressee is required to look to the sender for any relief and to have no cause of action against the company. *Brooke v. Western Union Tel. Co.*, 119 Ga. 694, 46 S. E. 826; *Western Union Tel. Co. v. Cooper*, 2 Ga. App. 376, 58 S. E. 517.

[d] Payment of the toll by the sender of the message, does not affect the right of the addressee to maintain the action. *Western Union Tel. Co. v. Allen*, 66 Miss. 549, 6 So. 461; *Western Union Tel. Co. v. Beringer*, 84 Tex. 638, 19 S. W. 336.

62. *Western Union Tel. Co. v. Cook*, 45 Tex. Civ. App. 87, 99 S. W. 1131.

63. *Anniston Cordage Co. v. Western Union Tel. Co.*, 161 Ala. 216, 49 So. 770, 135 Am. St. Rep. 124, 30 L. R. A. (N. S.) 1116; *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109.

64. **Ia.**—*Yunker v. Western Union Tel. Co.*, 146 Iowa 499, 125 N. W. 577. **N. C.**—*Young v. Western Union Tel. Co.*, 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L. R. A. 669. **Ore.** *McLeod v. Pacific Tel. Co.*, 52 Ore. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 16 Ann. Cas. 1239.

65. **U. S.**—*Western Union Tel. Co. v. Burris*, 179 Fed. 92, 102 C. C. A.

386; *Abraham v. Western Union Tel. Co.*, 23 Fed. 315. **Ala.**—*Anniston Cordage Co. v. Western Union Tel. Co.*, 161 Ala. 216, 49 So. 770, 135 Am. St. Rep. 124, 30 L. R. A. (N. S.) 1116. **Ark.** *Western Union Tel. Co. v. Short*, 53 Ark. 434, 14 S. W. 649, 9 L. R. A. 744. **Conn.**—*Penobscot Fish Co. v. Western Union Tel. Co.*, 91 Conn. 35, 98 Atl. 341. **Ill.**—*Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109. **Ia.**—*Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 98 N. W. 281, 101 Am. St. Rep. 268, 64 L. R. A. 545. **Ky.**—*Western Union Tel. Co. v. Cleaver*, 13 Ky. L. Rep. 301. **Mo.**—*Poor Grain Co. v. Western Union Tel. Co.*, 196 Mo. App. 557, 196 S. W. 28. **N. M.**—*State Bank of Commerce v. Western Union Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120; *Western Union Tel. Co. v. Longwill*, 5 N. M. 308, 21 Pac. 339. **Pa.**—*Bailey & Co. v. Western Union Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895; *New York & W. Print. Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338. **Va.**—*Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715.

66. *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281.

67. *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281.

68. *Western Union Tel. Co. v. Rowell*, 153 Ala. 295, 45 So. 73; *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678.

[a] The sender of a message in reply to a message from the plaintiff, is the agent of the latter. *Western Union Tel. Co. v. Cunningham*, 99 Ala.

the addressee as well as agent of the sender;<sup>69</sup> still others hold that the addressee may maintain an action as a party for whose benefit the contract was made.<sup>70</sup> The existence of some beneficial interest in the message would seem, however, under all the authorities to be essential to maintenance of the action,<sup>71</sup> and this interest, must, under some of the authorities have been known to the company or it must have been chargeable with knowledge of the facts, or no right of action exists.<sup>72</sup> When a telegram contains an offer which the addressee is to accept or reject, it is held by some courts that the telegraph company is the agent of the sender and, as such, liable to him, he in turn being liable to the addressee for any error in the message as delivered;<sup>73</sup> other authorities,

314, 14 So. 579; *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 63 Pac. 83, 80 Am. St. Rep. 153, 53 L. R. A. 678.

69. *New York & W. Print. Tel. Co. v. Dryburg*, 35 Pa. 298, 78 Am. Dec. 338.

70. **U. S.**—*Whitehill v. Western Union Tel. Co.*, 136 Fed. 499. **Ark.**—*Western Union Tel. Co. v. Holder*, 117 Ark. 210, 174 S. W. 552; *Western Union Tel. Co. v. Compton*, 114 Ark. 193, 169 S. W. 946. **Ind.**—See *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 15 N. E. 845. **Kan.**—*West v. Western Union Tel. Co.*, 39 Kan. 93, 17 Pac. 807, 7 Am. St. Rep. 530. **Ky.**—*Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S. W. 880; *Western Union Tel. Co. v. Jump*, 8 Ky. L. Rep. 531. **La.**—*Lagrange v. Southwestern Tel. Co.*, 25 La. Ann. 383. **N. Y.**—*Wolfskehl v. Western Union Tel. Co.*, 46 Hun 542, 12 N. Y. St. 555. **Ohio.**—*Barrack v. Postal Tel. Co.*, 12 Ohio Dec. 78. **Ore.**—*Frazier v. Western Union Tel. Co.*, 45 Ore. 414, 78 Pac. 330, 67 L. R. A. 319, 2 Ann. Cas. 396. **S. C.**—*Butler v. Western Union Tel. Co.*, 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893. **Tenn.**—*Western Union Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479. **Tex.**—*Western Union Tel. Co. v. Jones*, 81 Tex. 271, 16 S. W. 1006; *Western Union Tel. Co. v. Cook*, 45 Tex. Civ. App. 87, 99 S. W. 1131; *Western Union Tel. Co. v. Sweetman*, 19 Tex. Civ. App. 435, 47 S. W. 676; *Western Union Tel. Co. v. Clark*, 14 Tex. Civ. App. 563, 38 S. W. 225; *Western Union Tel. Co. v. Hale*, 11 Tex. Civ. App. 79, 32 S. W. 814. **Va.**—*Connelly v. Western Union Tel. Co.*, 100 Va. 51, 40 S. E. 618, 93 Am. St. Rep. 919, 56 L. R. A. 663.

Action by person for whose benefit

contract was made, see generally 20 STANDARD PROC. 914, et seq.

71. **Ala.**—*Anniston Cordage Co. v. Western Union Tel. Co.*, 161 Ala. 216, 49 So. 770, 135 Am. St. Rep. 124, 30 L. R. A. (N. S.) 1116. **Ky.**—*Curd v. Cumberland Tel. & Tel. Co.*, 119 S. W. 746, message transmitting money by telephone. **Ore.**—*McLeod v. Pacific Tel. Co.*, 52 Ore. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 16 Ann. Cas. 1239.

[a] The contract between the sender and defendant need not have been for the sole and exclusive benefit of the addressee (1) to entitle the latter to recover (*Jordan v. Western Union Tel. Co.*, 197 Ala. 28, 72 So. 339. But see *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 13 S. W. 888), nor (2) need it even have been primarily for his benefit. *McLeod v. Pacific Tel. Co.*, 52 Ore. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 16 Ann. Cas. 1239.

[b] In mental anguish cases there can be no recovery by the addressee where the message was to be given by the addressee to some other person. *Western Union Tel. Co. v. Goodson* (Tex. Civ. App.), 202 S. W. 766, *modifying* (Tex. Civ. App.), 188 S. W. 736.

72. **Ala.**—*Anniston Cordage Co. v. Western Union Tel. Co.*, 161 Ala. 216, 49 So. 770, 135 Am. St. Rep. 124, 30 L. R. A. (N. S.) 1116. **Okl.**—*Butner v. Western Union Tel. Co.*, 2 Okla. 234, 37 Pac. 1087. **Ore.**—*McLeod v. Pacific Tel. Co.*, 52 Ore. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 16 Ann. Cas. 1239; *Frazier v. Western Union Tel. Co.*, 45 Ore. 414, 78 Pac. 330, 67 L. R. A. 319, 2 Ann. Cas. 396.

73. See *supra*, VII, B, 2.



however, reject the theory of agency and allow the addressee to recover the amount of his damage from the company for breach of its public duty toward him.<sup>74</sup>

A right of action is expressly conferred upon the addressee by some statutes.<sup>75</sup>

4. **Third Persons.** — a. *In General.* — A person who had no personal interest in or connection with the message, has no right of recovery, although he acted to his injury upon a message erroneously transmitted.<sup>76</sup> But when it appears upon the face of the message that a person other than the addressee has a beneficial interest in the message, such a person may maintain an action for negligence in its transmission,<sup>77</sup> and the same is true where the company is expressly informed of such a person's interest where it accepts the message.<sup>78</sup> Where, however, the plaintiff's interest was entirely unknown to the defendant, there can be no recovery.<sup>79</sup> This rule has been frequently applied in mental anguish cases.<sup>80</sup> It is, however, inapplicable to a

74. *Penobscot Fish Co. v. Western Union Tel. Co.*, 91 Conn. 35, 98 Atl. 341. *Contra*, *Richmond Hosiery Mills v. Western Union Tel. Co.*, 123 Ga. 216, 51 S. E. 290.

75. *Ark.*—*Western Union Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528. *Ind.*—*Western Union Tel. Co. v. Fenton*, 52 Ind. 1. *Ia.*—*Yunker v. Western Union Tel. Co.*, 146 Iowa 499, 125 N. W. 577. *Minn.*—*Francis v. Western Union Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406. *Tenn.*—*Western Union Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479; *Western Union Tel. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725, existence of a contractual relation is not essential.

[a] Under a statute imposing liability upon a telegraph company generally, a cause of action has been held to vest in the addressee. *Markel v. Western Union Tel. Co.*, 19 Mo. App. 80.

[b] Such a statute, however, creates no right of recovery for damages not before recognized as recoverable. *Rowan v. Western Union Tel. Co.*, 149 Fed. 550.

[c] A penalty (1) imposed by statute can be recovered, under the terms of most statutes, only by the sender (*Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 15 N. E. 845; *Thompson v. Western Union Tel. Co.*, 40 Misc. 443, 82 N. Y. Supp. 675), though (2) under some statutes a recovery by the addressee is permitted. See *Pacific Pine Lumb. Co. v. Western Union Tel.*

*Co.*, 123 Cal. 428, 56 Pac. 103 (recovery permitted only if the addressee was actually damaged); *Western Union Tel. Co. v. Allen*, 66 Miss. 549, 6 So. 461.

76. *McCormick v. Western Union Tel. Co.*, 79 Fed. 449, 25 C. C. A. 35, 38 L. R. A. 684.

77. *U. S.*—*Whitehill v. Western Union Tel. Co.*, 136 Fed. 499. *Ark.*—*Louisiana & N. W. R. Co. v. Reeves*, 95 Ark. 214, 128 S. W. 1051. *N. C.*—*Penn v. Western Union Tel. Co.*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223; *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527, 14 S. E. 94. *Tenn.*—*Western Union Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479. *Tex.*—*Western Union Tel. Co. v. Coffin*, 88 Tex. 94, 30 S. W. 896; *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 16 Am. St. Rep. 920, 6 L. R. A. 844; *Western Union Tel. Co. v. Olivari* (Tex. Civ. App.), 136 S. W. 816; *Western Union Tel. Co. v. Morrison* (Tex. Civ. App.), 33 S. W. 1025.

Action by person for whose benefit contract is made, see 20 STANDARD PROC. 914, et seq.

78. *Western Union Tel. Co. v. Taylor* (Tex. Civ. App.), 167 S. W. 289.

79. *Western Union Tel. Co. v. Brown*, 6 Ala. App. 339, 59 So. 329; *Holler v. Western Union Tel. Co.*, 149 N. C. 336, 63 S. E. 92, 19 L. R. A. (N. S.) 475.

80. *Ala.*—*Western Union Tel. Co. v. Brown*, 6 Ala. App. 339, 59 So. 329. *Ark.*—*Western Union Tel. Co. v. Swear-*

partnership message sent by or addressed to one of the members of the firm.<sup>81</sup>

b. *Principals and Agents of Parties to Message.* — (I.) *Principals.* When the sender is the agent of the plaintiff, the latter may maintain an action.<sup>82</sup> This is the case when the addressee is the principal of the sender,<sup>83</sup> or the telegram is sent under an arrangement with the sender, at the special request of the addressee, and he is to bear the expense.<sup>84</sup> The general rule obtains even though the plaintiff is an undisclosed principal.<sup>85</sup> Some authorities, however, declare that there can be no recovery of damages for mental anguish when the plaintiff is an un-

engen, 94 Ark. 336, 126 S. W. 1071; Western Union Tel. Co. v. Weniski, 84 Ark. 457, 106 S. W. 486. **Ky.**—Western Union Tel. Co. v. Crutcher, 159 Ky. 429, 167 S. W. 138; Morrow v. Western Union Tel. Co., 107 Ky. 517, 54 S. W. 853. **Mass.**—Squire v. Western Union Tel. Co., 98 Mass. 232, 93 Am. Dec. 157. **N. C.**—Helms v. Western Union Tel. Co., 143 N. H. 386, 55 S. E. 831, 118 Am. St. Rep. 811, 8 L. R. A. (N. S.) 249, 10 Ann. Cas. 643. **S. C.**—Poteet v. Western Union Tel. Co., 74 S. C. 491, 55 S. E. 113; Rogers v. Western Union Tel. Co., 72 S. C. 290, 51 S. E. 773. **Tenn.**—Western Union Tel. Co. v. Potts, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479. **Tex.**—Southwestern Tel. & Tel. Co. v. Gotcher, 93 Tex. 114, 53 S. W. 686; Western Union Tel. Co. v. Herring (Tex. Civ. App.), 146 S. W. 699.

[a] The fact that the plaintiff is the wife of the addressee does not entitle her to recover. **Ky.**—Morrow v. Western Union Tel. Co., 107 Ky. 517, 54 S. W. 853; Davidson v. Western Union Tel. Co., 21 Ky. L. Rep. 1292, 54 S. W. 830. **N. C.**—Holler v. Western Union Tel. Co., 149 N. C. 336, 63 S. E. 92, 19 L. R. A. (N. S.) 475. **S. C.**—Poteet v. Western Union Tel. Co., 74 S. C. 491, 55 S. E. 113. **Tex.**—Western Union Tel. Co. v. Carter, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; Western Union Tel. Co. v. Kirkpatrick, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37; Western Union Tel. Co. v. Taylor (Tex. Civ. App.), 162 S. W. 999; Western Union Tel. Co. v. Procter, 6 Tex. Civ. App. 300, 25 S. W. 811.

81. Postal Tel. Co. v. L. W. Levy & Co. (Tex. Civ. App.), 102 S. W. 134.

[a] "Each member of a partnership

is an agent for all of its members, and it must be known by every one that communications, telegraphic or otherwise, to an individual may be intended for the benefit of a firm of which he is a member. Therefore, we do not think it essential to an action brought by members of a partnership against a telegraph company for its negligent failure to properly transmit and deliver a telegram addressed to one of its members, that the telegraph company should be informed of the fact the message was intended for the benefit of the firm." Postal Tel. Co. v. L. W. Levy & Co. (Tex. Civ. App.), 102 S. W. 134.

82. **N. C.**—Young v. Western Union Tel. Co., 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 833, 9 L. R. A. 669. **S. C.**—Butler v. Western Union Tel. Co., 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893. **Tex.**—Southwestern Tel. & Tel. Co. v. Gehring (Tex. Civ. App.), 137 S. W. 754, for failure to make a long distance telephone connection.

See generally the title "Principal and Agent."

83. Western Union Tel. Co. v. Hicks, 197 Ala. 81, 72 So. 356; De Rutte v. New York, A. & B. Elec. M. Tel. Co., 1 Daly (N. Y.) 547, 30 How. Pr. 403.

84. De Rutte v. New York, A. & B. Elec. Magn. Tel. Co., 1 Daly (N. Y.) 547, 30 How. Pr. 403; Loper v. Western Union Tel. Co., 70 Tex. 689, 8 S. W. 600.

85. **U. S.**—Purdum Naval Stores Co. v. Western Union Tel. Co., 153 Fed. 327. **Ala.**—Western Union Tel. Co. v. Northcutt, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38. **Ga.**—Dodd Grocery Co. v. Postal Tel. Cable Co., 112 Ga. 685, 37 S. E. 981. **Ia.**—Harkness v. Western Union Tel. Co., 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672. **Tex.**—Western Union Tel. Co. v. Broesche, 72

disclosed principal of the sender of the message,<sup>86</sup> though any general damages sustained may be recovered by him;<sup>87</sup> nor can a statutory penalty given to the sender of a message be recovered by the undisclosed principal of the sender.<sup>88</sup> A recovery has also been allowed upon the theory of agency, where the message was sent by the sender to a third person to be delivered to the plaintiff.<sup>89</sup>

A right of action by the undisclosed principal of the addressee has been denied.<sup>90</sup> But one who is the undisclosed principal of both the sender and the addressee can maintain an action.<sup>91</sup>

(II.) **Agents.**—The right of an agent whether of the sender or the addressee, to sue, depends upon the general rules elsewhere treated.<sup>92</sup> An agent of a disclosed principal cannot maintain an action for negligence in the transmission or delivery of a telegram to him, upon which he acts in the name of his principal;<sup>93</sup> but for any personal<sup>94</sup> loss sus-

Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843.

See 21 STANDARD PROC. 543.

86. **N. C.**—*Helms v. Western Union Tel. Co.*, 143 N. C. 386, 55 S. E. 831, 118 Am. St. Rep. 811, 8 L. R. A. (N. S.) 249, 10 Ann. Cas. 643. **Tenn.**—*Western Union Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479. **Tex.**—*Western Union Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 564.

*Compare Manker v. Western Union Tel. Co.*, 137 Ala. 292, 34 So. 839, *overruling* *Western Union Tel. Co. v. Allgood*, 125 Ala. 712, 27 So. 1024.

[a] The question involved is merely one as to the measure of damages and the general right of an undisclosed principal to maintain an action is not denied. *Western Union Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479.

87. *Western Union Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479.

88. *Western Union Tel. Co. v. Coyle*, 24 Okla. 740, 104 Pac. 367.

89. *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527, 14 S. E. 94.

90. **U. S.**—*Western Union Tel. Co. v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678, where an unauthorized message was accepted from the agent. **Miss.**—*Western Union Tel. Co. v. Lowden*, 116 Miss. 379, 77 So. 145; *Stuard v. Western Union Tel. Co.*, 106 Miss. 883, 64 So. 835. **Tenn.**—*Western Union Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 127 Am. St.

Rep. 991, 19 L. R. A. (N. S.) 479, a mental anguish case.

And see *Lee v. Western Union Tel. Co.*, 51 Mo. App. 375.

[a] "The duty to the undisclosed principals of senders rests on the fact that contracts have been made between the senders and the telegraph company, and that in the negotiation and enforcement of contracts the law places undisclosed principals in the shoes of their agents, so that the telegraph company, which must know the law, is charged with notice and may reasonably anticipate that its misrepresentations may affect them. It has no contracts with addressees and hence it is not charged by the law with notice that their undisclosed principals or others to whom they may display the messages will probably be affected by them." *Western Union Tel. Co. v. Schriver*, 141 Fed. 538, 72 C. C. A. 596, 4 L. R. A. (N. S.) 678.

91. *Harkness v. Western Union Tel. Co.*, 73 Iowa 190, 34 N. W. 811, 5 Am. St. Rep. 672; *Leonard v. New York, A. & B. Elect. M. Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446.

92. See 21 STANDARD PROC. 540.

93. *Rose v. United States Tel. Co.*, 34 How. Pr. (N. Y.) 308, 3 Abb. Pr. N. S. 408, 6 Robt. 305.

[a] Right of agent to maintain an action on a contract made in behalf of a principal generally, see the title "Principal and Agent."

94. *Pearlstone v. Western Union Tel. Co.* (Tex. Civ. App.), 199 S. W. 860.

[a] Where a duplicate message was sent by the company without authority



tained by him he may recover. When either the sender,<sup>95</sup> or the addressee,<sup>96</sup> is the agent of an undisclosed principal, he may maintain the action in his own name.

C. WHO MAY BE SUED. — A telegraph company which accepts a message is liable for its incorrect transmission,<sup>97</sup> or delay in or failure to deliver the message,<sup>98</sup> although the act of negligence resulting in the injury, was the act of a connecting company.<sup>99</sup> The propriety of joining the agent or servant of the company follows the general rules elsewhere treated.<sup>1</sup>

D. NATURE OF THE ACTION. — 1. **In General.** — In accordance with the principles elsewhere treated,<sup>2</sup> and subject to the limitations hereinafter discussed, the action may be either in tort or contract,<sup>3</sup> depending upon whether the liability is regarded as contractual or tortious.<sup>4</sup> An action for damages for negligence in altering a message is not an action for an injury to personal property.<sup>5</sup>

2. **By Sender.** — The sender of a telegram whose message has been incorrectly transmitted or delayed in delivery, has a choice of remedies;<sup>6</sup> he may sue either for breach of the contract<sup>7</sup> under which the

of the sender, the agent, addressee, could recover for the loss sustained. *Pearlstone v. Western Union Tel. Co.* (Tex. Civ. App.), 199 S. W. 860.

95. *American Union Tel. Co. v. Daugherty*, 89 Ala. 191, 7 So. 660; *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519.

96. *Lee v. Western Union Tel. Co.*, 51 Mo. App. 375.

97. *American Exp. Co. v. Postal Tel.-Cable Co.*, 97 Neb. 701, 151 N. W. 240; *Postal Tel. Cable Co. v. Harriss*, 56 Tex. Civ. App. 105, 121 S. W. 358, 122 S. W. 891.

98. *Western Union Tel. Co. v. Bowen* (Ala. App.), 76 So. 985; *Southwestern Tel. & Tel. Co. v. Jarrell* (Tex. Civ. App.), 138 S. W. 1165, failure to get a long distance telephone connection.

99. **Right to sue initial or connecting carrier**, see 10 STANDARD PROC. 239; 14 STANDARD PROC. 284.

1. See the titles "Master and Servant;" "Principal and Agent."

2. See the titles "Choice and Election of Remedies;" "Construction and Theory of Pleadings." See also 10 STANDARD PROC. 219, et seq.

3. See *infra*, this section.

4. **As to basis of plaintiff's right**, see *supra*, VII, B, and *infra*, this section.

5. *Penobscot Fish Co. v. Western Union Tel. Co.*, 91 Conn. 35, 98 Atl. 341, within meaning of limitation of statute.

6. **1a.**—*Bernstein v. Western Union Tel. Co.*, 169 Iowa 115, 151 N. W. 108. **Miss.**—*Shingleur v. Western Union Tel. Co.*, 72 Miss. 1030, 18 So. 425, 48 Am. St. Rep. 604, 30 L. R. A. 444. **Mo.** *Fitch v. Western Union Tel. Co.*, 150 Mo. App. 149, 130 S. W. 44. **N. Y.** *Bertuch v. United States & Hayti Tel. & Cable Co.*, 79 Misc. 10, 139 N. Y. Supp. 289. **N. C.**—*Penn v. Western Union Tel. Co.*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223.

See 5 STANDARD PROC. 112; 10 STANDARD PROC. 219.

[a] "The action may be based upon a violation of the contractual duty which a telegraph company owes to the sender of the message, or it may be based upon the general legal duty that all companies of this kind owe to the public in its dealings with the public. The action may sound in contract, or it may sound in tort. The party may waive the breach of contract and sue for damages based upon the legal wrong—the tort involved in the act. Actionable negligence is always based on a violation of some duty, whether that duty arises from contractual relationships existing between the parties, or whether the duty is imposed upon the wrongdoer by the law itself." *Bernstein v. Western Union Tel. Co.*, 169 Iowa 115, 151 N. W. 108.

7. *Western Union Tel. Co. v. Garthright*, 151 Ala. 413, 44 So. 212; *Carland v. Western Union Tel. Co.*, 118

message was accepted, or in tort, for negligence in its transmission<sup>8</sup> or delivery.<sup>9</sup>

The advantage in suing in tort, is that the measure of damages may be greater in such an action;<sup>10</sup> punitive damages may sometimes be recovered,<sup>11</sup> which could not be recovered in a contract action.<sup>12</sup>

**3. By Addressee.**—The proper action by the addressee for damages following from a mistake in the terms of a message as delivered, or delay in or failure to deliver the message,<sup>13</sup> is in most states said to be in tort for the negligence involved.<sup>14</sup> Where, however, the relation of the addressee to the company is regarded as contractual,<sup>15</sup> or the

Mich. 369, 76 N. W. 762, 74 Am. St. Rep. 394, 43 L. R. A. 280.

8. *Lahood v. Continental Tel. Co.*, 52 Mont. 313, 157 Pac. 639; *American Exp. Co. v. Postal Tel.-Cable Co.*, 97 Neb. 701, 151 N. W. 240.

9. *Western Union Tel. Co. v. Hill*, 163 Ala. 18, 50 So. 248, 23 L. R. A. (N. S.) 648; *Fitch v. Western Union Tel. Co.*, 150 Mo. App. 149, 130 S. W. 44.

10. See *infra*, this note.

[a] **Damages for mental suffering** may be recovered in some states in (1) an action *ex contractu*, when only nominal damages are established but in an action in tort only when there is proof of damages for physical injuries or injuries in estate. *Jordan v. Western Union Tel. Co.*, 197 Ala. 28, 72 So. 339; *Western Union Tel. Co. v. Wright*, 169 Ala. 104, 53 So. 95; *Western Union Tel. Co. v. Rowell*, 153 Ala. 295, 45 So. 73; *Blount v. Western Union Tel. Co.*, 126 Ala. 105, 27 So. 779. *Contra*, *Penn. v. Western Union Tel. Co.*, 159 N. C. 306, 75 S. E. 16, 41 L. R. A. (N. S.) 223. (2) In most states, however, unless the action is in tort, damages for mental suffering cannot be recovered. *Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 98 N. W. 281, 101 Am. St. Rep. 268, 64 L. R. A. 545; *Marlatt v. Western Union Tel. Co.*, 167 Wis. 176, 167 N. W. 263. Compare *Western Union Tel. Co. v. Melvin*, 175 Ky. 480, 194 S. W. 563.

11. *Lahood v. Continental Tel. Co.*, 52 Mont. 313, 157 Pac. 639.

12. *Western Union Tel. Co. v. Rowell*, 153 Ala. 295, 45 So. 73.

13. *Western Union Tel. Co. v. Burris*, 179 Fed. 92, 102 C. C. A. 386; *Stone & Co. v. Postal Tel. Co.*, 35 R. I. 498, 87 Atl. 319, 46 L. R. A. (N. S.) 180.

14. Ala.—*McGehee v. Western Union*

*Tel. Co.*, 169 Ala. 109, 53 So. 205, Ann. Cas. 1912B, 512; *Heathcoat v. Western Union Tel. Co.*, 156 Ala. 339, 47 So. 139, 132 Am. St. Rep. 38; *Western Union Tel. Co. v. Adams*, 154 Ala. 657, 46 So. 228; *Postal Tel.-Cable Co. v. Ford*, 117 Ala. 672, 23 So. 684. Ill.—*Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 21 N. E. 4, 15 Am. St. Rep. 109. Ga.—*Western Union Tel. Co. v. Cooper*, 2 Ga. App. 376, 58 S. E. 517. Ill.—*Webbe v. Western Union Tel. Co.*, 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207. Ia.—*Wells v. Western Union Tel. Co.*, 144 Iowa 605, 123 N. W. 371, 24 L. R. A. (N. S.) 1045; *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214. N. M.—*State Bank of Commerce v. Western Union Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120. Okla.—*Levy Bros. v. Western Union Tel. Co.*, 39 Okla. 416, 135 Pac. 423. Ore.—*McLeod v. Pacific Tel. Co.*, 52 Ore. 22, 94 Pac. 568, 95 Pac. 1009, 15 L. R. A. (N. S.) 810, 16 Ann. Cas. 1239. Pa.—*Bailey & Co. v. Western Union Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895.

[a] "The breach of the duty of the defendant in delivering a message is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it." *Woods v. Western Union Tel. Co.*, 148 N. C. 1, 61 S. E. 653, 128 Am. St. Rep. 581.

15. *Schmitt v. Postal Tel. Cable Co.*, 164 Iowa 654, 146 N. W. 467.

[a] **Contract Regarded as Made for Benefit of Addressee.**—*Western Union Tel. Co. v. Parsley*, 57 Tex. Civ. App. 8, 121 S. W. 226. And see *supra*, VII, B, 3.

particular circumstances of the case make it such,<sup>16</sup> the action may be in contract. An action pursuant to statute authorizing the addressee to sue, is in effect one for negligence.<sup>17</sup>

**4. Determination of the Character of the Action.** — It is frequently a matter of considerable difficulty to determine whether a complaint is based on a breach of contract or on a tort,<sup>18</sup> or on a statute.<sup>19</sup> In accordance with the principles elsewhere discussed,<sup>20</sup> where negligence in misstating the language of the message,<sup>21</sup> or in failing to deliver a message or in not delivering it promptly,<sup>22</sup> is averred as the gravamen of the action, it will be held to be in tort. On the other hand, if from a consideration of all of the allegations of the complaint the basis of the cause of action appears to be the breach of a contract, the action will be held to be contractual in its nature.<sup>23</sup> Averments of negligence may be merely descriptive of the mode in which a contract was broken,<sup>24</sup> and on the other hand, averments as to the contract may be pleaded by way of inducement to the allegation of facts constituting the tort.<sup>25</sup> Averments of a contract, in a complaint setting out the facts, will not prevent the action from being one based upon a statute.<sup>26</sup>

**E. CONDITIONS PRECEDENT. — 1. In General.**<sup>27</sup> — The party injured, need not before instituting the action afford the telegraph com-

16. See *infra*, this note.

[a] Message was given by the sender as the agent or representative of the addressee and the company had knowledge of this fact. *Western Union Tel. Co. v. Rowell*, 153 Ala. 295, 45 So. 73; *Western Union Tel. Co. v. Heathcoat*, 149 Ala. 623, 43 So. 117.

[b] Message given for the exclusive benefit of addressee. See *Western Union Tel. Co. v. Adams*, 154 Ala. 657, 46 So. 228.

17. *Western Union Tel. Co. v. Potts*, 120 Tenn. 37, 113 S. W. 789, 127 Am. St. Rep. 991, 19 L. R. A. (N. S.) 479.

18. *Western Union Tel. Co. v. Littleton*, 169 Ala. 99, 53 So. 97.

19. *Gray v. Western Union Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301.

20. See 5 STANDARD PROC. 357; 10 STANDARD PROC. 222; 21 STANDARD PROC. 118.

21. *Western Union Tel. Co. v. Louisville*, 161 Ala. 231, 50 So. 87, mistake in a proper name.

22. *Bernstein v. Western Union Tel. Co.*, 169 Iowa 115, 151 N. W. 108.

23. *Western Union Tel. Co. v. Littleton*, 169 Ala. 99, 53 So. 97.

24. *Western Union Tel. Co. v. Garthright*, 151 Ala. 413, 44 So. 212; *Western Union Tel. Co. v. Crumpton*, 138

Ala. 632, 32 So. 517; *Western Union Tel. Co. v. Bowen* (Ala. App.), 76 So. 985.

[a] Illustrations. — (1) Where a "count sets out the contract, consideration, etc., alleges that 'the defendant broke said contract in this,' and then goes on to allege that it negligently failed, etc., all of which is necessarily referred back to the preceding expression that it broke the contract 'in this,' " a cause of action *ex contractu* is stated. *Western Union Tel. Co. v. Littleton*, 169 Ala. 99, 53 So. 97. (2) An averment "that the defendant failed, wilfully and wantonly, to deliver said telegram as it agreed to do," does not change the action from one in contract to a tort action. *Western Union Tel. Co. v. Rowell*, 153 Ala. 295, 45 So. 73.

25. *Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 98 N. W. 281, 101 Am. St. Rep. 268, 64 L. R. A. 545; *Butler v. Western Union Tel. Co.*, 62 S. C. 222, 40 S. E. 162, 89 Am. St. Rep. 893.

26. *Gray v. Western Union Tel. Co.*, 108 Tenn. 39, 64 S. W. 1063, 91 Am. St. Rep. 706, 56 L. R. A. 301.

27. See generally the title "Suits and Actions,"



pany an opportunity to attempt to remedy the injury inflicted,<sup>28</sup> nor need he first proceed against other persons as to whom he may have a remedy arising out of the transaction concerning which the message was sent,<sup>29</sup> nor attempt to rescind the transaction entered into as a result of defendant's negligence.<sup>30</sup>

**2. Presentation of Claim.**—A stipulation in a telegraph blank requiring a claim for damages to be presented within a specified time after the telegram is filed for transmission, is in most states, valid and enforceable,<sup>31</sup> if reasonable in its nature and effect,<sup>32</sup> though in a few

**28.** *Western Union Tel. Co. v. Wofford* (Tex. Civ. App.), 42 S. W. 119, opportunity to move to set aside a foreclosure sale which would not have been made but for defendant's negligence need not be given.

**29.** *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. 899, 14 C. C. A. 166 (validity of prior attachments levied as a result of delay in transmitting the message, need not be litigated); *Strause v. Western Union Tel. Co.*, 8 Biss. 104, 23 Fed. Cas. No. 13,531, action against indorser of forged draft need not be instituted.

**30.** *Hasbrouck v. Western Union Tel. Co.*, 107 Iowa 160, 77 N. W. 1034, 70 Am. St. Rep. 181.

**31. U. S.**—*Gardner v. Western Union Tel. Co.*, 231 Fed. 405, 145 C. C. A. 399. **Ala.**—*Western Union Tel. Co. v. Prevatt*, 149 Ala. 617, 43 So. 106. **Ark.**—*Western Union Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112. **Ga.**—*Postal Tel.-Cable Co. v. Moss & Co.*, 5 Ga. App. 503, 63 S. E. 590. **Mass.**—*Weelock v. Postal Tel. Cable Co.*, 197 Mass. 119, 83 N. E. 313. **N. C.**—*Mason v. Western Union Tel. Co.*, 169 N. C. 229, 85 S. E. 384, Ann. Cas. 1917D, 159; *Bennett v. Western Union Tel. Co.*, 168 N. C. 496, 84 S. E. 798; *Lytle v. Western Union Tel. Co.*, 165 N. C. 504, 81 S. E. 759; *Sykes v. Western Union Tel. Co.*, 150 N. C. 431, 64 S. E. 177; *Sherrill v. Western U. Tel. Co.*, 109 N. C. 527, 14 S. E. 94. **S. C.**—*Toale v. Western Union Tel. Co.*, 83 S. C. 41, 64 S. E. 963. **Tenn.**—*Manier v. Western Union Tel. Co.*, 94 Tenn. 442, 29 S. W. 732. **Tex.**—*Lester v. Western Union Tel. Co.*, 84 Tex. 313, 19 S. W. 256; *Western Union Tel. Co. v. Verhalen* (Tex. Civ. App.), 204 S. W. 240.

[a] **Interstate messages are within such a stipulation.** *Western Union*

*Tel. Co. v. Bank of Spencer* (Okla.), 156 Pac. 1175.

[b] **Where the message is never delivered**, a stipulation requiring a claim to be presented within a specified time after sending, is inapplicable. **U. S.**—*Johnston v. Western Union Tel. Co.*, 33 Fed. 362. **Ind.**—*Western Union Tel. Co. v. Yopst*, 118 Ind. 248, 20 N. E. 222, 3 L. R. A. 224. **N. C.**—*Sherrill v. Western Union Tel. Co.*, 109 N. C. 527, 14 S. E. 94.

See 10 STANDARD PROC. 225; 14 STANDARD PROC. 44, 52.

[c] **Where fraud is alleged** such a stipulation is inapplicable. *Lahood v. Continental Tel. Co.*, 52 Mont. 313, 157 Pac. 639.

[d] **The period of limitation stated on the blank on which the message is written controls**, where the period stated on the blank on which the message is delivered is different. *Western Union Tel. Co. v. Taber* (Tex. Civ. App.), 127 S. W. 268.

[e] **Not a Limitation on Time for Bringing Action.**—Such a provision is not in the nature of a provision limiting the time within which an action must be brought. *Forney v. Postal Tel.-Cable Co.*, 152 N. C. 494, 67 S. E. 1011; *Sykes v. Western Union Tel. Co.*, 150 N. C. 431, 64 S. E. 177; *Simpson v. Western Union Tel. Co.*, 104 S. C. 393, 89 S. E. 321. Compare *Dodson v. Western Union Tel. Co.*, 97 Miss. 104, 52 So. 693.

**32.** See the cases cited in preceding note.

[a] **A stipulation for notice within a period less than that prescribed by statute is unreasonable** as a matter of law. *Western Union Tel. Co. v. Smith*, 61 Tex. Civ. App. 531, 130 S. W. 622. And see *Taber v. Western Union Tel. Co.*, 104 Tex. 272, 137 S. W. 106, 34 L. R. A. (N. S.) 185.

states such provisions are held to be void.<sup>33</sup> Where valid, such a stipulation is binding upon the addressee.<sup>34</sup> Some statutes also require the presentation of a claim to the company within a specified time.<sup>35</sup> Where knowledge of the negligence of the defendant is not acquired until after the period limited has wholly,<sup>36</sup> or partially,<sup>37</sup> elapsed, the claim is sufficient if presented within a period of the same extent computed from the date of discovery of the facts, though a few cases hold that where the period has only partially expired, the claim must be presented within the remaining portion of the period if this can reasonably be done.<sup>38</sup> The claim must be made by the plaintiff,<sup>39</sup> in writing,<sup>40</sup> and must clearly identify the message in connection with which defendant is charged with negligence.<sup>41</sup> It must state the acts of neg-

33. **Miss.**—*Dodson v. Western Union Tel. Co.*, 97 Miss. 104, 52 So. 693. **Neb.** *Pacific Tel. Co. v. Underwood*, 37 Neb. 315, 55 N. W. 1057, 40 Am. St. Rep. 490. **Okla.**—*Western Union Tel. Co. v. Sights*, 34 Okla. 461, 126 Pac. 234, Ann. Cas. 1914C, 204, 42 L. R. A. (N. S.) 419; *Western Union Tel. Co. v. Crawford*, 29 Okla. 143, 116 Pac. 925, 35 L. R. A. (N. S.) 930.

34. **U. S.**—*Gardner v. Western Union Tel. Co.*, 231 Fed. 405, 145 C. C. A. 399. **R. I.**—*Stone & Co. v. Postal Tel. Co.*, 31 R. I. 174, 76 Atl. 762, 29 L. R. A. (N. S.) 795. **S. C.**—*Broom v. Western Union Tel. Co.*, 71 S. C. 506, 51 S. E. 259, 4 Ann. Cas. 611.

But see *Markley v. Western Union Tel. Co.*, 144 Iowa 105, 122 N. W. 136, where the action by the addressee was in tort.

35. See the statutes and *Markley v. Western Union Tel. Co.*, 144 Iowa 105, 122 N. W. 136.

[a] A statute requiring a claim to be made for damages for "delay" in delivering a telegram does not apply where the telegram was not delivered at all. *Mueller v. Western Union Tel. Co.*, 173 Iowa 402, 155 N. W. 827.

[b] A claim based on the sending of a forged message need not be presented. *Wells v. Western Union Tel. Co.*, 144 Iowa 605, 123 N. W. 371, 24 L. R. A. (N. S.) 1045.

36. *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527, 14 S. E. 94; *Conrad v. Western Union Tel. Co.*, 162 Pa. 204, 29 Atl. 888.

37. **U. S.**—*Postal Tel. Cable Co. v. Nichols*, 159 Fed. 643, 89 C. C. A. 585, 16 L. R. A. (N. S.) 870. **Ky.**—*Western Union Tel. Co. v. Lee*, 174 Ky. 210, 192 S. W. 70, Ann. Cas. 1918C, 1026. **N. C.**—See *Forney v. Postal Tel.-Cable*

*Co.*, 152 N. C. 494, 67 S. E. 1011. **Tex.**—*Western Union Tel. Co. v. McMillan* (Tex. Civ. App.), 174 S. W. 918.

38. *Stone & Co. v. Postal Tel. Co.*, 31 R. I. 174, 76 Atl. 762, 29 L. R. A. (N. S.) 795; *Heiman v. Western Union Tel. Co.*, 57 Wis. 562, 16 N. W. 32.

39. **Ark.**—*Western Union Tel. Co. v. Swearingen*, 94 Ark. 336, 126 S. W. 1071. **Ia.**—*Brockelsby v. Western Union Tel. Co.*, 148 Iowa 273, 126 N. W. 1105; *Younker v. Western Union Tel. Co.*, 146 Iowa 499, 125 N. W. 577. **Tex.** *Swain v. Western U. Tel. Co.*, 12 Tex. Civ. App. 385, 34 S. W. 733.

40. **Ga.**—*Postal Tel.-Cable Co. v. Moss & Co.*, 5 Ga. App. 503, 63 S. E. 590. **N. C.**—*Lytle v. Western Union Tel. Co.*, 165 N. C. 504, 81 S. E. 759. **Tenn.**—*Western Union Tel. Co. v. Courtney*, 113 Tenn. 482, 82 S. W. 484.

[a] The claim itself should be filed and not merely notice of a claim be given. *Postal Tel.-Cable Co. v. Moss & Co.*, 5 Ga. App. 503, 63 S. E. 590.

[b] Where the claim was made by letter, it will be presumed that the letter was received. *Bennett v. Western Union Tel. Co.*, 168 N. C. 496, 84 S. E. 798.

[c] There may be a waiver of the right to have the claim presented in writing. *Hill v. Western Union Tel. Co.*, 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166; *Western Union Tel. Co. v. Stratemeyer*, 6 Ind. App. 125, 32 N. E. 871.

41. **Ga.**—*Postal Tel.-Cable Co. v. Moss & Co.*, 5 Ga. App. 503, 63 S. E. 590. **N. C.**—*Lytle v. Western Union Tel. Co.*, 165 N. C. 504, 81 S. E. 759; *Forney v. Postal Tel.-Cable Co.*, 152 N. C. 494, 67 S. E. 1011, where the message was set out in the letter mak-

ligence and the nature of plaintiff's demand,<sup>42</sup> and make a claim for payment of the damages sustained,<sup>43</sup> and the nature and extent of the damages should be stated.<sup>44</sup> Some authorities regard the presentation of a claim as a condition precedent to the right to maintain the action;<sup>45</sup> but many of them hold that the institution of an action, within the time limited, will be treated as a sufficient compliance with the stipulation requiring a claim to be presented.<sup>46</sup> The necessity of making a

ing the claim. **Tenn.**—*Western Union Tel. Co. v. Courtney*, 113 Tenn. 482, 82 S. W. 484.

42. **Ga.**—*Postal Tel.-Cable Co. v. Moss & Co.*, 5 Ga. App. 503, 63 S. E. 590. **N. C.**—*Lytle v. Western Union Tel. Co.*, 165 N. C. 504, 81 S. E. 759. **Tenn.**—*Western Union Tel. Co. v. Courtney*, 113 Tenn. 482, 82 S. W. 484.

43. **Ga.**—*Postal Tel.-Cable Co. v. Moss & Co.*, 5 Ga. App. 503, 63 S. E. 590, mere notice of loss is insufficient. **N. C.**—*Lytle v. Western Union Tel. Co.*, 165 N. C. 504, 81 S. E. 759. **Tenn.** *Manier v. Western Union Tel. Co.*, 94 Tenn. 442, 29 S. W. 732.

[a] "There is a clear distinction between a notice of negligence and a claim for damages. It is no doubt often the case that notice is given to this company concerning the negligence of its employes in transmitting and delivering telegrams, and complaint made thereof without any thought of making a claim for damages. A mere notice to the company that its employes have been negligent, with the circumstances thereof, is a very different thing from a presentment of a claim for damages based on such negligence, and to hold that a stipulation which requires a presentment of the claim for damages in writing is satisfied by a notice of negligence on which the claim is based would do violence to the language used, and be in effect making a different contract between these parties." *Western Union Tel. Co. v. Moxley*, 80 Ark. 554, 561, 98 S. W. 112.

[b] Letters merely notifying the company of the wrong complained of, are insufficient. *Toale v. Western Union Tel. Co.*, 76 S. C. 248, 57 S. E. 117.

44. **Ga.**—*Postal Tel.-Cable Co. v. Moss & Co.*, 5 Ga. App. 503, 63 S. E. 590. **N. C.**—*Lytle v. Western Union Tel. Co.*, 165 N. C. 504, 81 S. E. 759. See *Forney v. Postal Tel.-Cable Co.*, 152 N. C. 494, 67 S. E. 1011. **Tenn.**

*Western Union Tel. Co. v. Courtney*, 113 Tenn. 482, 82 S. W. 484. **Tex.** *Western Union Tel. Co. v. Brown*, 84 Tex. 54, 19 S. W. 336.

[a] Where the nature of the damages claimed is specified no others can be recovered. *Western Union Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112; *Western Union Tel. Co. v. Murray*, 29 Tex. Civ. App. 207, 68 S. W. 549.

[b] A formal statement of the amount of damages claimed for mental anguish need not be made. *Western Union Tel. Co. v. Freeman*, 121 Ark. 124, 180 S. W. 743.

[c] Damages accruing after the claim is made may be recovered. *Salinger v. Western Union Tel. Co.*, 147 Iowa 484, 126 N. W. 362.

45. *Western Union Tel. Co. v. Yopst (Ind.)*, 11 N. E. 16; *Heald v. Western Union Tel. Co.*, 129 Iowa 326, 105 N. W. 588.

See the title "Suits and Actions," and also 14 STANDARD PROC. 45, note 45 [f].

46. **Ala.**—*Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 7 So. 419, 18 Am. St. Rep. 148. **Ark.**—*Postal Tel. & Cable Co. v. Kelley*, 103 Ark. 442, 147 S. W. 457. **Ga.**—*Petty v. Western Union Tel. Co.*, 138 Ga. 314, 75 S. E. 152. **Ia.**—*Brockelsby v. Western Union Tel. Co.*, 148 Iowa 273, 126 N. W. 1105; *Seddon v. Western Union Tel. Co.*, 146 Iowa 743, 126 N. W. 969. **Ky.**—*Western Union Tel. Co. v. Lee*, 174 Ky. 210, 192 S. W. 70, Ann. Cas. 1918C, 1026. **N. C.**—*Mason v. Western Union Tel. Co.*, 169 N. C. 229, 85 S. E. 384, Ann. Cas. 1917D, 162. **S. C.**—*Smith v. Western Union Tel. Co.*, 77 S. C. 378, 58 S. E. 6, 12 Ann. Cas. 654. **Tenn.**—*Western Union Tel. Co. v. Mellon*, 96 Tenn. 66, 33 S. W. 725. **Tex.**—*Western Union Tel. Co. v. McMillan (Tex. Civ. App.)*, 174 S. W. 918. But see *Western Union Tel. Co. v. Hays (Tex. Civ. App.)*, 63 S. W. 171.

See the title "Suits and Actions,"



claim may of course, be waived by the company.<sup>47</sup>

F. JURISDICTION AND VENUE. — Matters of jurisdiction and venue are in general determined by the principles and rules elsewhere discussed.<sup>48</sup> An action by the addressee of a telegram may be instituted either in the state in which he<sup>49</sup> or the sender resides.<sup>50</sup> The venue of actions against telegraph companies is sometimes specially fixed by statute.<sup>51</sup>

G. JOINDER OF ACTIONS. — The joinder of causes of action in actions for negligent or improper rendition of service is governed by the general rules elsewhere treated.<sup>52</sup>

H. PLEADINGS. — 1. **Complaint.** — a. *In General.* — The declaration or complaint must, of course, conform to the general rules of pleading.<sup>53</sup> It should allege the ownership or operation of a telegraph or telephone line for the use and benefit of the public,<sup>54</sup> the facts showing the assumption of a legal obligation toward the plaintiff,<sup>55</sup> and the

and also 14 STANDARD PROC. 45, note 45, [f].

[a] Unless the process served contains the requisites of a valid notice of claim it will be insufficient as a claim. *Western Union Tel. Co. v. Courtney*, 113 Tenn. 482, 82 S. W. 484. *Compare, Bryan v. Western Union Tel. Co.*, 133 N. C. 603, 45 S. E. 938.

47. *Western Union Tel. Co. v. Heathcoat*, 149 Ala. 623, 43 So. 117. See the title "Suits and Actions," and 14 STANDARD PROC. 51; 10 STANDARD PROC. 225.

48. See the titles "Freight Carriers;" "Interstate Commerce;" "Jurisdiction;" "Venue."

[a] When the action is in contract, the general rules governing the proper venue of contract actions apply. See *Western Union Tel. Co. v. Morrison*, 15 Ala. App. 532, 74 So. 88, the fact that damages for mental anguish may be recovered does not change the action to one for personal injuries.

49. *Postal Tel. & Cable Co. v. Wells*, 82 Miss. 733, 35 So. 190.

50. *Penobscot Fish Co. v. Western Union Tel. Co.*, 91 Conn. 35, 98 Atl. 341.

51. See the statutes and *Western Union Tel. Co. v. Bailey*, 115 Ga. 725, 42 S. E. 89, 61 L. R. A. 933.

[a] A statute fixing the venue of actions against common carriers, applies to actions against a telegraph or telephone company. *Gainesboro Tel. Co. v. Buckner*, 160 Ky. 604, 169 S. W. 1000. See 10 STANDARD PROC. 226.

52. See the title "Joinder of Actions."

[a] Causes of action for breach of

contract in the transmission of different messages may be joined. *Western Union Tel. Co. v. Crumpton*, 138 Ala. 632, 36 So. 517.

[b] A cause of action in tort may be joined with one in contract, based on the same transaction. *May v. Western Union Tel. Co.*, 112 Mass. 90.

53. See generally the title "Declaration and Complaint" and other titles dealing with particular phases of pleading.

[a] The facts should be stated (1) in plain and concise language. *Western Union Tel. Co. v. Snell*, 3 Ala. App. 263, 56 So. 854. (2) They should be positively and distinctly. *Graddy v. Western Union Tel. Co.*, 19 Ky. L. Rep. 1455, 43 S. W. 468.

[b] Facts and not legal conclusions should be alleged. *South Florida Tel. Co. v. Maloney*, 34 Fla. 338, 16 So. 280.

[c] All reasonable intendments in support of the complaint will be made. *Ratliff v. Western Union Tel. Co.* (Tex. Civ. App.), 183 S. W. 78.

54. *South Florida Tel. Co. v. Maloney*, 34 Fla. 338, 16 So. 280.

[a] A mere allegation that the defendant had an office at the place the message was tendered to it, is insufficient. *South Florida Tel. Co. v. Maloney*, 34 Fla. 338, 16 So. 280.

55. *Greenberg v. Western Union Tel. Co.*, 89 Ga. 754, 15 S. E. 651; *Western Union Tel. Co. v. Smith* (Tex. Civ. App.), 133 S. W. 1062. *Compare* 10 STANDARD PROC. 242.

[a] Rule Stated.—"When the plaintiff's right consists of an obligation of the defendant to observe some particu-

wrongful breach of that obligation,<sup>56</sup> as well as the damage occasioned thereby.<sup>57</sup> The nature and form of the allegations will necessarily vary somewhat according as the complaint is founded upon a breach of contract or on tort.<sup>58</sup> Since, however, the action is ordinarily founded upon a breach either of contract or of a duty created by contract, at least where it is for error or failure in delivery,<sup>59</sup> the complaint in such cases, should allege the making of a contract,<sup>60</sup> by the parties or their agents,<sup>61</sup> and its breach,<sup>62</sup> and should set forth<sup>63</sup> the words or substance

lar duty, whether founded upon some contract between the parties, or on the obligation of law arising out of the defendant's particular character or situation, the declaration must specifically state the nature of such duty. The statement must set out distinctly the circumstances which create the liability of the defendant." *South Florida Tel. Co. v. Maloney*, 34 Fla. 338, 16 So. 280.

[b] "A direct allegation that it was the duty of the defendant to have received and to have transmitted the message, would have been insufficient. That averment would have been also only an allegation of a conclusion of law." *South Florida Tel. Co. v. Maloney*, 34 Fla. 338, 16 So. 280. See the title "Conclusions of Law."

[c] In an action for failure to notify plaintiff that he was wanted at the telephone, the complaint must allege that the defendant undertook to serve plaintiff in some capacity. *Lewis v. Southwestern Tel. & Tel. Co.* (Tex. Civ. App.), 59 S. W. 303.

56. *South Florida Tel. Co. v. Maloney*, 34 Fla. 338, 16 So. 280.

57. See *infra*, VII, H, 1, b and the title "Injuries to Persons and Property."

[a] That the damages claimed were proximately caused by the negligence alleged. *Cronheim v. Postal Tel.-Cable Co.*, 10 Ga. App. 716, 74 S. E. 78.

58. As to nature of the action, see *supra*, VII, D.

Pleading in actions on contract, see 11 STANDARD PROC. 981, et seq.

Pleadings in actions for negligence, see the title "Negligence."

In actions against a carrier, see 10 STANDARD PROC. 242; 21 STANDARD PROC. 118, 120.

59. See *Western Union Tel. Co. v. Henry*, 87 Tex. 165, 27 S. W. 63.

60. *Postal Tel.-Cable Co. v. Shepherd*, 14 Ala. App. 371, 70 So. 981; *Western Union Tel. Co. v. Hawkins*, 14

Ala. App. 295, 70 So. 12 (the consideration for the contract must be alleged); *Western Union Tel. Co. v. Henry*, 87 Tex. 165, 27 S. W. 63; *Western Union Tel. Co. v. Smith* (Tex. Civ. App.), 133 S. W. 1062 (action by the addressee); *Western Union Tel. Co. v. Cook*, 45 Tex. Civ. App. 87, 99 S. W. 1131.

Compare 10 STANDARD PROC. 242, 245; 21 STANDARD PROC. 120, 123.

Manner of alleging contracts generally, see 11 STANDARD PROC. 981, et seq.

Necessity of pleading, whole contract, see 11 STANDARD PROC. 992, 1036, 1045; 10 STANDARD PROC. 242, 245.

[a] A direct and express allegation of the making of the contract is not required. *Western Union Tel. Co. v. Conder* (Tex. Civ. App.), 133 S. W. 447; *Western Union Tel. Co. v. Saxon* (Tex. Civ. App.), 138 S. W. 1091.

[b] The consideration of the contract should appear. *Western Union Tel. Co. v. Hawkins*, 14 Ala. App. 295, 70 So. 12 (action by addressee); *Milliken v. Western Union Tel. Co.*, 110 N. Y. 403, 18 N. E. 251, 1 L. R. A. 281; *White v. Western Union Tel. Co.*, 153 App. Div. 684, 138 N. Y. Supp. 598. See 11 STANDARD PROC. 986; 10 STANDARD PROC. 244.

61. *Western Union Tel. Co. v. Cleveland*, 169 Ala. 131, 53 So. 80, Ann. Cas. 1912B, 534.

62. *Western Union Tel. Co. v. Bowen* (Ala. App.), 76 So. 985, when a contract to pay money by telegraph is alleged, a failure to make the payment should be averred. See 11 STANDARD PROC. 1006.

[a] Where the contract alleged was to "transmit" a message an allegation of its breach by failure to "deliver" the message is sufficient. *Western Union Tel. Co. v. Hicks*, 197 Ala. 81, 72 So. 356.

63. *Western Union Tel. Co. v. Johnson*, 164 Ala. 229, 51 So. 230 (action in contract); Compare, *Lee v. Western*

and effect of the message, which must appear to be of such character that the defendant was bound to accept and deliver it.<sup>64</sup> Payment of the usual charges for a message need not be alleged where the message was accepted,<sup>65</sup> but if the action is for the wrongful failure of the defendant to accept a message, an allegation of a readiness and offer to pay the amount of the charges is essential.<sup>66</sup> Matters of defense need not be anticipated and negatived,<sup>67</sup> but the complaint should show compliance with all conditions precedent to the maintenance of the action.<sup>68</sup> Where presentation of a claim to the telegraph company is treated as a condition precedent to the maintenance of the action,<sup>69</sup> the making and filing of the claim should be alleged.<sup>70</sup> Where the act of a servant or agent is pleaded it should appear that the act was within the scope of his employment or agency.<sup>71</sup> In an action for damages for delivering a message which was never sent, an intent to deceive need not be alleged.<sup>72</sup> In an action by the addressee, the facts

Union Tel. Co., 51 Mo. App. 375. See 11 STANDARD PROC. 989, 992.

[a] When a copy of the telegram is attached to the complaint, in the form of a blank upon which the message is written, the printed terms and conditions are thereby made a part of the complaint. *Sherrill v. Western Union Tel. Co.*, 109 N. C. 527, 14 S. E. 94.

[b] Where the telegram is in cipher and unintelligible, a translation or explanation of the message should be set forth. *Bashinsky v. Western Union Tel. Co.*, 1 Ga. App. 761, 58 S. E. 91.

64. *Gist v. Western Union Tel. Co.*, 45 S. C. 344, 23 S. E. 143, 55 Am. St. Rep. 763, message relating to a contract dealing in cotton "futures."

[a] Where there is a law against sending Sunday messages except of a limited class, the complaint must show that the message falls within this class. *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14, 54 N. E. 775.

[b] Attachment of a revenue stamp to the message need not be averred. *Western Union Tel. Co. v. Henley*, 157 Ind. 90, 60 N. E. 682. Compare, *Kirk v. Western Union Tel. Co.*, 90 Fed. 809.

65. *Western Union Tel. Co. v. Snodgrass*, 94 Tex. 284, 60 S. W. 308, 86 Am. St. Rep. 851.

[a] Payment of an account to which the message was charged by an arrangement between the parties, need not be alleged. *Western Union Tel. Co. v. Henley*, 157 Ind. 90, 60 N. E. 682.

66. *Lewis v. Southwestern Tel. & Tel. Co.* (Tex. Civ. App.), 59 S. W. 303.

[a] Where negligent failure to for-

ward a message to another station as promised is charged, payment of the forwarding charges should be pleaded. *Abbott v. Western Union Tel. Co.*, 86 Minn. 44, 90 N. W. 1.

67. *Western Union Tel. Co. v. Henley*, 157 Ind. 90, 60 N. E. 682. See 11 STANDARD PROC. 1005.

[a] The fact that the addressee lived within the free delivery limits of the receiving station need not be stated. *Western Union Tel. Co. v. Whitson*, 145 Ala. 426, 41 So. 405.

[b] The fact that a message was in writing, as required by the rules of the defendant, need not be alleged. *Western Union Tel. Co. v. Wilson*, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23.

68. See the title "Suits and Actions" and 11 STANDARD PROC. 998; 10 STANDARD PROC. 249.

69. See *supra*, VII, E, 2.

70. *Heald v. Western Union Tel. Co.*, 129 Iowa 326, 105 N. W. 588. See generally the title "Suits and Actions."

71. *Gardner v. Western Union Tel. Co.*, 14 Ga. App. 403, 81 S. E. 259. And see generally the titles, "Master and Servant;" "Principal and Agent."

[a] An allegation that a telegram was delivered "to defendant or its agent" is sufficient as an allegation showing that the agent was acting in behalf of his employer and within the scope of his agency. *Western Union Tel. Co. v. Russell*, 4 Ala. App. 485, 58 So. 938.

72. *May v. Western Union Tel. Co.*, 112 Mass. 90.

[a] Rule Stated.—"In an action against a telegraph company for de-



which would authorize him to sue must appear from the pleading.<sup>73</sup>

**Negligence** need not be alleged where the action is *ex contractu*.<sup>74</sup> But in a tort action if negligence is relied upon it must be alleged<sup>75</sup> in accordance with the rules elsewhere stated.<sup>76</sup> Contributory negligence need not be negated in most states.<sup>77</sup>

In an action for damages for mental anguish caused by defendant's delay or error, it should appear from the complaint that any action contemplated by the message, could<sup>78</sup> and would,<sup>79</sup> have been taken, but

delivering a message never sent, and alleging that the defendant falsely represented that it was authorized to deliver such a message, and thereby caused the plaintiff to send goods and suffer damage, it is not necessary to allege that it was done with intent to deceive, or that it was false within the knowledge of the defendant. It is not an action for deceit. It is an action in the nature of a false warranty against one acting as agent who represents that he has authority when he has not. . . . Nor in such an action or false representations is it necessary for 'he plaintiffs to allege that they used due care and diligence to ascertain if the representations were true.' *May v. Western Union Tel. Co.*, 112 Mass 90.

73. See *infra*, this note.

When addressee may sue, see *supra*, VII, B, 3.

[a] Where the action is based upon the ground that the sender was his agent, the fact of agency should appear. *Western Union Tel. Co. v. Cleveland*, 169 Ala. 131, 53 So. 80, Ann. Cas. 1912B, 534.

[b] That he was beneficially interested in the message to the knowledge of the defendant, must appear. *Aniston Cordage Co. v. Western Union Tel. Co.*, 161 Ala. 216, 49 So. 770, 135 Am. St. Rep. 124, 30 L. R. A. (N. S.) 1116.

74. *Western Union Tel. Co. v. Fuel*, 165 Ala. 391, 51 So. 571.

75. Ala.—*Western Union Tel. Co. v. Saunders*, 164 Ala. 234, 51 So. 176, 137 Am. St. Rep. 35. Ky.—*Western Union Tel. Co. v. Jump*, 8 Ky. L. Rep. 531. N. M.—*State Bank of Commerce v. Western Union Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120.

[a] An allegation of a delivery to plaintiff of a forged message is sufficient, as negligence will be presumed. *State Bank of Commerce v. Western Union Tel. Co.*, 19 N. M. 211, 142 Pac. 156, L. R. A. 1915A, 120.

[b] Allegation that defendant employed an incompetent agent shows no negligence unless it is further alleged that such employee was negligent in the performance of some act. *Hocker v. Western Union Tel. Co.*, 45 Fla. 363, 34 So. 901.

76. See the title "Negligence."

[a] **General Averment.**—"The rule is that the duty to exercise care being shown, the failure to perform that duty, the negligence causing the injuries complained of may be well averred in the most general terms, little if at all short of the mere conclusions of the pleader; and this upon the entirely sufficient consideration, among others, that if the defendant has been guilty of negligence he knows as well as, or better, than the plaintiff can in what that negligence consisted." *Postal Tel.-Cable Co. v. Jones*, 133 Ala. 217, 225, 32 So. 500.

[b] Distinct acts of negligence may be set out in the same complaint. *Western Union Tel. Co. v. Reed*, 158 Ky. 552, 165 S. W. 656, negligence in failure to deliver a telegram promptly and in incorrectly transmitting it.

77. *Cowan v. Western Union Tel. Co.*, 122 Iowa 379, 93 N. W. 231, 101 Am. St. Rep. 268, 64 L. R. A. 545; *Mitchell v. Western Union Tel. Co.*, 5 Tex. Civ. App. 527, 24 S. W. 550. See 20 *STANDARD PROC.* 314.

78. *Hartzog v. Western Union Tel. Co.* (Miss.), 34 So. 361; *Western Union Tel. Co. v. Stracner* (Tex. Civ. App.), 152 S. W. 845; *Western Union Tel. Co. v. Smith* (Tex. Civ. App.), 133 S. W. 1062; *Western Union Tel. Co. v. Bell*, 42 Tex. Civ. App. 462, 92 S. W. 1036, arrival in time for funeral.

79. Ky.—*Western Union Tel. Co. v. Melvin*, 175 Ky. 480, 194 S. W. 563. S. C.—*Simkins v. Western Union Tel. Co.*, 97 S. C. 413, 81 S. E. 657; *Capers v. Western Union Tel. Co.*, 71 S. C. 29, 50 S. E. 537; *Mood v. Western Union Tel. Co.*, 40 S. C. 524, 19 S. E. 67, action

for the error or delay,<sup>80</sup> and that by no other means could the suffering have been averted.<sup>81</sup> That the mental anguish suffered was proximately caused by the error or delay should appear from the facts alleged.<sup>82</sup>

b. *Allegations of Damage.*—(I.) *In General.*<sup>83</sup>—The complaint must state facts from which it appears as a matter of law that damages have been sustained,<sup>84</sup> though it will be sufficient if only nominal damages appear to have been suffered.<sup>85</sup> General damages need not be alleged.<sup>86</sup> Special damages, however, must be expressly alleged,<sup>87</sup> and it must

by doctor for loss of professional services. But see *Harrison v. Western Union Tel. Co.*, 71 S. C. 386, 51 S. E. 119. *Tex.*—*Southwestern Tel. & Tel. Co. v. Givens* (Tex. Civ. App.), 139 S. W. 676; *Western Union Tel. Co. v. Smith* (Tex. Civ. App.), 133 S. W. 1062.

But see *Western Union Tel. Co. v. Griffith*, 161 Ala. 241, 50 So. 91.

80. See preceding notes.

[a] *Forms of such allegations*, see *Western Union Tel. Co. v. Eskridge*, 7 Ind. App. 208, 33 N. E. 238; *Western Union Tel. Co. v. Cates* (Tex. Civ. App.), 132 S. W. 92; *Western Union Tel. Co. v. Gahan*, 17 Tex. Civ. App. 657, 44 S. W. 933.

[b] *A general averment* (1) has been held insufficient. *Western Union Tel. Co. v. Forest* (Tex. Civ. App.), 157 S. W. 204. (2) It is not necessary to plead the evidence upon which plaintiff relies. *Western Union Tel. Co. v. Rowe*, 44 Tex. Civ. App. 84, 98 S. W. 228; *Western Union Tel. Co. v. Martin* (Tex. Civ. App.), 191 S. W. 192. (3) But when it is averred that some special arrangement could have been made by plaintiff which no other person could have effected, the nature of such arrangement should be stated. *Western Union Tel. Co. v. Mitchell*, 91 Tex. 454, 44 S. W. 274, 66 Am. St. Rep. 906, 40 L. R. A. 209. (4) When it is alleged that it would have been necessary for plaintiff to take a certain train, it must also be alleged that he would have taken that particular train. *Southwestern Tel. & Tel. Co. v. Givens* (Tex. Civ. App.), 139 S. W. 676.

[c] That a funeral would not have been postponed if plaintiff had replied to a delayed telegram, requesting a postponement, need not be alleged. *Western Union Tel. Co. v. Cook*, 45 Tex. Civ. App. 87, 99 S. W. 1131.

81. See *infra*, this note.

[a] When a telegram sending money to enable a person to make a journey was not delivered it should be alleged

that the necessary money could not be obtained by the person from any other source. *Western Union Tel. Co. v. Melvin*, 175 Ky. 480, 194 S. W. 563.

[b] But where notice of a death and funeral was delayed in transmission, the plaintiff addressee need not allege that he replied or that if he had done so the funeral would not have been delayed, since this is matter for defensive pleading. *Western Union Tel. Co. v. Cook*, 45 Tex. Civ. App. 87, 99 S. W. 1131, funeral message.

82. *Western Union Tel. Co. v. Martin* (Tex. Civ. App.), 191 S. W. 192.

*Necessity for allegation of other damage*, see *infra*, VII, H, 1, b, (II).

83. See generally the title "*Injuries to Persons and Property.*"

84. *Pacific Pine Lumb. Co. v. Western Union Tel. Co.*, 123 Cal. 428, 56 Pac. 103; *Ratliff v. Western Union Tel. Co.* (Tex. Civ. App.), 183 S. W. 73.

[a] Where the actual damages, the charges paid, are set out an averment of damages which cannot be recovered does not invalidate the complaint. *Western Union Tel. Co. v. Garthright*, 151 Ala. 413, 44 So. 212.

85. *Stafford v. Western Union Tel. Co.*, 73 Fed. 273; *Taliferro v. Western Union Tel. Co.*, 21 Ky. L. Rep. 1290, 54 S. W. 825.

86. See 13 STANDARD PROC. 364.

[a] The charges paid the company may be recovered as general damages, without being specially pleaded. *Western Union Tel. Co. v. Appleton*, 190 Ala. 283, 67 So. 412; *Western Union Tel. Co. v. Snell*, 3 Ala. App. 263, 56 So. 854.

87. *Ala.*—*McLendon v. Western Union Tel. Co.*, 15 Ala. App. 230, 73 So. 120. *Cal.*—*Pacific Pine Lumb. Co. v. Western Union Tel. Co.*, 123 Cal. 428, 56 Pac. 103. *S. C.*—*Mood v. Western Union Tel. Co.*, 40 S. C. 524, 19 S. E. 67. *Tex.*—*Western Union Tel. Co. v. Partlow*, 30 Tex. Civ. App. 599, 71 S. W. 584.

See 13 STANDARD PROC. 365.

appear, in actions *ex contractu* at least, either from the face of the message,<sup>88</sup> or from the other facts alleged,<sup>89</sup> that the damages claimed were within the reasonable contemplation of the defendant. If the pleading of special damages is insufficient, general damages may nevertheless be recovered,<sup>90</sup> unless the nature of the action is such that only special damages are recoverable.<sup>91</sup>

(II.) **In Mental Anguish Cases.** — Damages for mental anguish may in some states be recovered under a general averment of damage;<sup>92</sup> in other states they must be pleaded specially,<sup>93</sup> and in actions *ex delicto* other damage to the person, estate, or reputation must be alleged.<sup>94</sup> When the contents of the message are not such as to impart notice that mental suffering is likely to arise from the negligence of the company in delivering the message, the facts showing that the company had actual notice of the circumstances surrounding the parties and their relationship should be alleged,<sup>95</sup> except where otherwise provided by statute.<sup>96</sup>

88. *Western Union Tel. Co. v. Henley*, 157 Ind. 90, 60 N. E. 682; *Simkins v. Western Union Tel. Co.*, 97 S. C. 413, 81 S. E. 657, loss of compensation for services by attorney. See also *Western Union Tel. Co. v. Bowen* (Ala. App.), 76 So. 985.

89. **Ala.**—*Western Union Tel. Co. v. Bowen* (Ala. App.), 76 So. 985, damages for mental anguish. **Ky.**—*Taylor v. Western Union Tel. Co.*, 31 Ky. L. Rep. 240, 101 S. W. 969, apparently action *ex delicto*. **S. C.**—*Mood v. Western Union Tel. Co.*, 40 S. C. 524, 19 S. E. 67.

See *Western Union Tel. Co. v. Robertson Bros.*, 63 Tex. Civ. App. 239, 133 S. W. 454 (that loss or injury might occur) and 13 STANDARD PROC. 380.

[a] "The complaint is sufficient if it alleges knowledge of facts and circumstances from which a person of ordinary intelligence and prudence should have known that such damages would result from delay in delivering the message, for facts are well pleaded, which may, by reasonable intendment, be inferred from the facts and circumstances directly alleged. Therefore, in determining the sufficiency of the allegations of the complaint in which the telegram is set out in full, we may consider the information which the telegram itself afforded, when read in the light of the attendant circumstances known to defendant, and also alleged in the complaint." *Simkins v. Western Union Tel. Co.*, 97 S. C. 413, 415, 81 S. E. 657.

**In mental anguish cases, see *infra*, VII, H, 1, b, (II).**

90. *Western Union Tel. Co. v. McMorris*, 158 Ala. 563, 48 So. 349, 132 Am. St. Rep. 46; *Hall v. Western Union Tel. Co.*, 139 N. C. 369, 52 S. E. 50.

91. See 13 STANDARD PROC. 366, note 61.

92. *Sorelle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805.

93. *Lay v. Postal Tel. Cable Co.*, 171 Ala. 172, 54 So. 529; *Amos v. Western Union Tel. Co.*, 79 S. C. 259, 60 S. E. 660, 128 Am. St. Rep. 845, where the relationship between the parties was remote.

94. *Western Union Tel. Co. v. Williams* (Ala. App.), 78 So. 414; *McLendon v. Western Union Tel. Co.*, 15 Ala. App. 230, 73 So. 120.

95. **Ala.**—*Western Union Tel. Co. v. Bowen* (Ala. App.), 76 So. 985. **S. C.** *Fass v. Western Union Tel. Co.*, 82 S. C. 461, 64 S. E. 235. **Tex.**—*Western Union Tel. Co. v. Samuels* (Tex. Civ. App.), 141 S. W. 802.

[a] When the action is for failure to call the plaintiff to receive a telephone message, the fact that the company had notice of the nature of the message must be alleged. *Southwestern Tel. & Tel. Co. v. Givens* (Tex. Civ. App.), 139 S. W. 676.

96. *Bush v. Western Union Tel. Co.*, 93 S. C. 176, 76 S. E. 197; *Stewart v. Western Union Tel. Co.*, 93 S. C. 119, 76 S. E. 111, each holding constitutional a statute establishing a different rule.



(III.) **Exemplary Damages.**—The complaint need not contain a distinct and express claim for exemplary damages,<sup>97</sup> though the facts alleged must be such as to warrant their allowance.<sup>98</sup>

**2. Plea or Answer.**—The defendant's plea or answer should conform to the general rules elsewhere treated.<sup>99</sup> Affirmative defenses must be specially pleaded.<sup>1</sup> This is true of the defense that a claim for damages was not presented within the time limited by the terms of the contract under which the contract was accepted, where compliance with such a stipulation is not regarded as a condition precedent to the right to maintain the action which must be alleged in the complaint.<sup>2</sup>

**I. TRIAL.**—**1. In General.**—Proof of delay in the delivery of a message,<sup>3</sup> and proof of delivery of an erroneous or altered message establishes prima facie the negligence of the telegraph company,<sup>4</sup> and if accompanied by proof of damages sustained as a proximate result of the negligence,<sup>5</sup> justifies a recovery. Evidence of special damages will not be received unless the incurring of such damages is alleged in the complaint.<sup>6</sup> In actions to recover for mental anguish, there can be no recovery unless it is proved that action contemplated in the message,

97. *Machen v. Western Union Tel. Co.*, 63 S. C. 363, 41 S. E. 448. See 13 STANDARD PROC. 366. But see *McAllen v. Western Union Tel. Co.*, 70 Tex. 243, 7 S. W. 715.

98. See 13 STANDARD PROC. 366. But see *Western Union Tel. Co. v. Williams* (Ala. App.), 78 So. 414, containing dictum to the effect that an allegation of simple negligence is sufficient if the facts justify it, and citing *Birmingham Waterworks Co. v. Brooks* (Ala. App.), 76 So. 515.

[a] **Ratification of Agent's Act.** When gross negligence is the basis of the claim for exemplary damages, the complaint should allege that the act of the defendant's agent was either directed, ratified, or adopted by it. *Western Union Tel. Co. v. Schoonmaker* (Tex. Civ. App.), 181 S. W. 263, a verdict does not cure a defect in the pleading in this particular.

99. See 11 STANDARD PROC. 1010; 10 STANDARD PROC. 252; 13 STANDARD PROC. 388; and the titles "Answers;" "Confession and Avoidance;" "Denials." See also titles dealing with particular pleas, answers and defenses.

[a] **General Denial.**—See *Mitchiner v. Western Union Tel. Co.*, 70 S. C. 522, 50 S. E. 190 and the title "Denials."

1. *Western Union Tel. Co. v. Rowell*, 166 Ala. 651, 51 So. 880, that a message was sent collect and that there was no person at the place to which

the message was directed to receive and pay for it. See also 2 STANDARD PROC. 37; 5 STANDARD PROC. 238; 11 STANDARD PROC. 1017, et seq.

2. **Ala.**—*Harris v. Western Union Tel. Co.*, 121 Ala. 519, 25 So. 910, 77 Am. St. Rep. 70. **Ind.**—*Western Union Tel. Co. v. Trumbell*, 1 Ind. App. 121, 27 N. E. 313. **Tex.**—*Western Union Tel. Co. v. Linney* (Tex. Civ. App.), 28 S. W. 234. **Wash.**—*Martin v. Sunset Tel. & Tel. Co.*, 18 Wash. 260, 51 Pac. 376.

See *supra*, VII, E; VII, H, 1, a.

3. *Baker v. Western Union Tel. Co.*, 84 S. C. 477, 66 S. E. 182, 137 Am. St. Rep. 848.

[a] **Long and unexplained delay** is evidence of wilfulness or wantonness. *Baker v. Western Union Tel. Co.*, 84 S. C. 477, 66 S. E. 182, 137 Am. St. Rep. 848.

4. **Ga.**—*Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480.

III.—*Tyler v. Western U. Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38. **Mo.** *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 58 Am. St. Rep. 609, 34 L. R. A. 492. **Pa.**—*Bailey & Co. v. Western Union Tel. Co.*, 227 Pa. 522, 76 Atl. 736, 43 L. R. A. (N. S.) 502, 19 Ann. Cas. 895.

5. *Champion Chemical Works v. Postal Tel.-Cable Co.*, 123 Ill. App. 20.

6. *Amos v. Western Union Tel. Co.*, 79 S. C. 259, 60 S. E. 660, 128 Am. St.

could and would have been taken.<sup>7</sup> If negligence of a particular kind or at a particular place is charged, other acts of negligence cannot be shown.<sup>8</sup> Under a general denial, defendant may show, that it was instructed to deliver the telegram by mail,<sup>9</sup> or that the addressee lived beyond the free delivery limits of the receiving station.<sup>10</sup>

**2. Questions of Law and Fact.**<sup>11</sup>—When the evidence is conflicting or reasonable minds might properly draw different inferences from it, it becomes a question for the jury to determine whether a mistake was actually made in the message as transmitted,<sup>12</sup> whether the defendant used due diligence and was reasonably prompt in transmitting,<sup>13</sup> or delivering<sup>14</sup> a message, at what time the message was delivered,<sup>15</sup> whether the message was delivered by the sender to a person who was the agent of defendant,<sup>16</sup> whether the telegram was in part at least for the benefit of the addressee,<sup>17</sup> whether the injury suffered was caused by the negligent act of the company,<sup>18</sup> whether plaintiff exercised reasonable care to minimize his injury,<sup>19</sup> the amount of damages to which plaintiff is entitled,<sup>20</sup> whether punitive damages should be awarded,<sup>21</sup>

Rep. 845; *Mood v. Western Union Tel. Co.*, 40 S. C. 524, 19 S. E. 67. See *supra*, VII, H, 1, b.

7. *Western Union Tel. Co. v. Sims* (Tex. Civ. App.), 181 S. W. 800.

Necessity of pleading this fact, see *supra*, VII, H, 1, b, (II).

8. *Western Union Tel. Co. v. Webb*, 94 Ark. 350, 126 S. W. 1072.

9. *Hinson v. Western Union Tel. Co.*, 91 S. C. 338, 74 S. E. 752, Ann. Cas. 1914A, 114.

Proof under general denial or general issue, see generally the title "Denials" and 11 STANDARD PROC. 1014.

10. *Long v. Western Union Tel. Co.*, 92 S. C. 211, 75 S. E. 403.

11. See generally the title "Province of Judge and Jury" and 11 STANDARD PROC. 1054; 13 STANDARD PROC. 392; 10 STANDARD PROC. 256.

12. *Western Union Tel. Co. v. Louisville*, 161 Ala. 231, 50 So. 87.

13. *Western Union Tel. Co. v. Holland*, 11 Ala. App. 510, 66 So. 926.

14. *Ala.*—*Western Union Tel. Co. v. Hill*, 163 Ala. 18, 50 So. 248, 23 L. R. A. (N. S.) 648. *Ia.*—*Mueller v. Western Union Tel. Co.*, 173 Iowa 402, 155 N. W. 827; *Schmitt v. Postal Tel. Cable Co.*, 164 Iowa 654, 146 N. W. 467; *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214. *Mo.*—*Held v. Western Union Tel. Co.*, 192 Mo. App. 31, 178 S. W. 221. *Tex.*—*Western Union Tel. Co. v. Douglass* (Tex. Civ. App.), 124 S. W. 488.

15. *Western Union Tel. Co. v. Northcutt*, 158 Ala. 539, 48 So. 553, 132 Am. St. Rep. 38.

16. *Western Union Tel. Co. v. Craven* (Tex. Civ. App.), 95 S. W. 633.

17. *Western Union Tel. Co. v. Baker*, 14 Ala. App. 208, 69 So. 246.

18. *Western Union Tel. Co. v. Louisville*, 161 Ala. 231, 50 So. 87; *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 78 N. W. 63, 70 Am. St. Rep. 205, 43 L. R. A. 214. See the title "Negligence."

[a] The court should pass upon the matter where the conclusion that a stated result followed from the act of defendant is nothing but a speculation or guess. *Bernstein v. Western Union Tel. Co.*, 169 Iowa 115, 151 N. W. 108.

19. *Dempsey v. Western Union Tel. Co.*, 77 S. C. 399, 58 S. E. 9.

20. *Salinger v. Western Union Tel. Co.*, 147 Iowa 484, 126 N. W. 362. See 13 STANDARD PROC. 393.

[a] In fixing damages for mental suffering the jury has a wide discretion. *Western Union Tel. Co. v. Cleveland*, 169 Ala. 131, 53 So. 80, Ann. Cas. 1912B, 534.

21. *Western Union Tel. Co. v. Baker*, 14 Ala. App. 208, 69 So. 246; *Glover v. Western Union Tel. Co.*, 78 S. C. 502, 59 S. E. 526. See 13 STANDARD PROC. 394.

[a] Unexplained delay of seventeen hours in the delivery of a telegram is sufficient evidence to carry the question of defendant's willfulness to the

whether the plaintiff could and would have acted upon the request contained in the message,<sup>22</sup> whether the action contemplated by the message could have been taken in time to have been of benefit to the person interested,<sup>23</sup> and whether defendant's agent did not know that a message accepted by him could not be delivered promptly on arrival at its destination.<sup>24</sup> The reasonableness of a stipulation in the contract is ordinarily a question for the court to determine;<sup>25</sup> but it is a question for the jury whether a stipulation was agreed to or a regulation established,<sup>26</sup> whether a claim for damages was presented within the time limited by the contract,<sup>27</sup> or whether defendant had waived its rules as to office hours.<sup>28</sup>

3. **Variance.**—In accordance with the rules elsewhere treated,<sup>29</sup> a material variance between the allegations of the complaint and the proof, will prevent a recovery,<sup>30</sup> but an immaterial variance will be disregarded.<sup>31</sup>

**VIII. ACTIONS TO RECOVER PENALTIES.**—An action to recover a penalty imposed by statute,<sup>32</sup> upon a telephone or telegraph

jury. *Dempsey v. Western Union Tel. Co.*, 77 S. C. 399, 58 S. E. 9.

[b] Whether there has been a ratification of the willful act of an employee, by reason of which plaintiff is entitled to recover punitive damages. *Marlatt v. Western Union Tel. Co.*, 167 Wis. 176, 167 N. W. 263.

22. **Ala.**—*Western Union Tel. Co. v. Griffith*, 161 Ala. 241, 50 So. 91. **N. C.**—*Cordell v. Western Union Tel. Co.*, 149 N. C. 402, 63 S. E. 71, 22 L. R. A. (N. S.) 540. **S. C.**—*Roberts v. Western Union Tel. Co.*, 76 S. C. 275, 56 S. E. 960; *Willis v. Western Union Tel. Co.*, 69 S. C. 531, 48 S. E. 538, 104 Am. St. Rep. 828, 2 Ann. Cas. 52. **Tex.** *Southwestern Tel. & Tel. Co. v. Jarrell* (Tex. Civ. App.), 138 S. W. 1165; *Western Union Tel. Co. v. May*, 8 Tex. Civ. App. 176, 27 S. W. 760, although the addressee testifies positively that he would have acted upon a telegram if it had been received.

23. *Western Union Tel. Co. v. Merrill*, 144 Ala. 618, 39 So. 121, 113 Am. St. Rep. 66; *Western Union Tel. Co. v. Forest* (Tex. Civ. App.), 177 S. W. 204.

24. *Western Union Tel. Co. v. Hicks*, 197 Ala. 81, 72 So. 356.

25. **Ark.**—*Western Union Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528. **Ky.** *Western Union Tel. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963. **Wis.**—*Heiman v. Western Union Tel. Co.*, 57 Wis. 562, 16 N. W. 32.

*Compare Western Union Tel. Co. v. Timmons* (Tex. Civ. App.), 136 S. W.

1169; *Brown v. Western Union Tel. Co.*, 6 Utah 219, 21 Pac. 988.

26. *Western Union Tel. Co. v. Love Banks Co.*, 73 Ark. 205, 83 S. W. 949; *Webbe v. Western Union Tel. Co.*, 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207.

27. *Western Union Tel. Co. v. De Golyer*, 27 Ill. App. 489; *Wheelock v. Postal Tel. Cable Co.*, 197 Mass. 119, 83 N. E. 313.

28. *Western Union Tel. Co. v. Hill*, 163 Ala. 18, 50 So. 248, 23 L. R. A. (N. S.) 648.

29. See the title "**Variance and Failure of Proof**" and 13 STANDARD PROC. 389; 11 STANDARD PROC. 1036; 10 STANDARD PROC. 255; 20 STANDARD PROC. 319.

30. **Ala.**—*Western Union Tel. Co. v. Brown*, 6 Ala. App. 339, 59 So. 329, variance as to the capacity in which the sender of the message acted. **Ky.** *Gainesboro Tel. Co. v. Buckner*, 160 Ky. 604, 169 S. W. 1000, allegation of contract to transmit a message and proof of contract to call a party to the telephone. **Tex.**—*Western Union Tel. Co. v. Smith*, 88 Tex. 9, 28 S. W. 931, 30 S. W. 549.

31. *Brown v. Western Union Tel. Co.*, 169 N. C. 509, 86 S. E. 290; *Western Union Tel. Co. v. McMillan* (Tex. Civ. App.), 174 S. W. 918; *Western Union Tel. Co. v. Roberts*, 34 Tex. Civ. App. 76, 78 S. W. 522.

32. See the statutes.

[a] **Such Statutes Are To Be Strict-**



company for failure in its duty toward such members of the public as employ it, is governed by the general rules applicable to this class of actions.<sup>33</sup> The action may be maintained only by those persons for whose benefit the statute affords a right of recovery.<sup>34</sup> The complaint need not directly refer to the statute,<sup>35</sup> need not precisely follow the language of the statute,<sup>36</sup> nor negative matters of defense.<sup>37</sup> No allegation that actual damages were sustained need be made,<sup>38</sup> nor need actual damages be proved to have been sustained.<sup>39</sup> But all material facts necessary to constitute a cause of action under the statute must be pleaded.<sup>40</sup> Payment or tender of the usual charges should be pleaded.<sup>41</sup>

**IX. CRIMINAL OFFENSES.**—Various acts in connection with the maintenance of telegraph and telephone systems and the transmission of message, have by statutes been made criminal offenses which may be prosecuted by indictment or information.<sup>42</sup>

**ly Though Fairly Construed.**—*Taylor v. Western Union Tel. Co.*, 181 Mo. App. 288, 168 S. W. 895; *Elliott v. Western Union Tel. Co.*, 175 Mo. App. 213, 157 S. W. 670.

[b] **A Statute Imposing a Penalty May Apply to Interstate Messages.** *Western Union Tel. Co. v. Chiles*, 107 Va. 60, 57 S. E. 587.

[c] **Penalty for failure to deliver a message in another state cannot be recovered.** *Western Union Tel. Co. v. Gilkison*, 46 Ind. App. 29, 90 N. E. 650. And see *Western Union Tel. Co. v. Boegli (Ind.)*, 115 N. E. 773.

33. See generally, the title "**Penalties, Forfeitures and Fines.**"

[a] **Payment for the message is (1) a condition precedent to a right of recovery under some statutes.** *Brockman Com. Co. v. Western Union Tel. Co.*, 180 Mo. App. 626, 163 S. W. 920. (2) Under other statutes, prepayment of the charge is not required. *Western Union Tel. Co. v. Boegli (Ind.)*, 115 N. E. 773.

[b] **Institution of a suit within the time limited by a stipulation in the contract, is a sufficient demand and claim.** *Elliott v. Western Union Tel. Co.*, 175 Mo. App. 213, 157 S. W. 670.

34. See *Western Union Tel. Co. v. Coyle*, 24 Okla. 740, 104 Pac. 367, and *supra*, VII, B.

35. *Western Union Tel. Co. v. Griffin*, 1 Ind. App. 46, 27 N. E. 113.

36. *Western Union Tel. Co. v. Walker*, 102 Ind. 599, 2 N. E. 137.

37. *Western Union Tel. Co. v. Buskirk*, 107 Ind. 549, 8 N. E. 557; *West-*

*ern Union Tel. Co. v. Troth*, 43 Ind. App. 7, 84 N. E. 727, presentation of claim within sixty days.

38. *Western Union Tel. Co. v. Ferguson*, 157 Ind. 37, 60 N. E. 679.

39. *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744.

40. *Western Union Tel. Co. v. Hadley (Ind. App.)*, 119 N. E. 870 (a fact necessarily inferable from other facts alleged, is sufficiently shown to exist); *Western Union Tel. Co. v. Klitzke*, 45 Ind. App. 550, 89 N. E. 405 (fact that addressee of message lived within a certain distance from the receiving station); *Elliott v. Western Union Tel. Co.*, 175 Mo. App. 213, 157 S. W. 670.

[a] **A defect in the statement of sufficient facts cannot be cured by verdict.** *Bradshaw v. Western Union Tel. Co.*, 150 Mo. App. 711, 131 S. W. 912.

41. *Bradshaw v. Western Union Tel. Co.*, 150 Mo. App. 711, 131 S. W. 912.

42. See the statutes and generally the title "**Information and Information.**"

[a] **Indictment for Forging a Telegraph Message With Intent To Deceive.**—See *People v. Chadwick*, 143 Cal. 116, 76 Pac. 884; *People v. Danford*, 14 Cal. App. 442, 112 Pac. 474.

[b] **Willful interference with transmission of a message, see** *Southwestern Tel. & Tel. Co. v. Priest*, 31 Tex. Civ. App. 345, 72 S. W. 241.

[c] **Use of obscene language over telephone, see** *Taylor v. State*, 76 Tex. Crim. 642, 177 S. W. 82; *Darnell v. State*, 72 Tex. Crim. 271, 161 S. W. 971.

# TENANTS IN COMMON

By the Editorial Staff.

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## CROSS-REFERENCES:

Ejectment;	Party Walls;
Injuries to Persons and Property;	Survival;
Joint Tenants;	Trespass;
Landlord and Tenant;	Trespass To Try Title;
Lands and Land Transfers;	Use and Occupation;
Parties;	Waste.

Action between cotenants for rent, see 18 STANDARD PROC. 482.

Action of forcible entry and detainer, see 8 STANDARD PROC. 1102.

Attachment of interest of tenant in common, see 3 STANDARD PROC. 322.

Execution against property owned in common, see 15 STANDARD PROC. 861, 950, 963.

Summary proceedings to recover leased premises, see 18 STANDARD PROC. 583.

For further references and cross-references, see the index to this work and the references throughout this article.

**I. REMEDIES BETWEEN COTENANTS INTER SESE.** — A. IN GENERAL. — Some statutes provide that a cotenant may have his action in the same manner as he would have if the tenancy did not exist.<sup>1</sup>

B. ACCOUNT. — **Action of Account.** — By statute in England and in some of the United States one tenant in common may maintain an action of account against his cotenant for receiving more than his just share or proportion.<sup>2</sup> But this statute has not been adopted in

1. See generally the statutes and the following: *Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642; *Anaconda C. M. Co. v. Butte & Boston Min. Co.*, 17 Mont. 519, 43 Pac. 924, construing statute.

2. **Me.**—*Richardson v. Richardson*, 72 Me. 403; (Statute of Anne is a part of the common law of Maine); *Farrar v. Pearson*, 59 Me. 561, 8 Am. Rep. 439. **Mass.**—*Brown v. Wellington*, 106 Mass. 318, 8 Am. Rep. 330. **Md.**—*Hamilton v. Conine*, 28 Md. 635, 92 Am. Dec. 724. **N. H.**—*Webster v. Calef*, 47 N. H. 289. **N. C.**—*Darden v. Cowper*, 52 N. C. 210. **Vt.**—*Hayden v. Merrill*, 44 Vt. 336, 8 Am. Rep. 372. **Va.**—*Early v. Friend*, 16 Gratt. (57 Va), 21, 78 Am. Dec. 649. **W. Va.**—*Ward v. Ward's Heirs*, 40 W. Va. 611, 21 S. E. 746, 52 Am. St. Rep. 911, 29 L. R. A. 449; *Dodson v. Hays*, 29 W. Va. 577, 2 S. E. 415.

St. 4 & 5 Anne, c. 16, §27. See 18 STANDARD PROC. 459.

[a] Where rents, issues and profits are received by tenant, the action may be brought. *Izard v. Bodine*, 11 N. J. Eq. 403, 69 Am. Dec. 595.

[b] Accounting for profits made by occupancy cannot be required in the absence of an actual ouster. **Me.**



some states.<sup>3</sup>

**Accounting in Equity.** — In a proper case, equity may compel an accounting between tenants in common.<sup>4</sup>

**C. ASSUMPSIT.** — Although at common law an action of assumpsit could not be brought by one tenant in common against his cotenant,<sup>5</sup> the general rule under the modern practice is otherwise.<sup>6</sup>

**Action for Rent.** — At common law an action for rent did not lie by one tenant in common against another except by appointment as bailiff to render an account.<sup>7</sup>

**D. REPAIRS AND CONTRIBUTION.** — At common law, tenants in com-

*Gowen v. Shaw*, 40 Me. 56. *Mass.* *Sargent v. Parsons*, 12 Mass. 149. *Md.*—*Hogan v. McMahon*, 115 Md. 195, 80 Atl. 695. *Contra*, *Darden v. Cowper*, 52 N. C. 210; *Hayden v. Merrill*, 44 Vt. 336, 8 Am. Rep. 372.

[c] **Declaration must set forth** that defendant received more than his share, and that plaintiff and defendant are tenants in common. *Munroe v. Luke*, 1 Mete. (Mass.) 459; *Wheeler v. Horne*, Willes 208, 125 Eng. Reprint 1135.

[d] **The common law provided** no remedy where one tenant in common received more than his share of the profits unless he was made bailiff. *Gulf Red Cedar Co. v. Crenshaw*, 138 Ala. 134, 35 So. 50; *Lyon v. Bursey*, 42 App. Cas. (D. C.) 519.

3. *Gulf Red Cedar Co. v. Crenshaw*, 138 Ala. 134, 35 So. 50; *McCord v. Oakland Q. M. Co.*, 64 Cal. 134, 146, 27 Pac. 863, 49 Am. Rep. 686.

4. *Ala.*—*Caldwell v. Caldwell*, 173 Ala. 216, 55 So. 515; *Gulf Red Cedar Co. v. Crenshaw*, 138 Ala. 134, 35 So. 50; *Sanders v. Robertson*, 57 Ala. 465. *Alaska.*—See *Garside v. Norval*, 1 Alaska 19. *Ark.*—*Coopwood v. Jeffries*, 98 Ark. 609, 136 S. W. 660. *Ga.* *Thompson v. Sanders*, 113 Ga. 1024, 39 S. E. 419. *Ill.*—*Hollahan v. Sowers*, 111 Ill. App. 263. *Mo.*—*Bates v. Hamilton*, 144 Mo. 1, 45 S. W. 641, 66 Am. St. Rep. 407. *N. Y.*—*Dyckman v. Valiente*, 42 N. Y. 549. *N. C.*—*Darden v. Cowper*, 52 N. C. 210. *Pa.*—*McCann v. McCann*, 248 Pa. 564, 94 Atl. 240. *Vt.*—*Leach v. Beattie*, 33 Vt. 195. *W. Va.*—*Sommers v. Bennett*, 68 W. Va. 157, 69 S. E. 690.

See 1 STANDARD PROC. 274.

[a] **Accounting Where Waste Is Waived.**—*Cecil v. Clark*, 49 W. Va. 459, 39 S. E. 202.

[b] **Jurisdiction of Law and Equity Is Concurrent.**—*Hamilton v. Conine*, 28 Md. 635, 92 Am. Dec. 724; *Leach v. Beattie*, 33 Vt. 195. But see *Gloninger v. Hazard*, 42 Pa. 389, declining to take jurisdiction as remedy at law is adequate.

5. *Hamilton v. Conine*, 28 Md. 635, 92 Am. Dec. 724.

6. *Richardson v. Richardson*, 72 Me. 403, independent of statute one tenant may maintain assumpsit against another. See *Kites v. Church*, 142 Mass. 587, 8 N. E. 743 (account annexed) and 18 STANDARD PROC. 459.

[a] **Action for share of money collected** as rents and profits of common property. *Cal.*—*Abel v. Love & Fowler*, 17 Cal. 233. *Me.*—*Hudson v. Coe*, 79 Me. 83, 8 Atl. 249, 1 Am. St. Rep. 288; *Richardson v. Richardson*, 72 Me. 403; *Buck v. Spofford*, 40 Me. 328. *Mass.*—*Shepard v. Richards*, 2 Gray 424, 61 Am. Dec. 473; *Munroe v. Luke*, 1 Mete. 459, after partition. *Mich.* *Fenton v. Miller*, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502, under express statute. *N. H.*—*Ela v. Ela*, 70 N. H. 163, 47 Atl. 414. *Contra*, *Kran v. Case*, 123 Ill. App. 214, 218.

[b] **To recover share of value of trees destroyed or carried away** by cotenant. *Webster v. Calef*, 47 N. H. 289 (by statute); *Mooers v. Bunker*, 29 N. H. 420.

[c] **Where One Tenant as Agent Sells the Property.**—*Garside v. Norval*, 1 Alaska 19.

[d] **Where One Tenant Wrongfully Sells the Whole Property.**—*White v. Brooks*, 43 N. H. 402, 407.

[e] **Where property is divisible** by measurement, weight, or count and defendant refuses to allow plaintiff his share. *Fiquet v. Allison*, 12 Mich. 323, 86 Am. Dec. 54.

7. See 18 STANDARD PROC. 482.

mon could be compelled to repair by the writ de reparatione facienda, This writ is now obsolete.<sup>8</sup> Under the modern practice generally a tenant in common may enforce his right to contribution or reimbursement by a bill in equity,<sup>9</sup> or by an ordinary civil action,<sup>10</sup> or by set-off against a claim for rents and profits.<sup>11</sup> Or in a partition suit, the improved part may be set aside to the tenant making the repairs, or an allowance may be made in lieu thereof.<sup>12</sup> But no action can be maintained between them for neglecting or refusing to repair.<sup>13</sup>

E. EJECTMENT AND TRESPASS TO TRY TITLE. — One tenant in common may maintain an action of ejectment<sup>14</sup> or trespass to try title<sup>15</sup>

8. Ill.—Haven *v.* Mehlgarten, 19 Ill. 91. Mass.—Calvert *v.* Aldrich, 99 Mass. 74, 96 Am. Dec. 693. N. Y.—Mumford *v.* Brown, 6 Cow. 475, 16 Am. Dec. 440. Eng.—Cubitt *v.* Porter, 8 B. & C. 257, 15 E. C. L. 133, 108 Eng. Reprint 1039.

9. Ala.—Russell *v.* Bell, 169 Ala. 646, 53 So. 997. Ill.—Haven *v.* Mehlgarten, 19 Ill. 91. Tenn.—Mayfield *v.* McKnight, 56 S. W. 42.

[a] Jurisdiction of Law and Equity Is Concurrent.—Haven *v.* Mehlgarten, 19 Ill. 91.

10. Conn.—Fowler *v.* Fowler, 50 Conn. 256. Ill.—Haven *v.* Mehlgarten, 19 Ill. 91, 105, assumpsit. Mass.—Wheeler *v.* Wheeler, 111 Mass. 247. Tex.—Stephenson *v.* Luttrell (Tex. Civ. App.), 160 S. W. 666. Vt.—Duplesse *v.* Haskell, 89 Vt. 166, 94 Atl. 503; Farrand *v.* Gleason, 56 Vt. 633.

[a] Where money is expended to pay off common incumbrance, assumpsit may be brought. Dickinson *v.* Williams, 11 Cush. (Mass.) 258, 59 Am. Dec. 142.

[b] Allegation of Notice.—Stephenson *v.* Luttrell (Tex. Civ. App.), 160 S. W. 666.

[c] Showing.—(1) A request to unite in the reparation, a refusal and an actual expenditure must be shown. Ill.—Louville *v.* Menard, 6 Ill. 39, 41 Am. Dec. 161. Ia.—Cooper *v.* Brown, 143 Iowa 482, 122 N. W. 144, 136 Am. St. Rep. 768. N. Y.—Mumford *v.* Brown, 6 Cow. 475, 16 Am. Dec. 440. (2) Consent of cotenant to the repair is necessary to maintenance of action. Calvert *v.* Aldrich, 99 Mass. 74, 96 Am. Dec. 693.

[d] Jury may imply request in proper case. Haven *v.* Mehlgarten, 19 Ill. 91.

11. Shelangowski *v.* Schrack, 162 Iowa 176, 143 N. W. 1081.

12. Ala.—Wilkinson *v.* Stuart, 74

Ala. 198. Haw.—Nahaolelua *v.* Kaaahu, 10 Hawaii 662. Ind.—Alleman *v.* Hawley, 117 Ind. 532, 20 N. E. 441, counterclaim for repairs. Ia.—Van Ormer *v.* Harley, 102 Iowa 150, 71 N. W. 241. N. J.—Danforth *v.* Moore, 55 N. J. Eq. 127, 35 Atl. 410.

See *infra*, I, K, 2.

13. Calvert *v.* Aldrich, 99 Mass. 74, 96 Am. Dec. 693.

14. Ala.—Farr *v.* Perkins, 173 Ala. 500, 55 So. 923. Cal.—Hebrard *v.* Jefferson G. & S. M. Co., 33 Cal. 290. D. C.—Lyon *v.* Bursey, 42 App. Cas. 519. Ga.—Whitfield *v.* Means, 140 Ga. 430, 78 S. E. 1067; Whigby *v.* Burnham, 135 Ga. 584, 69 S. E. 1114. Haw.—Nakuaimanu *v.* Halstead, 4 Hawaii 42; Nahinai *v.* Lai, 3 Hawaii 317. Ind.—Ellrott *v.* Frakes, 71 Ind. 412; Bethell *v.* McCool, 46 Ind. 303. Mich.—Fenton *v.* Miller, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502. Miss.—Corbin *v.* Cannon, 31 Miss. 570. Mo.—Llewellyn *v.* Llewellyn, 201 Mo. 303, 100 S. W. 40; Peterson *v.* Laik, 24 Mo. 541, 69 Am. Dec. 441. N. Y.—Clason *v.* Rankin, 1 Duer 337, holding denial in answer equivalent to confession of ouster. N. C.—Ricks *v.* Pope, 129 N. C. 52, 39 S. E. 638. Ore.—Crane *v.* Oregon R. & N. Co., 66 Ore. 317, 133 Pac. 810. Pa.—Bennet *v.* Bullock, 35 Pa. 364.

[a] A surrender of possession or a showing of adverse possession is necessary before action on an outstanding title for tenant's exclusive benefit. Forder *v.* Davis, 38 Mo. 107.

[b] Demand of possession is not a prerequisite to the action. Hebrard *v.* Jefferson G. & S. M. Co., 33 Cal. 290.

[c] Whether there has been an ouster is a question for the jury. Farr *v.* Perkins, 173 Ala. 500, 55 So. 923.

15. Martin *v.* Quattlebaum, 3 McCord L. (S. C.) 205; St. Louis, A. &

against his cotenant upon proof of an ouster or its equivalent, but not otherwise.<sup>16</sup> On recovery, the judgment is that the tenant be let into possession with his cotenant.<sup>17</sup>

**F. TROVER.**—As a general rule one tenant in common cannot maintain trover against his cotenant with respect to common property indivisible in nature.<sup>18</sup> But trover may be brought if there has been such a loss, or destruction,<sup>19</sup> or sale or disposal of the common property,<sup>20</sup> as amounts to a conversion, or if there is such an appropriation of the property to the use of the tenant as renders any further enjoyment by the cotenant impossible,<sup>21</sup> or if the property is divisible in

**T. R. Co. v. Prather**, 75 Tex. 53, 12 S. W. 969.

16. **Ala.**—Farr v. Perkins, 173 Ala. 500, 55 So. 923. **Cal.**—Ewald v. Corbett, 32 Cal. 493. **Ga.**—Daniel v. Daniel, 102 Ga. 181, 28 S. E. 167. **Haw.**—Nakuaimanu v. Halstead, 4 Hawaii 42. **Miss.**—Corbin v. Cannon, 31 Miss. 570.

17. **Cal.**—Ewald v. Corbett, 32 Cal. 493. **Haw.**—Kaehu v. Namealoha, 20 Hawaii 648. **N. C.**—Ricks v. Pope, 129 N. C. 52, 39 S. E. 638. **Tenn.**—See also Williams v. Coal Creek M. & M. Co., 115 Tenn. 578, 93 S. W. 572, 112 Am. St. Rep. 878, 6 L. R. A. (N. S.) 710.

18. **Cal.**—Balch v. Jones, 61 Cal. 234; Hewlett v. Owens & Moore, 51 Cal. 570. **Ga.**—King v. Neel, 98 Ga. 438, 25 S. E. 513, 58 Am. St. Rep. 311; Starnes v. Quin, 6 Ga. 84. **Ky.**—Pettitt v. Marble, 13 Ky. L. Rep. 780. **Me.**—Weeks v. Hackett, 104 Me. 264, 71 Atl. 858, 129 Am. St. Rep. 390, 19 L. R. A. (N. S.) 1201. **Mass.**—Weld v. Oliver, 21 Pick. 559. **Mich.**—Hennes v. Hebard & Sons, 169 Mich. 670, 135 N. W. 1073. **Mo.**—Dewesse v. Yost, 161 Mo. App. 10, 143 S. W. 72. **N. Y.**—Osborn v. Schenck, 83 N. Y. 201. **N. C.**—Doyle v. Bush, 171 N. C. 10, 86 S. E. 165; Waller v. Bowling, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261, note. **Vt.**—Goodrich v. Chappell, 90 Vt. 263, 98 Atl. 46. **Wis.**—Sullivan v. Sherry, 111 Wis. 476, 87 N. W. 471, 87 Am. St. Rep. 890.

[a] A demand for possession of common property and refusal does not authorize trover between tenants in common. Doyle v. Bush, 171 N. C. 10, 86 S. E. 165.

19. **Cal.**—Balch v. Jones, 61 Cal. 234. **Ga.**—Starnes v. Quin, 6 Ga. 84. **Me.**—Fleming v. Katahdin Pulp & P. Co., 93 Me. 110, 44 Atl. 378. **Mo.**—Merrill v. Mason, 159 Mo. App. 605, 141 S. W. 454. **N. Y.**—Osborn v. Schenck, 83

N. Y. 201. **Wis.**—Sullivan v. Sherry, 111 Wis. 476, 87 N. W. 471, 87 Am. St. Rep. 890.

20. **Ala.**—Perminster v. Kelly, 18 Ala. 716, 54 Am. Dec. 177. **Mass.**—Goell v. Morse, 126 Mass. 480; Weld v. Oliver, 21 Pick. 559. **Me.**—Strickland v. Parker, 54 Me. 263. **Minn.**—Shepard v. Pettit, 30 Minn. 119, 14 N. W. 511. **N. H.**—Redington v. Chase, 44 N. H. 36, 82 Am. Dec. 189, where iron was mixed with others so it could not be identified. **N. Y.**—Osborn v. Schenck, 83 N. Y. 201; Dyckman v. Valiente, 42 N. Y. 549.

But compare Trammell v. McDade, 29 Tex. 360.

[a] Tenant and his agent in making the sale may be joined as defendants. Goell v. Morse, 126 Mass. 480.

21. **Ala.**—Stamps v. Thomas, 7 Ala. App. 622, 62 So. 314. **Colo.**—Meador v. Cullison, 52 Colo. 172, 120 Pac. 145, under statute. **Ind.**—Bimel v. Boyd, 53 Ind. App. 310, 101 N. E. 657. **Ky.**—Pettitt v. Marble, 13 Ky. L. Rep. 780, must be an absolute conversion. **Mich.**—Hennes v. Hebard & Sons, 169 Mich. 670, 135 N. W. 1073. **N. Y.**—Osborn v. Schenck, 83 N. Y. 201. **N. C.**—Doyle v. Bush, 171 N. C. 10, 86 S. E. 165; Waller v. Bowling, 108 N. C. 289, 12 S. E. 990, 12 L. R. A. 261, note.

[a] Trover may be brought, if the cotenant, retaining possession of the common property, renders impossible any further enjoyment of it by his cotenant, or appropriates it to uses it is not designed, or directly and positively excludes the cotenant from its use. Bimel v. Boyd, 53 Ind. App. 310, 101 N. E. 657.

[b] Demand before bringing suit is unnecessary. **Ala.**—Stamps v. Thomas, 7 Ala. App. 622, 62 So. 314. **Ind.**—Bimel v. Boyd, 53 Ind. App. 310, 101 N. E. 657. **Mich.**—Hennes v. Hebard



its nature and the share of each ascertainable by measurement, weight, or count, and a demand for plaintiff's share is refused.<sup>22</sup>

**G. TRESPASS.**—As a general rule trespass cannot be maintained by one tenant in common against another.<sup>23</sup> But such an action may be maintained where there has been an actual ouster,<sup>24</sup> or where there is a destruction by one cotenant of the common property, or the interest of his cotenant,<sup>25</sup> or where mesne profits are claimed.<sup>26</sup>

**H. CASE.**—An action on the case is maintainable by one tenant in common against another.<sup>27</sup>

**I. REPLEVIN, DETINUE, CLAIM AND DELIVERY.**—An action of replevin, detinue, or claim and delivery is not maintainable by one tenant in common against another,<sup>28</sup> unless by agreement one tenant is

& Sons, 169 Mich. 670, 135 N. W. 1073. *Compare* Clow v. Plummer, 85 Mich. 550, 48 N. W. 795.

22. **Cal.**—Balch v. Jones, 61 Cal. 234. **Me.**—Weeks v. Hackett, 104 Me. 264, 71 Atl. 858, 129 Am. St. Rep. 390, 19 L. R. A. (N. S.) 1201. **Mich.**—Sutherland v. Carter, 52 Mich. 471, 18 N. W. 223. **N. H.**—Pickering v. Moore, 67 N. H. 533, 32 Atl. 828, 68 Am. St. Rep. 695, 31 L. R. A. 698. **N. Y.**—Stall v. Wilbur, 77 N. Y. 158; Crosby v. Woleben, 149 App. Div. 337, 134 N. Y. Supp. 328; Dear v. Reed, 37 Hun 594. **Wis.**—Wood v. Noack, 84 Wis. 398, 54 N. W. 785.

[a] A written demand for plaintiff's share is required by statute. Wood v. Noack, 84 Wis. 398, 54 N. W. 785.

23. **D. C.**—Lyon v. Bursey, 42 App. Cas. 519. **Me.**—Davis v. Poland, 102 Me. 192, 66 Atl. 380, 120 Am. St. Rep. 480, 10 L. R. A. (N. S.) 212; Symonds v. Harris, 51 Me. 14, 81 Am. Dec. 553. **Mass.**—Keay v. Goodwin, 16 Mass. 1. **Minn.**—Booth v. Sherwood, 12 Minn. 426. **N. H.**—Kenniston v. Leighton, 43 N. H. 309. **Pa.**—Bennet v. Bullock, 35 Pa. 364. **Wis.**—Sullivan v. Sherry, 111 Wis. 476, 87 N. W. 471, 87 Am. St. Rep. 890.

[a] But where each occupies separate parts of the common property, one tenant may sue another in trespass for injury to his separate possession. Keay v. Goodwin, 16 Mass. 1.

24. **Mass.**—Silloway v. Brown, 12 Allen 30. **N. H.**—Boynton v. Hodgdon, 59 N. H. 247; Kenniston v. Leighton, 43 N. H. 309. **N. Y.**—Dubois v. Beaver, 25 N. Y. 123, 82 Am. Dec. 326; Erwin v. Olmstead, 7 Cow. 229. **Pa.**—McGill v. Ash, 7 Pa. 397. **S. C.**

Gibson v. Vaughn, 2 Bailey L. 389, 23 Am. Dec. 143.

25. **Me.**—Davis v. Poland, 102 Me. 192, 66 Atl. 380, 120 Am. St. Rep. 480, 10 L. R. A. (N. S.) 212; Symonds v. Harris, 51 Me. 14, 81 Am. Dec. 553. **Mass.**—Silloway v. Brown, 12 Allen 30. **Pa.**—Bennet v. Bullock, 35 Pa. 364. **Tex.**—Trammell v. McDade, 29 Tex. 360. **Wis.**—Sullivan v. Sherry, 111 Wis. 476, 87 N. W. 471, 87 Am. St. Rep. 890. **Eng.**—Cubitt v. Porter, 8 B. & C. 257, 15 E. C. L. 133, 108 Eng. Reprint 1039.

26. Fenton v. Miller, 116 Mich. 45, 74 N. W. 384, 72 Am. St. Rep. 502; Bennet v. Bullock, 35 Pa. 364.

[a] After Judgment in Ejectment. Chambers v. Chambers, 10 N. C. 232, 14 Am. Dec. 585.

27. **Ala.**—McGehee's Admr. v. Peterson, 57 Ala. 333, where one tenant permitted his cattle to destroy the common crop. **Me.**—Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91, action for diverting water from common mill to separate use. **N. H.**—Odiorne v. Lyford, 9 N. H. 502, 32 Am. Dec. 387. **Eng.**—Cubitt v. Porter, 8 B. & C. 257, 15 E. C. L. 133, 108 Eng. Reprint 1039. See *infra*, I, J.

[a] But case cannot be brought where one receives the whole profits of the common property. Chambers v. Chambers, 10 N. C. 232, 14 Am. Dec. 585.

Case in the nature of waste, see *infra*, I, J.

28. **Cal.**—Balch v. Jones, 61 Cal. 234; Hewlett v. Owens & Moore, 50 Cal. 474. But *compare* Schwartz v. Skinner, 47 Cal. 3. **Del.**—Ellis v. Culver, 2 Harr. 129. **D. C.**—Lyon v. Bursey, 42 App. Cas. 519. **Kan.**—Smith-

entitled to exclusive possession,<sup>29</sup> or the property is divisible by measurement, weight, or count.<sup>30</sup>

**J. WASTE.**—Generally by statute, a tenant in common may maintain an action of waste or an action on the case in the nature of waste against his cotenant.<sup>31</sup>

**K. EQUITABLE REMEDIES.**—**1. Generally.**—In a proper case a tenant in common may have relief in equity against his cotenant, by an injunction,<sup>32</sup> or the appointment of a receiver.<sup>33</sup> A cotenant may maintain a bill in equity to be let in to the enjoyment of his joint interest in the common property.<sup>34</sup> And if one tenant acquires title to the property in himself individually, a bill will lie to declare and enforce the trust resulting therefrom.<sup>35</sup>

*McCord Dry Goods Co. v. Burke*, 63 Kan. 740, 66 Pac. 1036. **Mich.**—*Kline v. Kline*, 49 Mich. 419, 13 N. W. 800. **Mo.**—*Kelley v. Vandiver*, 75 Mo. App. 435. **Ore.**—*Halsey v. Simmons*, 85 Ore. 324, 166 Pac. 944.

**29.** *Morgan v. Hedges*, 4 Colo. 526; *Manti City Sav. Bank v. Peterson*, 33 Utah 209, 220, 93 Pac. 566, 126 Am. St. Rep. 817.

**30.** **Cal.**—*Adams v. Thornton*, 5 Cal. App. 455, 90 Pac. 713. **Mich.**—*Wattles v. Dubois*, 67 Mich. 313, 34 N. W. 672. **N. J.**—*Hurff v. Hires*, 40 N. J. L. 581, 29 Am. Rep. 282. **Ore.**—*Halsey v. Simmons*, 85 Ore. 324, 166 Pac. 944; *Phipps v. Taylor*, 15 Ore. 484, 16 Pac. 171. **Utah.**—*Manti City Sav. Bank v. Peterson*, 33 Utah 209, 221, 93 Pac. 566, 126 Am. St. Rep. 817.

**31.** **Cal.**—*McCord v. Oakland Q. M. Co.*, 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686. **Me.**—*Hall v. Hall*, 112 Me. 234, 91 Atl. 949; *Hubbard v. Hubbard*, 15 Me. 198. **Mich.**—*Hennes v. Hebard & Sons*, 169 Mich. 670, 135 N. W. 1073. **Minn.**—*Shepard v. Pettit*, 30 Minn. 119, 14 N. W. 511; *Booth v. Sherwood*, 12 Minn. 426. **N. Y.**—*Elwell v. Burnside*, 44 Barb. 447. **N. C.**—*Darden v. Cowper*, 52 N. C. 210. **R. I.**—*Buchanan v. Jencks*, 38 R. I. 443, 96 Atl. 307. **W. Va.**—*Hardman v. Brown*, 77 W. Va. 478, 88 S. E. 1016. **Eng.**—*Cubitt v. Porter*, 8 B. & C. 257, 15 E. C. L. 133, 108 Eng. Reprint 1039.

Action in the case, see *supra*, I, H.

[a] The names of the cotenants other than the defendant are not required to be stated. *Hubbard v. Hubbard*, 15 Me. 198.

**32.** **Alaska.**—*Binswanger v. Henninger*, 1 Alaska 509. **Cal.**—*Barton Land & W. Co. v. Crafton Water Co.*, 171 Cal. 89, 152 Pac. 48; *McCord v.*

*Oakland Q. M. Co.*, 64 Cal. 134, 143, 27 Pac. 863, 49 Am. Rep. 686. **Ia.**—*Musch v. Burkhardt*, 83 Iowa 301, 48 N. W. 1025, 32 Am. St. Rep. 305, 12 L. R. A. 484. **Mont.**—*Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642; *Anaconda C. M. Co. v. Butte & Boston Min. Co.*, 17 Mont. 519, 43 Pac. 924. **N. J.**—*Obert v. Obert*, 5 N. J. Eq. 397, 408. **Va.**—*Woods v. Early*, 95 Va. 307, 28 S. E. 374. **Vt.**—*Duplesse v. Haskell*, 89 Vt. 166, 94 Atl. 503.

See *Pettitt v. Marble*, 13 Ky. L. Rep. 780.

[a] **Restraining Waste.**—**Ala.**—*Walshe v. Dwight Mfg. Co.*, 178 Ala. 310, 59 So. 630. **Cal.**—*McCord v. Oakland Q. M. Co.*, 64 Cal. 134, 27 Pac. 863, 49 Am. Rep. 686. **Ind.**—*Stout v. Curry*, 110 Ind. 514, 11 N. E. 487, where defendant is insolvent. **Ky.**—*Layne v. Layne*, 177 Ky. 592, 197 S. W. 1062.

[b] **Insolvency of tenant will authorize injunction.** *Obert v. Obert*, 5 N. J. Eq. 397, 408. See *Hihn v. Peck*, 18 Cal. 640.

**33.** *Williams v. Jenkins*, 11 Ga. 595, where cotenants are insolvent. Compare *Roy v. Henderson*, 132 Ala. 175, 31 So. 457.

**34.** *Roy v. Henderson*, 132 Ala. 175, 31 So. 457. See *Smith v. Smith*, 150 N. C. 81, 63 S. E. 177.

[a] But a bill to oust a cotenant from the common property cannot be maintained. *Board of Education v. Day*, 128 Ga. 156, 57 S. E. 359; *Thompson v. Sanders*, 113 Ga. 1024, 39 S. E. 419.

**35.** *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. 192, 37 L. ed. 1189; *Arthur v. Coyne*, 32 Okla. 527, 122 Pac. 688. See *Ennis v. Hutchinson*, 30 N. J. Eq. 110. See the title "Trusts and Trustees."

**2. Partition.**—Partition of property owned in common may be compelled by suit in equity.<sup>36</sup>

**L. JOINDER OF PARTIES.**—The general rule that tenants in common must join as plaintiffs in actions for injury to the common property does not apply to tort actions between them.<sup>37</sup> One tenant in common may maintain an action in forcible entry and detainer against another without joining the cotenants.<sup>38</sup>

**II. REMEDIES BETWEEN TENANTS IN COMMON AND THIRD PERSONS.**—**A. PARTIES PLAINTIFF.**—**1. Generally.**—At common law, tenants in common must sever in real actions, because their titles or interests are several and distinct.<sup>39</sup> But they must join in personal actions concerning the common property,<sup>40</sup> although a non-joinder may be waived by failure to object.<sup>41</sup>

**2. In Actions To Determine Title or Possession.**—As it was necessary for tenants in common to sever in real actions at common

[a] A payment or offer to pay his share of the purchase price must be alleged. *Kershaw v. Simpson*, 46 Wash. 313, 89 Pac. 889.

36. *Ga.*—*Thompson v. Sanders*, 113 Ga. 1024, 39 S. E. 419. *N. C.*—*Thompson v. Silverthorne*, 142 N. C. 12, 54 S. E. 782. *Tex.*—*Trammell v. McDade*, 29 Tex. 360. See the title "Partition."

See 20 STANDARD PROC. 1011.

[a] Disseizin destroys right to partition. *Forder v. Davis*, 38 Mo. 107. *Contra*, *Cecil v. Clark*, 45 W. Va. 659, 30 S. E. 216.

[b] Value of Property Is Test of Jurisdiction.—*Fowler v. Fowler*, 50 Conn. 256. See the title "Jurisdiction."

[c] Bill by tenant in possession, not holding adversely to his cotenants, need not contain offer to pay for use and occupation. *Wilkinson v. Stuart*, 74 Ala. 198.

37. *N. H.*—*Odiorne v. Lyford*, 9 N. H. 502, 512, 32 Am. Dec. 387. *N. Y.* *Stall v. Wilbur*, 77 N. Y. 158. *Wis.* *Sullivan v. Sherry*, 111 Wis. 476, 87 N. W. 471, 87 Am. St. Rep. 890.

See *infra*, II, A, 4.

[a] Two tenants in common cannot join in an action against a third. *Me.*—*Farrar v. Pearson*, 59 Me. 561, 8 Am. Rep. 439. *N. H.*—*Mooers v. Bunker*, 29 N. H. 420. *N. Y.*—*Stall v. Wilbur*, 77 N. Y. 158.

38. See 8 STANDARD PROC. 1102.

39. *Conn.*—See *Robinson v. Roberts*, 31 Conn. 145. *Ga.*—*Starnes v. Quin*, 6 Ga. 84. *Mass.*—*Bullock v. Hayward*, 10 Allen 460. *Minn.*—*Peck v. McLean*,

36 Minn. 228, 30 N. W. 759, 1 Am. St. Rep. 665. *N. Y.*—*Hill v. Gibbs*, 5 Hill 56. *R. I.*—*Clapp v. Pawtucket Inst.*, 15 R. I. 489, 8 Atl. 697, 2 Am. St. Rep. 915. *Tex.*—See *May v. Shade*, 24 Tex. 205. *Tenn.*—*Williams v. Coal Creek M. & M. Co.*, 115 Tenn. 578, 93 S. W. 572, 112 Am. St. Rep. 878, 6 L. R. A. (N. S.) 710.

See 21 STANDARD PROC. 932.

As to real actions, see the title "Real and Mixed Actions."

40. *Mass.*—*Bullock v. Hayward*, 10 Allen 460. *Mo.*—*Lane v. Dobyns*, 11 Mo. 105. *N. Y.*—*Jackson v. Moore*, 94 App. Div. 504, 87 N. Y. Supp. 1101.

As to personal actions, see the title "Personal Actions."

Action on contract, see 11 STANDARD PROC. 969.

Debt for rent, see 18 STANDARD PROC. 482.

Distraining for rent, see 18 STANDARD PROC. 524.

[a] Whether arising *ex contractu* or *ex delicto*, tenants in common must join. *Jackson v. Moore*, 94 App. Div. 504, 87 N. Y. Supp. 1101.

[b] In Personal Action in the Nature of Waste.—*Bullock v. Hayward*, 10 Allen (Mass.) 460.

[c] A joinder of all the tenants is not required where in a previous action the nonjoined tenants recovered judgment to the extent for their interest without objection to the defect of parties. *Starnes v. Quin*, 6 Ga. 84; *Brizendine v. Frankfort Bridge Co.*, 2 B. Mon. (Ky.) 32, 36 Am. Dec. 587.

41. See the title "Parties."



law,<sup>42</sup> so also, under the modern practice in some states, in actions against third persons to determine title or possession to real property owned in common, a tenant in common must sue separately,<sup>43</sup> and can recover judgment only to the extent of his interest in the property, the judgment in effect making him a tenant in common with his disseisor and entitling him to the same possessory rights with the latter, as in case of any other tenants in common.<sup>44</sup> The rule more generally

42. See *supra*, II, A, 1.

43. **Ark.**—Louisville, N. O. & T. R. Co. v. Jackson, 123 Ark. 1, 184 S. W. 450, Ann. Cas. 1918A, 604. **Ga.**—Sanford v. Sanford, 58 Ga. 259. **Ind.**—Martin v. Neal, 125 Ind. 547, 25 N. E. 813. **Mass.**—Butrick v. Tilton, 141 Mass. 93, 6 N. E. 563. **Mo.**—Baber v. Henderson, 156 Mo. 566, 57 S. W. 719, 79 Am. St. Rep. 540. **N. M.**—See Neher v. Armijo, 9 N. M. 325, 54 Pac. 236. **Pa.**—Mobley v. Bruner, 59 Pa. 481, 98 Am. Dec. 360. **S. C.**—Bannister v. Bull, 16 S. C. 220. See Harrelson v. Sarvis, 39 S. C. 14, 17 S. E. 368, he may sue for the whole and on proof recover his share. **Tenn.**—Williams v. Coal Creek M. & M. Co., 115 Tenn. 578, 93 S. W. 572, 112 Am. St. Rep. 878, 6 L. R. A. (N. S.) 710. **Va.**—Marshall v. Palmer, 91 Va. 344, 21 S. E. 672, 50 Am. St. Rep. 838.

[a] "Each tenant in common in this state who is ousted of possession by a stranger, must sue for and recover his aliquot part or share of the estate, which part or moiety, so recovered, he holds in common with his disseisor, until his remaining co-tenants institute like proceedings as himself to oust the stranger from the possession of his or their undivided interest in the premises." Baber v. Henderson, 156 Mo. 566, 570, 57 S. W. 719, 79 Am. St. Rep. 540.

[b] **Rationale of Rule.**—"A plaintiff in ejectment must recover on the strength of his own title, and his recovery must consequently be in accordance with his title. Tenants in common have several and distinct titles and estates, independent of each other, so as to render the freehold several also. They are separately seized and there is no privity of estate between them. . . . If tenants in common are separately seized, and there is no privity of estate between them, if they must sue separately or joint according to the circumstances of the case, the nature and the cause of action, or the

character of the injury to be redressed, it follows as a necessary corollary that one tenant in common cannot maintain ejectment or sue and recover in any form of action for the interest and benefit of the others." Mobley v. Bruner, 59 Pa. 481, 484, 98 Am. Dec. 360. After quoting from this case, the court, in Williams v. Coal Creek Min. & Mfg. Co., 115 Tenn. 578, 583, 93 S. W. 572, 112 Am. St. Rep. 878, 6 L. R. A. (N. S.) 710, continues: "We think this a correct statement of the relations of tenants in common, and that the limitation upon the right of such a tenant, who sues alone for his interest, in property, is logically deduced from this relationship. We are satisfied that while the common law rule that tenants in common should not join in an action of ejectment has been modified in Tennessee, yet, from Barrow's Lessee v. Nave, 2 Yerg. [Tenn.] 227, it has been the established practice to confine the recovery of a tenant in common both in right and possession to his undivided interest in the property in controversy."

[c] **Trespass To Try Title.**—Mitchell v. Mitchell, 80 Tex. 101, 15 S. W. 705; Carley v. Parton, 75 Tex. 98, 12 S. W. 950; May v. Slade, 24 Tex. 205. **Ejectment.**—See 7 STANDARD PROC. 1011.

[d] **In Real Action of Waste.**—Bullock v. Hayward, 10 Allen (Mass.) 460.

44. **Mass.**—Dewey v. Brown, 2 Pick. 387. **Mo.**—Baber v. Henderson, 156 Mo. 566, 57 S. W. 719, 79 Am. St. Rep. 540; Gray v. Givens, 26 Mo. 291. **Pa.**—Mobley v. Bruner, 59 Pa. 481, 98 Am. Dec. 360. **Tenn.**—Williams v. Coal Creek M. & M. Co., 115 Tenn. 578, 93 S. W. 572, 112 Am. St. Rep. 878, 6 L. R. A. (N. S.) 710.

[a] The judgment should entitle "the plaintiff to be put in possession of the property, leaving him to share the possession with the defendant, as though he also were an owner of an

followed, however, is that one cotenant may sue alone and recover possession of the whole estate as against strangers.<sup>45</sup> Some statutes permit a joinder of tenants in common,<sup>46</sup> but they are permissive merely and do not require a joinder.<sup>47</sup>

In forcible entry and detainer suits, one tenant in common may sue a stranger without joining his cotenants,<sup>48</sup> and recover the possession of the whole premises.<sup>49</sup>

**In Suits To Quiet Title.** — One of several tenants in common may maintain a suit to remove a cloud on his title or quiet title,<sup>50</sup> or they may sue jointly to quiet title to the common property.<sup>51</sup>

**3. In Actions To Recover Personalty or Its Value.** — The rule at common law and apparently sanctioned by most authorities, is that in actions of replevin and detinue or their statutory equivalent, to recover the common personal property from third persons, all of the

undivided interest, and as such entitled to share in the possession of the premises." *Williams v. Coal Creek Min. & Mfg. Co.*, 115 Tenn. 578, 581, 93 S. W. 572, 112 Am. St. Rep. 878, 6 L. R. A. (N. S.) 710.

45. *Ala.*—*Hooper v. Bankhead*, 171 Ala. 626, 54 So. 549; *Leecroix v. Malone*, 157 Ala. 434, 47 So. 725. *Alaska.* *Binswanger v. Henninger*, 1 Alaska 509. *Cal.*—*McCormick v. Marcy*, 165 Cal. 386, 132 Pac. 449; *Collier v. Corbett*, 15 Cal. 183. *Compare Throckmorton v. Burr*, 5 Cal. 400; *De Johnson v. Sepulveda*, 5 Cal. 149. *Colo.*—*Field v. Tanner*, 32 Colo. 278, 75 Pac. 916. *Haw.* *Godfrey v. Rowland*, 17 Hawaii 577. *Kan.*—*Horner v. Ellis*, 75 Kan. 675, 90 Pac. 275, 121 Am. St. Rep. 446. *Mich.* *Lamb v. Lamb*, 139 Mich. 166, 102 N. W. 645. *Mont.*—*Hopkins v. Noyes*, 4 Mont. 550, 2 Pac. 280. *Nev.*—*Brown v. Warren*, 16 Nev. 228. *N. C.*—*Taylor v. Meadows*, 169 N. C. 124, 85 S. E. 1; *Morehead v. Hall*, 126 N. C. 213, 35 S. E. 428. *S. D.*—*Mather v. Dunn*, 11 S. D. 196, 76 N. W. 922, 74 Am. St. Rep. 788. *Tex.*—*Louisiana & T. Lumb. Co. v. Southern Pine Lumb. Co.* (Tex. Civ. App.), 171 S. W. 537; *Wadsworth v. Vinyard* (Tex. Civ. App.), 131 S. W. 1171. See *Nona Mills Co. v. Jackson* (Tex. Civ. App.), 159 S. W. 932. *Vt.*—*Bigelow v. Rising*, 42 Vt. 678. *W. Va.*—*Voss v. King*, 33 W. Va. 236, 10 S. E. 402, unlawful detainer suit. *Eng.*—*Doe ex dem. Hellyer v. King*, 6 Welsby, H. & G. 791.

[a] **One Tenant May Maintain Trespass To Try Title.**—*Lane v. Miller & Vidor Lumb. Co.* (Tex. Civ. App.), 176

S. W. 100; *Hill v. Whitworth* (Tex. Civ. App.), 162 S. W. 434.

46. *Ga.*—*Williamson v. Youmans*, 136 Ga. 222, 71 S. E. 138. *Haw.*—*Godfrey v. Rowland*, 17 Haw. 577, 585; *Aylett v. Keaweamahi*, 8 Haw. 320. *Miss.*—*Corbin v. Cannon*, 31 Miss. 570. *Neb.*—*Mattis v. Boggs*, 19 Neb. 698, 28 N. W. 325. *N. M.*—*Neher v. Armijo*, 9 N. M. 325, 54 Pac. 236. *Tex.*—*Harber v. Dyches*, 14 S. W. 580, where several but less than all joined in trespass to try title.

47. *Neb.*—*Mattis v. Boggs*, 19 Neb. 698, 28 N. W. 325. *N. Y.*—*Deering v. Reilly*, 38 App. Div. 164, 56 N. Y. Supp. 704. *Okla.*—*Moppin v. Norton*, 40 Okla. 284, 137 Pac. 1182, Ann. Cas. 1915D, 1042. *S. C.*—*Harrelson v. Sarvis*, 39 S. C. 14, 17 S. E. 368.

[a] **Tenants in Common Are Not "United in Interest."**—*Mather v. Dunn*, 11 S. D. 196, 76 N. W. 922, 74 Am. St. Rep. 788.

48. See 8 STANDARD PROC. 1102.

49. *Rabe v. Fyler*, 10 Smed. & M. (Miss.) 440, 48 Am. Dec. 763; *Allen v. Gibson*, 4 Rand. (25 Va.) 468.

50. *N. Y.*—*O'Donnell v. McIntyre*, 37 Hun 615. *Wash.*—*Hannegan v. Roth*, 12 Wash. 695, 44 Pac. 256. *Wis.*—*Herron v. Knapp, Stout & Co.*, 72 Wis. 553, 40 N. W. 149.

See also 21 STANDARD PROC. 1010.

[a] That plaintiff should be in actual possession of the property is not required. *Herron v. Knapp, Stout & Co.*, 72 Wis. 553, 40 N. W. 149.

51. *Cornwell v. Lee*, 14 Conn. 524; *Hannegan v. Roth*, 12 Wash. 695, 44 Pac. 256.

tenants in common must be joined,<sup>52</sup> unless the property is naturally severable and the share of one tenant in common only is unlawfully taken.<sup>53</sup> It would seem, however, particularly in those jurisdictions where an analogous rule is recognized in case of real property,<sup>54</sup> that as against third persons not claiming under or through other tenants in common, one cotenant ought to be entitled to the exclusive possession of the chattel and should therefore be entitled to sue alone to recover possession,<sup>55</sup> and it has been so held.<sup>56</sup> In most of the cases enunciating the contrary general rule the third party was in fact claiming through another of the cotenants.<sup>57</sup>

**4. In Actions for Injury to Common Property.**—Tenants in common must ordinarily join in actions for injuries done to the common property, whether they sue in tort,<sup>58</sup> or waive the tort and sue in assumpsit.<sup>59</sup> Where, however, the circumstances are such that the interests of the cotenants have been to some extent segregated and injury is done to the interest of a single cotenant, he may sue without joining the others.<sup>60</sup> And where by agreement a tenant has the pos-

52. **Colo.**—Hoeffer *v.* Agee, 9 Colo. App. 189, 47 Pac. 973. **Del.**—Ellis *v.* Culver, 2 Harr. 129. **Mass.**—Hart *v.* Fitzgerald, 2 Mass. 509, 3 Am. Dec. 75. **Mo.**—Smoot *v.* Wathen, 8 Mo. 522. **N. Y.**—Hill *v.* Gibbs, 5 Hill 56. **Ore.** Sharp *v.* Johnson, 38 Ore. 246, 63 Pac. 485, 84 Am. St. Rep. 788. **R. I.** Clapp *v.* Pawtucket Inst., 15 R. I. 489, 8 Atl. 697, 2 Am. St. Rep. 915. **Wash.** Vermont L. & T. Co. *v.* Cardin, 19 Wash. 304, 53 Pac. 164. **Wis.**—George *v.* McGovern, 83 Wis. 555, 53 N. W. 899, 35 Am. St. Rep. 77.

**Joinder in personal actions essential**, see *supra*, II, A, 1.

[a] **The reason** is the right to possession is an entire right and all owners must unite. Ellis *v.* Culver, 2 Harr. (Del.) 129.

**Replevin**, see 22 STANDARD PROC. 895.

**Trover**, see the title "Trover and Conversion."

**Detinue**, see 7 STANDARD PROC. 480. 53. Newton *v.* Howe, 29 Wis. 531, 9 Am. Rep. 616.

54. See *supra*, II, A, 2.

55. See Freeman on Cotenancy (2nd ed.), §337.

56. McArthur *v.* Oliver, 60 Mich. 605, 27 N. W. 689.

57. See cases cited *supra*, this section.

58. **Ala.**—Prouty *v.* Alabama G. S. R. Co., 174 Ala. 404, 56 So. 980. **Cal.** De Johnson *v.* Sepulbeda, 5 Cal. 149. **Ga.**—Starnes *v.* Quin, 6 Ga. 84. **Mass.** Gilmore *v.* Wilbur, 12 Pick. 120, 22

Am. Dec. 410. **Minn.**—Peck *v.* McLean, 36 Minn. 228, 30 N. W. 759, 1 Am. St. Rep. 665. **Miss.**—Armstrong *v.* Canady, 35 So. 138. **Mo.**—Lumerate *v.* St. Louis & S. F. R. Co., 149 Mo. App. 47, 130 S. W. 448. **N. H.**—Boyn-ton *v.* Hodgdon, 59 N. H. 247; Hatch *v.* Hart, 40 N. H. 93. **Pa.**—Mobley *v.* Bruner, 59 Pa. 481, 98 Am. Dec. 360; M'Creary *v.* Ross, 7 Watts 483. **Tex.** May *v.* Slade, 24 Tex. 205; Galveston, H. & S. A. R. Co. *v.* Stockton, 15 Tex. Civ. App. 145, 38 S. W. 647; Gillum *v.* St. Louis, Ark. & T. R. Co., 4 Tex. Civ. App. 622, 23 S. W. 716. **Vt.** Johnson *v.* Goodwin, 27 Vt. 288. **Wash.** Fuhrman *v.* Interior Warehouse Co., 64 Wash. 159, 116 Pac. 666, fraud. **Wis.** Sullivan *v.* Sherry, 111 Wis. 476, 87 N. W. 471, 87 Am. St. Rep. 890.

[a] **Action for Damages for Nuisance.**—Parke *v.* Kilham, 8 Cal. 77, 68 Am. Dec. 310.

[b] **Trespass Quare Clausum Fright.** May *v.* Slade, 24 Tex. 205; Cummings & Co. *v.* Masterson, 42 Tex. Civ. App. 549, 93 S. W. 500.

[c] **Except where cotenants refuse to join** and are nonresidents. Peck *v.* McLean, 36 Minn. 228, 30 N. W. 759, 1 Am. St. Rep. 665.

59. Gilmore *v.* Wilbur, 12 Pick. (Mass.) 120, 22 Am. Dec. 410. See 11 STANDARD PROC. 969.

60. **U. S.**—Union Mill & M. Co. *v.* Dangberg, 81 Fed. 73. **Ia.**—Arthur *v.* Chicago, R. I. & P. R. Co., 61 Iowa 648, 17 N. W. 24, action for tenant's



session and control of the common property, he may maintain an action for all the damages to the property against a wrongdoer, without joining his cotenants.<sup>61</sup>

**5. In Suits for Injunction.**—Tenants in common may join in a suit for an injunction with respect to the common property,<sup>62</sup> and when one cotenant is, by agreement, in exclusive possession, he may sue alone.<sup>63</sup>

**6. In Action for Rent.**—When tenants in common join in the execution of a lease, they must join in an action upon it, unless the lease provides for payment to each.<sup>64</sup>

**7. Statutes.**—Some statutes have changed or modified the rules as to joinder of tenants in common, and permit them to either join or sever in actions to protect or enforce their rights.<sup>65</sup>

**B. PARTIES DEFENDANT.**—In ejectment to recover an undivided portion of land, cotenants in possession of other undivided portions not claiming adversely to the plaintiff need not be joined.<sup>66</sup> But in tort actions for nonfeasance respecting the common property, the tenants should be joined.<sup>67</sup> Statutes sometimes provide that all persons holding as tenants in common may jointly or severally defend any action for the protection of their rights.<sup>68</sup>

share of grain destroyed. **Mich.**—Wight v. Roethlisberger, 116 Mich. 241, 74 N. W. 474. **N. H.**—Blake v. Milliken, 14 N. H. 213, under statute. **Pa.** Steele v. McGill, 172 Pa. 100, 33 Atl. 146. **Tex.**—Gulf, Colo. & S. F. Ry. Co. v. Wheat, 68 Tex. 133, 3 S. W. 455.

[a] "Where one entire injury is done to both tenants in common, they shall have one entire remedy. But where the injury is separate, they may have several actions." Cutting v. Derby, 2 Wm. Black. 1075, 96 Eng. Reprint 633, followed in Blake v. Milliken, 14 N. H. 213; Odiorne v. Lyford, 9 N. H. 502, 512, 32 Am. Dec. 387. See also Boobier v. Boobier, 39 Me. 406.

[b] Where there is an agreement as to exclusive use of portions of the common property by each tenant, each may sue alone for injury to his possession. Gulf, Colo. & S. F. Ry. Co. v. Wheat, 68 Tex. 133, 3 S. W. 455. See also Milner v. Milner, 101 Ala. 599, 14 So. 373. *Contra*, Johnson v. Goodwin, 27 Vt. 288, holding the agreement does not affect their rights as tenants in common and they must join.

[c] **After Termination of the Tenancy.**—A tenant may sue alone to enforce rights relating to his individual interest after a severance of the estate or his interest. McGhee v. Alexander, 104 Ala. 116, 16 So. 148.

61. Cal.—See Fortain v. Smith, 114

Cal. 494, 46 Pac. 381. **N. Y.**—Sparks v. Leavy, 1 Rob. 530. **N. H.**—Hyde v. Noble, 13 N. H. 494, 38 Am. Dec. 508. **N. C.**—Harper v. Rivenbark, 165 N. C. 180, 80 S. E. 1057.

62. Cal.—Smith v. Stearns Rancho Co., 129 Cal. 58, 61 Pac. 662. **Mo.** Russell v. DeFrance, 39 Mo. 506. **N. Y.** Nillson v. Lawrence, 148 App. Div. 678, 133 N. Y. Supp. 293.

63. Fortain v. Smith, 114 Cal. 494, 46 Pac. 381.

64. See 18 STANDARD PROC. 482.

65. See the codes and statutes and the following cases: **Cal.**—Lee Chuck v. Quan Wo Chong, 91 Cal. 592, 28 Pac. 44. **Me.**—Fleming v. Katahdin P. & P. Co., 93 Me. 110, 44 Atl. 378. **Utah.** Boley v. Allred, 25 Utah 402, 71 Pac. 869. **Wis.**—George v. McGovern, 83 Wis. 555, 53 N. W. 899, 35 Am. St. Rep. 77.

In actions to recover real property, see *supra*, II, A, 2.

66. Waring v. Crow, 11 Cal. 366.

67. Baker v. Fritts, 143 Ill. App. 465. See Low v. Mumford, 14 Johns. (N. Y.) 426, 7 Am. Dec. 469, and the title "Parties."

[a] Where negligence is that of tenant in possession, a joinder is improper. Baker v. Fritts, 143 Ill. App. 465.

68. Karren v. Rainey, 30 Utah 7, 83 Pac. 333.

C. PLEADING. — The complaint by a tenant in common need not show who his cotenants are,<sup>69</sup> or set up the nature of their interests.<sup>70</sup>

D. REMEDY WHERE ONE COTENANT SELLS WHOLE PROPERTY. — If one cotenant wrongfully sells the whole property his action amounts to a conversion for he may be sued by his cotenants.<sup>71</sup> However, since the purchaser thereby acquires the interest of his vendor, he becomes a tenant in common with the remaining cotenants and cannot be sued by them in trover or conversion unless he afterward sells or otherwise converts the property, in accordance with the rules hereinbefore discussed.<sup>72</sup>

69. *Deering v. Reilly*, 38 App. Div. 164, 56 N. Y. Supp. 704; *Boley v. Allred*, 25 Utah 402, 71 Pac. 869.

70. *Deering v. Reilly*, 38 App. Div. 164, 56 N. Y. Supp. 704.

71. See *supra*, I, F.

72. See *supra*, I, F, and the following cases: **U. S.**—*Duff v. Bindley*, 16 Fed. 178. **Ga.**—*King v. Neel*, 98 Ga. 438, 25 S. E. 513, 58 Am. St. Rep.

311. **Me.**—*Kilgore v. Wood*, 56 Me. 150, 96 Am. Dec. 404. **Mass.**—*Weld v. Oliver*, 21 Pick. 559. **N. H.**—*White v. Brooks*, 43 N. H. 402. **N. Y.**—*Osborn v. Schenck*, 83 N. Y. 201; *Dyckman v. Valiente*, 42 N. Y. 549. **Tex.** *Trammell v. McDade*, 29 Tex. 360.

[a] **Assumpsit** for money had and received. *White v. Brooks*, 43 N. H. 402.

# TENDER

By the Editorial Staff.

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**CROSS-REFERENCES:**

Deposit in Court;	Specific Performance;
Payment;	Vendor and Purchaser.
Sales;	

For forms, see 9 STANDARD PROC. 1198, et seq.

Offer of judgment, see 5 STANDARD PROC. 850.

Redemption, tender as condition precedent, see 16 STANDARD PROC. 833; 19 STANDARD PROC. 1079.

For further references and cross-references, see the index to this work and the references throughout this article.

**I. AS CONDITIONS PRECEDENT TO ACTIONS.** — A. IN GENERAL. — A tender is sometimes necessary as a condition precedent to actions.<sup>1</sup>

B. ACTIONS OF TROVER AND REPLEVIN. — It is a condition precedent to an action of replevin for possession of goods in the possession of a person claiming a lien upon them,<sup>2</sup> or to an action of trover for their value,<sup>3</sup> that the amount of the lien be tendered to such party, unless

1. See *infra*, this section and see the titles, "Sales;" "Specific Performance;" "Vendor and Purchaser;" and other titles dealing with specific actions.

In action to recover estrayed property, see 8 STANDARD PROC. 715.

In replevin suit to recover goods illegally distrained, see 18 STANDARD PROC. 534.

In action to set aside execution sale, see 16 STANDARD PROC. 210.

Rule in admiralty, see 1 STANDARD PROC. 530.

In actions to enjoin collection of taxes, see the title, "Taxation."

In actions for loss of goods shipped by freight, see 10 STANDARD PROC. 244.

2. See 22 STANDARD PROC. 897.

[a] A tender of freight charges is necessary before suing for possession of freight. *Loewenberg v. Ark. & L. R. Co.*, 56 Ark. 439, 19 S. W. 1051; *Hoyt v. Sprague*, 61 Barb. (N. Y.) 497.

3. *Ind.*—*Picquet v. McKay*, 2 Blackf. 465. *N. Y.*—*Saltus v. Everett*, 20 Wend. 267, 32 Am. Dec. 541; *Coller v. Shepard*, 19 Barb. 305. *Tenn.*—*Banks*

for some reason a tender is excused or waived.<sup>4</sup> But a tender is not a prerequisite to an action for the loss of the goods.<sup>5</sup>

C. ACTIONS UPON CONTRACTS. — The necessity of a tender as a condition precedent to an action upon a contract depends upon the nature and purpose of the action and upon whether the action is at law or in equity, as well as upon the terms of the contract.<sup>6</sup> As a general rule when the covenants in the contract are mutual and dependent, it is a condition precedent to an action at law in affirmance of the contract, that the party suing put the other in default before he subjects him to the costs of litigation, by a performance, or by an offer or tender of performance,<sup>7</sup> except where such performance, offer or tender is excused for some reason.<sup>8</sup> In equity, however, since costs are in the discretion of the court, and since such relief can be granted to the plaintiff as he is entitled to upon such conditions as shall fully protect the defendant, some authorities hold that a tender is not a condition precedent to an action for specific performance of a contract,<sup>9</sup> and that a tender of a deed is not a condition precedent to an action by the

*v. Wilks*, 1 Humph. 279. **Vt.**—*Benoir v. Paquin*, 40 *Vt.* 199.

4. See *infra*, I, E.

5. **Ind.**—*Evansville & T. H. R. Co. v. Keith*, 8 *Ind. App.* 57, 35 *N. E.* 296. **Md.**—*Ferguson v. Cappeau*, 6 *Har. & J.* 394. **N. H.**—*Hall v. Cheney*, 36 *N. H.* 26.

6. See *infra*, this section.

7. **U. S.**—*Phillips & C. Const. Co. v. Seymour*, 91 *U. S.* 646, 23 *L. ed.* 341. **Colo.**—*Bailey v. Lay*, 18 *Colo.* 405, 33 *Pac.* 407. **Ind.**—*Kenney v. Bevilheimer*, 158 *Ind.* 653, 64 *N. E.* 215. **Neb.**—*Burwell & Ord I. & P. Co. v. Wilson*, 57 *Neb.* 396, 77 *N. W.* 762. **N. Y.**—*Nelson v. Plimpton Fireproof E. Co.*, 55 *N. Y.* 480.

See the titles, “Sales” and “Vendor and Purchaser.”

[a] A vendor suing for breach of contract of sale must tender a deed. **Ala.**—*Moss v. King*, 186 *Ala.* 475, 65 *So.* 180. **Fla.**—*Sanford v. Cloud*, 17 *Fla.* 532. **Ia.**—*Harker v. Cochrane*, 36 *Iowa* 390. **Minn.**—*Blunt v. Egeland*, 164 *Minn.* 351, 116 *N. W.* 653.

[b] A mere averment of readiness is insufficient. *Sanford v. Cloud*, 17 *Fla.* 532; *Parker v. Parmele*, 20 *Johns.* (N. Y.) 130, 11 *Am. Dec.* 253.

[c] Before suing at law to recover purchase money, the vendor must tender a deed. **U. S.**—*Loud v. Pomona Land & Water Co.*, 153 *U. S.* 564, 576, 14 *Sup. Ct.* 928, 38 *L. ed.* 822. **Ala.**—*Moss v. King*, 186 *Ala.* 475, 65 *So.* 180.

**Ark.**—*Rudd v. Savelli*, 44 *Ark.* 145, 150. **Cal.**—*Howard v. Higgins*, 137 *Cal.* 227, 69 *Pac.* 1060. **Kan.**—*Evans v. Jacobitz*, 67 *Kan.* 249, 72 *Pac.* 848. **Miss.**—*Lee v. Dozier*, 40 *Miss.* 477. **N. Y.**—*Ewing v. Wightman*, 167 *N. Y.* 107, 60 *N. E.* 322.

[d] A vendee suing for breach of contract of sale must first tender the purchase price. **Ala.**—*Moss v. King*, 186 *Ala.* 475, 65 *So.* 180. **N. J.**—*Ackley v. Richman*, 10 *N. J. L.* 304. **N. Y.**—*Ziehen v. Smith*, 148 *N. Y.* 558, 42 *N. E.* 1080. **N. D.**—*Beiseker v. Amberson*, 17 *N. D.* 215, 116 *N. W.* 94. **Ohio.**—*Randa- baugh v. Hart*, 61 *Ohio St.* 73, 55 *N. E.* 214, 76 *Am. St. Rep.* 361.

[e] Action for Breach of Contract to Store Grain.—*Nelson v. Plimpton Fireproof E. Co.*, 55 *N. Y.* 480.

To action for breach of contract to purchase and deliver stock, see 8 *STANDARD PROC.* 908.

[f] But where a purchaser agrees to reconvey property by mortgage as security, he cannot reconvey until he receives a deed from the vendor, and therefor, although the covenants of the vendor to deliver a deed and of the purchaser to reconvey by mortgage are dependent, the purchaser need not tender a mortgage before suing for breach of covenant. *West v. Emmons*, 5 *Johns.* (N. Y.) 179.

8. See *infra*, I, E.

9. See the title “Specific Performance.”

vendor to enforce his lien.<sup>10</sup> The failure to make a tender under this rule only affects the question of costs,<sup>11</sup> but there is a line of cases holding that an actual tender is necessary even in such case.<sup>12</sup>

When the covenants are independent, a tender of performance is not a condition precedent to the action,<sup>13</sup> unless the performance of the covenant of the party suing is a condition precedent to the right to demand performance of the covenant of the adverse party.<sup>14</sup>

**D. TO RESCISSION.—Tender of Thing Received Under Contract.** — As a general rule, with certain specified exceptions,<sup>15</sup> it is a condition precedent to an action at law founded upon a rescission of a contract, that the plaintiff, whether he be the vendor or vendee, return or offer or tender to the other party what he has received upon the contract.<sup>16</sup> But the authorities are in conflict as to the necessity of a previous surrender of or offer to surrender possession as a condition precedent to a suit in equity for rescission, one line of authorities holding a previous surrender or offer is necessary,<sup>17</sup> the other holding to the contrary.<sup>18</sup>

**10. Ark.**—Anderson *v.* Mills, 28 Ark. 175. **Ia.**—Boynton *v.* Salinger, 147 Iowa 537, 126 N. W. 369. **Neb.**—Harrington *v.* Birdsall, 38 Neb. 176, 56 N. W. 961. **N. Y.**—Freeson *v.* Bissell, 63 N. Y. 168.

See more fully the title, “Vendor and Purchaser.”

**11.** Anderson *v.* Mills, 28 Ark. 175.

**12. In actions for specific performance,** see the title, “Specific Performance.”

[a] **In Actions To Foreclose a Vendor's Lien.**—**Ala.**—Broughton *v.* Mitchell, 64 Ala. 210. **Ind.**—Cole *v.* Wright, 50 Ind. 296. **Miss.**—Kimbrough *v.* Curtis, 50 Miss. 117.

[b] **A mere allegation of readiness and of an offer is insufficient.** Kimbrough *v.* Curtis, 50 Miss. 117.

**13. Ala.**—Batson *v.* Johnson, 162 Ala. 411, 50 So. 348, 136 Am. St. Rep. 50. **Cal.**—Donovan *v.* Judson, 81 Cal. 334, 22 Pac. 682, 6 L. R. A. 591. **Ga.**—Water Lot Co. *v.* Leonard, 30 Ga. 560. **Ind.**—Pickens *v.* Bozell, 11 Ind. 275. **Miss.**—Sadler *v.* Bowles, 42 Miss. 414. **N. D.**—Shelly *v.* Mikkelson, 5 N. D. 22, 63 N. W. 210. **Tenn.**—Johnson *v.* Kurtz, 97 Tenn. 503, 37 S. W. 222. **Wis.**—Collins *v.* Schmidt, 126 Wis. 227, 105 N. W. 671.

[a] **Thus if the payment of the purchase price is a condition precedent to a deed, a vendor need not tender a deed before he can sue at law for the purchase money.** Loud *v.* Pomona Land & Water Co., 153 U. S. 564, 14 Sup. Ct. 928, 38 L. ed. 822; Paine *v.* Brown, 37 N. Y. 228. See the title, “Vendor

and Purchaser.”

**14.** Winstandley *v.* Rariden, 110 Ind. 140, 11 N. E. 15.

[a] **Thus, if a delivery of a deed is a condition precedent to the right to demand payment of the purchase price, a vendor must deliver or tender a deed before he can sue for the purchase money.** Winstandley *v.* Rariden, 110 Ind. 140, 11 N. E. 15. See the title, “Vendor and Purchaser.”

**15.** See *infra*, this note.

[a] **Where Nothing of Value Is Received.**—Carter *v.* Fox, 11 Cal. App. 67, 103 Pac. 910.

[b] **Where There Is a Total Failure of Consideration.**—Richter *v.* Union Land etc. Co., 129 Cal. 367, 62 Pac. 39.

[c] **Where the Property Is Worthless.**—Morrow *v.* Rees, 69 Pa. 368.

**Return of property as condition precedent to action for fraud,** see 10 STANDARD PROC. 42.

**16.** Florence Oil & Ref. Co. *v.* McCandless, 26 Colo. 534, 58 Pac. 1084.

**Action to avoid effects of duress,** see 7 STANDARD PROC. 951.

**In detinue to recover property parted with through fraud,** see 7 STANDARD PROC. 479.

**17.** California Farm & Fruit Co. *v.* Shiappa Pietra, 151 Cal. 732, 91 Pac. 593; Brady *v.* Cole, 164 Ill. 116, 45 N. E. 438. See the title, “Vendor and Purchaser.”

**18.** Rohrof *v.* Schulte, 154 Ind. 183, 55 N. E. 427; Vail *v.* Reynolds, 118 N. Y. 297, 23 N. E. 301.

**As to offer in pleading to restore con-**



**Tender of Purchase Money.** — When a conveyance is not to be made until payment of the consideration, a purchaser suing for a recovery of the purchase money paid must put the vendor in default by paying or tendering the balance of the purchase money, if the contract has not been rescinded by mutual consent, and if it does not provide for a return of the money under other circumstances.<sup>19</sup>

**E. TENDER WAIVED OR EXCUSED.** — A tender which would otherwise be necessary may be waived by the parties,<sup>20</sup> and it is excused where it would be wholly nugatory or a useless idle ceremony,<sup>21</sup> provided the party, whose duty it is to make a tender, is ready and able to do so.<sup>22</sup> Thus a tender is excused when the person to whom it is to be made, before the time fixed for performance, repudiates the contract,<sup>23</sup> denies its existence,<sup>24</sup> or denies liability thereunder,<sup>25</sup> or where he abandons the contract and refuses to perform it,<sup>26</sup> or notifies the party suing that he will not perform it,<sup>27</sup> or when he prevents the making of a tender,<sup>28</sup> or evades the party making it,<sup>29</sup> or where he fails to attend at the time and place appointed for the consummation of the contract.<sup>30</sup> So also a tender is excused when the party to whom a tender should be

sideration, see 22 STANDARD PROC. 1010, et seq.

19. **Cal.**—Leach *v.* Rowley, 138 Cal. 709, 72 Pac. 403. **N. J.**—Ackley *v.* Richman, 10 N. J. L. 304. **S. D.**—Way *v.* Johnson, 5 S. D. 237, 58 N. W. 552. **Wis.**—Oakes *v.* Estate of Buckley, 49 Wis. 592, 6 N. W. 321.

20. **Me.**—Babb *v.* Kennedy, 19 Me. 267. **N. Y.**—Holmes *v.* Holmes, 12 Barb. 137. **S. C.**—Du Bignon *v.* Loud, 5 Rich. L. 251.

21. **Ala.**—Hawkins *v.* Merritt, 109 Ala. 261, 19 So. 589. **Cal.**—Los Angeles Gas & Elec. Co. *v.* Amalgamated Oil Co., 156 Cal. 776, 106 Pac. 55; Reed *v.* Witcher, 23 Cal. App. 136, 137 Pac. 294. **Colo.**—Mulford *v.* Central L. Assur. Soc., 25 Colo. App. 527, 139 Pac. 1044. **D. C.**—Hazleton *v.* Le Duc, 10 App. Cas. 379. **Me.**—Bowden *v.* Dugan, 91 Me. 141, 39 Atl. 467. **N. Y.**—Ziehen *v.* Smith, 148 N. Y. 558, 42 N. E. 1080; Jewett *v.* Earle, 21 Jones & S. 349; Klinck *v.* Kelly, 63 Barb. 622. **N. D.**—Beiseker *v.* Amberson, 17 N. D. 215, 116 N. W. 94. **Ore.**—Daniels *v.* Morris, 65 Ore. 289, 130 Pac. 397, 132 Pac. 958.

22. **Marie v. Garrison**, 13 Jones & S. (N. Y.) 157. See *infra*, II, D, 4.

23. **Kuhlman v. Wieben**, 129 Iowa 188, 105 N. W. 445, 2 L. R. A. (N. S.) 666.

24. **Eames v. Haver**, 11 Cal. 401, 43

Pac. 1120; **Duffy v. Patten**, 74 Me. 396.

25. **Duffy v. Patten**, 74 Me. 396.

26. **Ill.**—Dulin *v.* Prince, 124 Ill. 76, 16 N. E. 242; **Burnham v. Roberts**, 70 Ill. 19. **Ky.**—Harmon *v.* Thompson, 119 Ky. 528, 84 S. W. 569. **Mass.**—Mansfield *v.* Hodgdon, 147 Mass. 304, 17 N. E. 544. **Minn.**—Blunt *v.* Egeland, 104 Minn. 351, 116 N. W. 653. **N. Y.**—Booth *v.* Milliken, 127 App. Div. 522, 111 N. Y. Supp. 791.

27. **U. S.**—Columbia Bank *v.* Hagner, 1 Pet. (U. S.) 455, 7 L. ed. 219. **Ala.**—McKleroy *v.* Tulane, 34 Ala. 78. **Cal.**—Carter *v.* Fox, 11 Cal. App. 67, 103 Pac. 910. **Mo.**—Armstrong *v.* Dunn, 163 Mo. App. 701, 147 S. W. 509. **N. Y.**—Ziehen *v.* Smith, 148 N. Y. 558, 42 N. E. 1080; **Franchot v. Leach**, 5 Cow. 506. **Ore.**—Wells, Fargo & Co. *v.* Page, 48 Ore. 74, 82 Pac. 856, 3 L. R. A. (N. S.) 103.

28. **Nelson v. Plimpton Fireproof E. Co.**, 55 N. Y. 480. See also **Sands v. Lyon**, 18 Conn. 18, where the defendant walked away from the plaintiff when he made an offer of the money. But compare **Knight v. Abbott**, 30 Vt. 577.

**In action for recovery of broker's commission**, see 8 STANDARD PROC. 894.

29. **Schayer v. Commonwealth Loan Co.**, 163 Mass. 322, 39 N. E. 1110.

30. **Holmes v. Holmes**, 12 Barb. (N. Y.) 137.

made is unable to perform his part of the contract,<sup>31</sup> or where he has disabled himself from performing and is not able to perform at the time fixed therefor.<sup>32</sup> If a person claiming a lien on goods in his possession refuses to surrender them except upon payment of an excessive amount,<sup>33</sup> or if he refuses to surrender them on some other ground,<sup>34</sup> a formal tender of the amount of the lien is not necessary. In the latter case, a tender is excused also when the damage to the goods exceeds the amount of the lien.<sup>35</sup>

**II. PLEADING TENDER OR EXCUSE FOR NOT MAKING TENDER.**—A. NECESSITY OF.—1. By Plaintiff.—Where the plaintiff is required to make a tender or offer of performance before he is entitled to sue, he must allege it.<sup>36</sup> This rule applies to law<sup>37</sup>

31. Ala.—Allen v. Greene, 19 Ala. 34. D. C.—Newman v. Baker, 10 App. Cas. 187. Ia.—Wilhelm v. Fimple, 31 Iowa 131, 7 Am. Rep. 117. Ky.—Estill v. Jenkins, 4 Dana 75. N. Y.—Darrow v. Cornell, 30 App. Div. 115, 51 N. Y. Supp. 828.

[a] Where the vendor has no title or his title is defective at the time conveyance is to be made, the purchaser need not make a tender before suing to foreclose his lien. Holmes v. Holmes, 12 Barb. (N. Y.) 137, 146.

32. Ala.—Hawkins v. Merritt, 109 Ala. 261, 19 So. 589. Cal.—Joyce v. Shafer, 97 Cal. 335, 32 Pac. 320; Burks v. Davies, 85 Cal. 110, 24 Pac. 613, 20 Am. St. Rep. 213. Ill.—Smith v. Lamb, 26 Ill. 396, 79 Am. Dec. 381. Mich.—Wright v. Dickinson, 67 Mich. 580, 35 N. W. 164, 11 Am. St. Rep. 602. N. Y.—Higgins v. Eagleton, 155 N. Y. 466, 50 N. E. 287. Eng.—Sir Anthony Maynie v. Scot, Cro. Eliz. 479, 78 Eng. Reprint 731.

33. Me.—Bowden v. Dugan, 91 Me. 141, 39 Atl. 467. Mass.—Schayer v. Commonwealth L. Co., 163 Mass. 322, 39 N. E. 1110. Mo.—Bower v. Bower, 97 Mo. App. 674, 71 S. W. 739. N. Y.—Murr v. Western Assur. Co., 50 App. Div. 4, 64 N. Y. Supp. 12.

[a] It is only when the demand of a larger sum amounts to an announcement that it is useless to tender a smaller sum, that a tender of the amount legally demandable is excused. Ark.—Loewenberg v. Ark. & L. R. Co., 56 Ark. 439, 19 S. W. 1051. N. Y.—Hoyt v. Sprague, 61 Barb. 497. Eng.—The Norway, Brown & Lush. 404.

34. West v. Tupper, 1 Bailey (S. C.) 193.

35. Reeve v. Fox, 40 Ill. App. 127.

36. See the following notes, and 11 STANDARD PROC. 999, 1003.

[a] Aider by Verdict.—Failure to allege tender or offer of performance is cured by verdict. Davis v. Watson, 89 Mo. App. 15, 27; Bailey v. Clay, 4 Rand. (25 Va.) 346. See generally 21 STANDARD PROC. 415.

37. See the following cases: U. S. Loud v. Pomona L. & W. Co., 153 U. S. 564, 14 Sup. Ct. 928, 38 L. ed. 822; Columbia Bank v. Hagner, 1 Pet. 455, 7 L. ed. 219; Meis v. Yocum, 9 Sawy. 24, 16 Fed. 168. Cal.—Heine v. Treadwell, 72 Cal. 217, 13 Pac. 503; Englander v. Rogers, 41 Cal. 420. Colo.—Bailey v. Lay, 18 Colo. 405, 33 Pac. 407. Conn.—Phillips v. Sturm, 91 Conn. 331, 99 Atl. 689. Ind.—Johnson v. Powell, 9 Ind. 566; Vankirk v. Talbot, 4 Blackf. 367. Ky.—Hawley v. Mason, 9 Dana 32, 33 Am. Dec. 522; Turner v. Johnson, 7 Dana 435. Mass.—Kane v. Hood, 13 Pick. 281. Minn.—St. Paul Div. No. 1 v. Brown, 9 Minn. 157. Mo.—Thompson v. Dickerson, 68 Mo. App. 535. Miss.—Morrison v. Ives, 4 Smed. & M. 652. N. J.—Leslie v. Casey, 59 N. J. L. 6, 35 Atl. 6; Harvey v. Trenchard, 6 N. J. L. 126. N. Y.—Lester v. Jewett, 11 N. Y. 453; Smith v. Smith, 83 Hun 381, 31 N. Y. Supp. 924, 64 N. Y. St. 756; Williams v. Healey, 3 Denio 363. N. C.—Ducker v. Cochrane, 92 N. C. 597. Ohio.—Campbell v. Gittings, 19 Ohio 347. Ore.—Powell v. Dayton, etc. R. Co., 12 Ore. 488, 8 Pac. 544. Pa.—Henry v. Raiman, 25 Pa. 354, 64 Am. Dec. 703; Rennyson v. Reifsnyder, 11 Pa. Co. Ct. 157; Wagenblast v. McKean, 2 Grant Cas. 393. Tex.—Van Norman's Exrs. v. Wheeler, 13 Tex.

actions as well as to suits in equity,<sup>38</sup> although the circumstances under which a tender or offer is necessary may not always be the same in the two classes of cases.<sup>39</sup> So where a tender or offer of performance appears to be essential but is not alleged, plaintiff must allege facts showing an excuse for the failure to make the tender or offer,<sup>40</sup> and the ability to make it.<sup>41</sup> In equity it is generally regarded as necessary that the bill or complaint contain an offer or allegation of readiness and ability to pay or otherwise perform,<sup>42</sup> and where a previous tender or offer is not a condition precedent, this is all that is required to satisfy the maxim that he who seeks equity must do equity.<sup>43</sup>

316. *Eng.*—*Rawson v. Johnson*, 1 East 203, 102 *Eng. Reprint* 79; *Morton v. Lamb*, 7 T. R. 125, 101 *Eng. Reprint* 890.

38. *U. S.*—*Bailey v. Atlantic & P. R. Co.*, 3 Dill. 22, 2 *Fed. Cas.* No. 732. *Ga.*—*Dotterer v. Freeman*, 88 *Ga.* 479, 14 S. E. 863. *Ill.*—*Gage v. Goudy*, 141 *Ill.* 215, 30 N. E. 320. *Ind.*—*Morrison v. Jacoby*, 114 *Ind.* 84, 14 N. E. 546, 15 N. E. 806. *Kan.*—*Hagaman v. Cloud County*, 19 *Kan.* 394. *Minn.*—*Dunn v. Hunt*, 63 *Minn.* 484, 65 N. W. 948. *Mo.*—*Ailey v. Burnett*, 134 *Mo.* 313, 33 S. W. 1122, 35 S. W. 1137. *Tex.*—*Hunter v. Clayton* (*Tex. Civ. App.*), 36 S. W. 326.

39. See *supra*, I, C and D.

40. *Phillips v. Sturm*, 91 *Conn.* 331, 99 *Atl.* 689; *Wessel v. Waltke & Co.*, 196 *Mo. App.* 582, 190 S. W. 628. See also the cases cited in the preceding notes.

41. *Moss v. King*, 186 *Ala.* 475, 65 *So.* 180; *Marie v. Garrison*, 13 *Jones & S. (N. Y.)* 157; *Booth v. Milliken*, 127 *App. Div.* 522, 111 *N. Y. Supp.* 791.

42. *U. S.*—*Gage v. Pumpelly*, 115 *U. S.* 454, 6 *Sup. Ct.* 136, 29 *L. ed.* 449; *Paton v. Northern Pac. R. Co.*, 85 *Fed.* 838. *Ala.*—*Tucker v. Holley*, 20 *Ala.* 426. *Conn.*—*Johnson v. Connecticut Bank*, 21 *Conn.* 148. *Md.*—*Oliver v. Palmer*, 11 *Gill & J.* 426, 446. *Miss.*—*Deans v. Robertson*, 64 *Miss.* 195, 1 *So.* 159. *Tex.*—*Bateson v. Choate*, 85 *Tex.* 239, 20 *S. W.* 64.

[a] **Offer Unnecessary Under Code.** However it may be where equity forms of pleading are retained, such offer is not necessary "under the code system, which requires a complaint to contain only a statement of the facts constituting the cause of action, and the prayer for relief. . . . The willingness of the party to perform those terms which the court may think it

right to impose as the price of any relief is sufficiently shown by his submitting his cause to the court, which has the power to impose the proper terms." *Knappen v. Freeman*, 47 *Minn.* 491, 50 *N. W.* 533.

43. *U. S.*—*Stanley v. Gadsby*, 10 *Pet.* 521, 9 *L. ed.* 518; *Gordon v. Smith*, 62 *Fed.* 503, 10 *C. C. A.* 516; *Lee v. Electric Typo. Co.*, 68 *Fed.* 519. See *Paton v. Northern Pac. R. Co.*, 85 *Fed.* 838. *Ala.*—*Loxley v. Douglas*, 121 *Ala.* 575, 25 *So.* 998; *Sandford v. Hamner*, 115 *Ala.* 406, 22 *So.* 117; *Murphree v. Summerlin*, 114 *Ala.* 54, 21 *So.* 470; *Cain v. Gimon*, 36 *Ala.* 168. *Ark.*—*Ruddell v. Ambler*, 18 *Ark.* 369. *Cal.*—*Hammond v. Ocean Shore Dev. Co.*, 22 *Cal. App.* 167, 133 *Pac.* 978. *Colo.*—*Caldwell v. Davis*, 10 *Colo.* 481, 15 *Pac.* 696, 3 *Am. St. Rep.* 599. *Ga.*—*Bell v. Weyman*, 99 *Ga.* 273, 25 *S. E.* 636; *Coleman v. Easterling*, 93 *Ga.* 29, 18 *S. E.* 819; *Whatley v. Barker*, 79 *Ga.* 790, 4 *S. E.* 387. But see *Dotterer v. Freeman*, 88 *Ga.* 479, 14 *S. E.* 863. *Ill.*—*Board of Henneberry*, 41 *Ill.* 179; *Wright v. McNeely*, 11 *Ill.* 241. *Ind.*—*Sowle v. Holdridge*, 63 *Ind.* 213; *Indianapolis v. Gilmore*, 30 *Ind.* 414. *Ia.*—*McWhirter v. Crawford*, 104 *Iowa* 550, 72 *N. W.* 505, 73 *N. W.* 1021; *Binford v. Boardman*, 44 *Iowa* 53; *Washburn v. Carmichael*, 32 *Iowa* 475; *Casady v. Bosler*, 11 *Iowa* 242; *Stringham v. Brown*, 7 *Iowa* 33. *Kan.*—*Soper v. Gabe*, 55 *Kan.* 646, 41 *Pac.* 969. *Mich.*—*Beedle v. Crane*, 91 *Mich.* 429, 51 *N. W.* 1070. *Minn.*—*St. Paul Div. No. 1 v. Brown*, 9 *Minn.* 157. *Miss.*—*Pounds v. Clarke*, 70 *Miss.* 263, 14 *So.* 22; *American F. Land & Mtg. Co. v. Jefferson*, 69 *Miss.* 770, 12 *So.* 464, 30 *Am. St. Rep.* 587. *Mo.*—*Kline v. Vogel*, 90 *Mo.* 239, 1 *S. W.* 733, 2 *S. W.* 408; *Overton v. Stevens*, 8 *Mo.* 622. *Mont.*—*Maloy v. Berkin*, 11 *Mont.* 138, 27 *Pac.* 442. *Neb.*—*Weston v. Meyers*, 45 *Neb.*



The application of these rules will be found elsewhere in this work.<sup>44</sup>

**2. By Defendant.**—Where a previous tender has been made by the defendant, in order to avail himself of the benefit thereof he must plead it,<sup>45</sup> as where he seeks thereby to defeat or mitigate liability for costs,<sup>46</sup> and, except as otherwise provided by statute,<sup>47</sup> it is not available under the general issue.<sup>48</sup> It cannot be taken advantage of for the first time on appeal.<sup>49</sup>

**B. NATURE OF THE PLEA.**—A plea of tender is an affirmative plea<sup>50</sup> to the merits,<sup>51</sup> and in bar of subsequently accruing interest<sup>52</sup> and costs,<sup>53</sup> and, where followed up by a sufficient deposit in court, in bar to the action.<sup>54</sup>

**C. JOINDER.**—A plea of tender may not be joined with an inconsistent plea or defense,<sup>55</sup> as for instance the general issue or general

95, 63 N. W. 117. **N. J.**—Oakley v. Cook, 41 N. J. Eq. 350, 7 Atl. 495. **N. Y.**—Zebbley v. Farmers' L. & T. Co., 139 N. Y. 461, 34 N. E. 1067; Kley v. Healy, 127 N. Y. 555, 28 N. E. 593; Post v. Utica Bank, 7 Hill 391. **Ohio.** Columbus & T. R. Co. v. Steinfeld, 42 Ohio St. 449; Rains v. Scott, 13 Ohio 107; Dustin v. Newcomer, 8 Ohio 49. **Pa.**—Wilson v. Buchanan, 170 Pa. 14, 32 Atl. 620. **Tex.**—Weaver v. Nugent, 72 Tex. 272, 10 S. W. 458, 13 Am. St. Rep. 792. **Wis.**—Rietz v. Foeste, 30 Wis. 693; Breitenbach v. Turner, 18 Wis. 140.

44. See titles dealing with specific actions and causes of action.

45. **U. S.**—Sheredine v. Gaul, 2 Dall. 190, 1 L. ed. 344; Boulton v. Moore, 14 Fed. 922, 11 Biss. 500. **Ala.**—Park v. Wiley, 67 Ala. 310. **Cal.**—Meredith v. Santa Clara Min. Assn., 56 Cal. 178. **Ia.**—Barker v. Brink, 5 Iowa 481. **Mass.**—Carley v. Vance, 17 Mass. 389. **N. Y.**—Stieglitz v. Cohen, 69 Misc. 634, 126 N. Y. Supp. 145. **Pa.**—Sharpless v. Dobbins, 1 Del. Co. 25. **P. R.** Semidey v. Central Aguirre, 7 Porto Rico Fed. 572. **Tex.**—Floyd v. Illinois Bankers' Life Assn. (Tex. Civ. App.), 192 S. W. 607. **Vt.**—Griffin v. Tyson, 17 Vt. 35.

[a] But "if the tender is collateral to the action, as having operated to extinguish or suspend plaintiff's title to the specific property sued for," it need not be specially pleaded. Woodcock v. Clark, 18 Vt. 333. See also Langdale v. Bowden, 139 Ga. 324, 77 S. E. 172.

46. **Ill.**—Leonard v. Patton, 106 Ill. 99; Knox v. Light, 12 Ill. 86; McDaniel v. Upton, 45 Ill. App. 151. **N. Y.**

Falkenberg v. Bash, 33 Misc. 607, 67 N. Y. Supp. 1111, 9 N. Y. Ann. Cas. 132. **Can.**—Darrow v. Millard, 33 Nova Scotia 334; Kennermann v. Canadian Northern Ry. Co., 3 Sask. L. Rep. 74. As to offer of judgment, see the title "Costs."

47. See the statutes and the following cases: **Mass.**—Brickett v. Wallace, 98 Mass. 528. **N. H.**—Colby v. Stevens, 38 N. H. 191. **Vt.**—Davis v. Nelson's Est., 73 Vt. 328, 59 Atl. 1094.

48. Seibert v. Kline, 1 Pa. 38; York v. Newland, 10 Humph. (Tenn.) 330.

49. **Ill.**—McDaniel v. Upton, 45 Ill. App. 151. **Ia.**—Johnson v. Triggs, 4 G. Gr. 97. **Mass.**—Grover v. Smith, 165 Mass. 132, 42 N. E. 555, 52 Am. St. Rep. 506. **Pa.**—Seibert v. Kline, 1 Pa. 38. **Vt.**—Chipman v. Bates, 5 Vt. 143. 50. Park v. Wiley, 67 Ala. 310.

51. Tiernan v. Napier, 5 Yerg. (Tenn.) 410; Noone v. Smith, 1 H. Bl. 369, 126 Eng. Reprint 217.

52. Manning v. Carter (Ala.), 77 So. 744; Loomis v. Knox, 60 Conn. 343, 22 Atl. 771. See *infra*, VI, C.

53. **Ark.**—Brent v. Fenner, 4 Ark. 160. **Ind.**—Ireland v. Montgomery, 34 Ind. 174. **N. Y.**—Ayres v. Pease, 12 Wend. 393. **N. C.**—Haughton v. Leary, 20 N. C. 14. **Ohio.**—Huntington v. Ziegler, 2 Ohio St. 10. **Vt.**—Adams v. Morgan, 39 Vt. 302.

See *infra*, VII, B.

54. Wheeler v. Woodward, 66 Pa. 158; Sheehan v. Rosen, 12 Pa. Super. 298.

**Judgment for defendant** where deposit in court is made, see *infra*, VI, B.

55. As to pleading inconsistent defenses, see 2 STANDARD PROC. 26, 60.

denial.<sup>56</sup> But it is held there is no such inconsistency between a general denial and the tender of a smaller sum than plaintiff claims, as to prevent their being pleaded together,<sup>57</sup> and the same is true as to a denial of damages and a plea of tender of amends.<sup>58</sup> And a qualified general issue or denial of the claim may be pleaded with a tender of that portion of the claim excepted from the denial.<sup>59</sup>

D. HOW PLEADED.—1. **Generally.**—When it is necessary to plead a tender, whether as the foundation of a cause of action or as a defense, all the facts essential to show a valid and sufficient tender should be set forth with particularity.<sup>60</sup> This is the rule both at law,<sup>61</sup> and in equity,<sup>62</sup> though the same strictness is not always observed in equity when the only bearing tender may have is on the right to costs.<sup>63</sup> What facts must be pleaded as a tender depends somewhat upon what, under the common law or statute, amounts to such tender or excuse, a matter outside the scope of this work. As a general rule, there should be an allegation or showing of the actual production and offer of the thing tendered,<sup>64</sup> its acceptance or refusal,<sup>65</sup> and, in case of non-production, the averment of a valid excuse.<sup>66</sup> A lone plea of tender to part of a claim is bad.<sup>67</sup>

56. **Conn.**—Hatch v. Thompson, 67 Conn. 74, 34 Atl. 770. **Ill.**—County of Jo Daviess v. Staples, 108 Ill. App. 539. **Ia.**—Brayton v. Delaware, 16 Iowa 44. **La.**—Davis v. Millaudon, 17 La. Ann. 97, 87 Am. Dec. 517. **Md.** Union Bank v. Ridgely, 1 Har. & G. 324. **N. Y.**—Livingston v. Harrison, 2 E. D. Smith 197. **Eng.**—Dobie v. Larkan, 10 Exch. 776, 3 W. R. 247; Jenkins v. Edwards, 5 Term. R. 97, 101 Eng. Reprint 55.

[a] But in Alabama a plea of tender "may be accompanied by a plea of the general issue, which, for all purposes except the acquisition of the sum tendered (and paid into court), imposes upon the plaintiff the burden of proving his complaint—especially where it consists of several variant counts." Southern Ry. Co. v. Slade, 192 Ala. 568, 68 So. 867.

57. Clarke v. Lyon, 7 Nev. 75, tender of a smaller sum is not necessarily an admission that anything is due.

58. Gerring v. Manning, Barnes 366, 94 Eng. Reprint 957; Martin v. Kesterson, 2 W. Bl. 1089, 96 Eng. Reprint 643.

59. Smith v. Whitham, 204 Ill. App. 110; County of Jo Daviess v. Staples, 108 Ill. App. 539.

60. **U. S.**—Harding, W. & Co. v. York Knitting Mills, 142 Fed. 223. **Cal.**—Duff v. Fisher, 15 Cal. 375. **Ky.** Bank of Kentucky v. Hickey, 4 Litt. 225. **Mass.**—Tinney v. Ashley, 15 Pick.

546, 26 Am. Dec. 620. **W. Va.**—Towles & Co. v. Carpenter, 62 W. Va. 151, 57 S. E. 365.

61. **Ga.**—Dotterer v. Freeman, 88 Ga. 479, 14 S. E. 863. **Ind.**—Indiana Bond Co. v. Jameson, 24 Ind. App. 8, 56 N. E. 37. **W. Va.**—Towles & Co. v. Carpenter, 62 W. Va. 151, 57 S. E. 365.

62. **U. S.**—Sheets v. Selden, 7 Wall. 416, 19 L. ed. 166. **Ga.**—Cothran v. Scanlan, 34 Ga. 555. **Ky.**—Taylor v. Admrs. v. Reed, 5 Mon. 36. **Me.** Lumsden v. Manson, 96 Me. 357, 52 Atl. 783. **N. J.**—Shields v. Lozear, 22 N. J. Eq. 447.

63. See the following: **Ill.**—Glos v. Goodrich, 175 Ill. 20, 51 N. E. 643. **Ia.**—Binford v. Boardman, 44 Iowa 53. **Wis.**—Breitenbach v. Turner, 18 Wis. 140.

64. McGehee v. Jones, 10 Ga. 127; Dickerson v. Hayes, 26 Minn. 100, 1 N. W. 834.

65. **Ind.**—Wah Kee v. Clark, 48 Ind. App. 462, 96 N. E. 18. **W. Va.**—Towles & Co. v. Carpenter, 62 W. Va. 151, 57 S. E. 365. **Eng.**—Lancashire v. Kellingworth, 1 Comyns 117, 92 Eng. Reprint 991.

66. McGehee v. Jones, 10 Ga. 127; Dickerson v. Hayes, 26 Minn. 100, 1 N. W. 834.

67. Dixon v. Clark, 5 M. G. & S. 365, 57 E. C. L. (Eng.) 365.

**2. Time and Place.**—The time<sup>68</sup> and place<sup>69</sup> of making the tender should be definitely stated, and as to the former the plea should show an offer at a proper time.<sup>70</sup>

**3. Amount, etc.**—The amount tendered must be averred,<sup>71</sup> and it should appear from the facts stated or by direct affirmation that such amount is the entire sum due.<sup>72</sup> Thus a plea of a tender made after commencement of the action should show that the amount tendered included costs, and separately state the principal amount and the amount representing costs.<sup>73</sup> Whether the offer is of legal tender or its equivalent should be stated with sufficient particularity to determine its nature.<sup>74</sup> Also when the thing tendered is a chattel it

**68. Ga.**—*Cothrans v. Mitchell*, 54 Ga. 498. **Ky.**—*Duckham v. Smith*, 5 Mon. 372. **Miss.**—*Lanier v. Trigg*, 6 Smed. & M. 641, 45 Am. Dec. 293. **N. J.**—*Ryerson v. Kitchell*, 2 N. J. L. 154. **Ohio.**—*Vance v. Blair*, 18 Ohio 532, 51 Am. Dec. 467. **Va.**—*Downman v. Downman's Exrs.*, 1 Wash. (1 Va.) 26. **W. Va.**—*Shank v. Groff*, 45 W. Va. 543, 32 S. E. 248.  
*Compare Shepherd v. Wysong*, 3 W. Va. 46.

[a] **An allegation of tender "on or about"** a given date is sufficient as to time, in the absence of an objection for uncertainty. *Haile v. Smith*, 113 Cal. 656, 45 Pac. 872.

**69. Cal.**—*Hammond v. Ocean Shore Dev. Co.*, 22 Cal. App. 167, 133 Pac. 978. **Ind.**—See also *Taylor v. Meek*, 4 Blackf. 388. **Ky.**—*Kendal v. Talbot*, 1 A. K. Marsh. 321; *Trabue v. Kay*, 4 Bibb 226.

**70. Allen v. Shortridge**, 1 Ky. Op. 361.

[a] **Premature Tender.**—A plea showing a premature tender is bad. *Morgan v. East*, 126 Ind. 42, 25 N. E. 867, 9 L. R. A. 558.

[b] **At common law** (1) a plea showing a tender made after law day is of no avail (**Me.**—*Call v. Lathrop*, 39 Me. 434. **Mass.**—*Dewey v. Humphrey*, 5 Pick. 187. **Miss.**—*Lanier v. Trigg*, 6 Smed. & M. 641, 45 Am. Dec. 293. **Tenn.**—*Miller v. McKinney*, 5 Lea 93. **Eng.**—*Poole v. Tunbridge*, 2 M. & W. 223); likewise (2) if made after commencement of the action. *Levan v. Sternfeld*, 55 N. J. L. 41, 25 Atl. 854.

[c] **Tender after the commencement of the action** is insufficiently pleaded by the averment that it was made after the complaint was filed where issuing the summons constitutes

the commencement of the action. *Ireland v. Montgomery*, 34 Ind. 174.

**71. Ala.**—*Chapman v. Lee's Admr.*, 55 Ala. 616. **Ind.**—*Goss v. Bowen*, 104 Ind. 207, 2 N. E. 704. **Minn.**—*Dickerson v. Hayes*, 26 Minn. 100, 1 N. W. 834. **N. H.**—*Ffrost v. Butler*, 58 N. H. 146. **N. Y.**—*Sussman v. Mason*, 10 Misc. 20, 30 N. Y. Supp. 542, 62 N. Y. St. 656. **Eng.**—*Smith v. Manners*, 5 C. B. N. S. 632, 94 E. C. L. 632, 28 L. J. C. P. 220, 5 Jur. N. S. 549, 141 Eng. Reprint 254.

**72. Ala.**—*Lamb v. Pate*, 4 Ala. App. 628, 58 So. 943. **Ind.**—*Wah Kee v. Clark*, 48 Ind. App. 462, 96 N. E. 18. **N. Y.**—*People v. Banker*, 8 How. Pr. 258. **Pa.**—*Kennedy v. Arnold*, 16 Pa. Dist. 147. **Can.**—*Conger v. Hutchinson*, 6 U. C. Q. B. (O. S.) 644.

[a] **Where a larger sum is demanded in the declaration** than the defendant is willing to admit is due, the record, in assumpsit for money had and received, is no estoppel against the averment that the sum tendered was all that was due, since the declaration is inconclusive as to the sum actually due, or demanded, and the sum which the plaintiff assumes to be due. *Sawyer v. Baker*, 20 N. H. 525.

**73. U. S.**—*The Good Hope*, 40 Fed. 608. **Ala.**—*Smith v. Anders*, 21 Ala. 782; *Lamb v. Pate*, 4 Ala. App. 628, 58 So. 943. **Ia.**—*Freeman v. Fleming*, 5 Iowa 460. **N. Y.**—*Eaton v. Wells*, 82 N. Y. 576; *People v. Banker*, 8 How. Pr. 258. **S. C.**—*Hinchey v. Foster*, 3 McCord L. 428.

**74. Cal.**—*Magraw v. McGlynn*, 26 Cal. 420. **Ind.**—*Goss v. Bowen*, 104 Ind. 207, 2 N. E. 704. **Miss.**—*Bonnell v. Covington*, 7 How. 322. **Va.**—*Downman v. Downman's Exrs.*, 1 Wash. (1 Va.) 26. **Wash.**—*Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760.



should be particularly described,<sup>75</sup> and when material, its value stated.<sup>76</sup>

**4. Continued Readiness and Ability.**<sup>77</sup> — In addition to alleging that he tendered the amount due, the pleader must aver, when it is necessary to keep the tender good, that he has at all times since the tender been ready, able, and willing to pay.<sup>78</sup> The same rule applies to suits in equity.<sup>79</sup> In cases involving the tender of a chattel the averment of continued readiness and ability is not generally necessary.<sup>80</sup> Nor is it necessary when the effect of a tender is to destroy a lien.<sup>81</sup> The averment of readiness to pay cannot, as a rule, be made in lieu of an actual tender,<sup>82</sup> except when it is shown that through the fault of the adverse party a tender before suit was not possible,<sup>83</sup> but in equity, when the right to relief is not based on a previous tender, as in a suit to quiet title,<sup>84</sup> such a plea has been held sufficient, as an offer to do equity, which is all that can be required.<sup>85</sup>

**75.** *Lilienthal v. McCormick*, 86 Fed. 100; *Smith v. Toomiss*, 7 Conn. 110; *Nichols v. Whiting*, 1 Root (Conn.) 443.

**76.** *Johnson v. Butler*, 4 Bibb (Ky.) 97.

[a] **When an appraisal is necessary**, the value of the thing tendered should be so determined and alleged. *Stockton v. Creager*, 51 Ind. 262; *Bohannons v. Lewis*, 3 Mon. (Ky.) 376.

**77.** **Pleading payment into court**, see *infra*, IV, J.

**78.** **U. S.**—*The Walter W. Pharo*, 1 Low. 437, 29 Fed. Cas. No. 17,124. **Ala.**—*McCalley v. Otey*, 90 Ala. 302, 8 So. 157. **Ark.**—*Helena v. Turner*, 36 Ark. 577. **Del.**—*Cullen v. Green*, 5 Harr. 17. **Fla.**—*Caruthers v. Williams*, 21 Fla. 485. **Ga.**—*Cothrans v. Mitchell*, 54 Ga. 498. **Ill.**—*Wright v. McNeefy*, 11 Ill. 241. **Ind.**—*Wilson v. McVey*, 83 Ind. 108. **Ia.**—*Phelps v. Kathron*, 30 Iowa 231; *Barker v. Brink*, 5 Iowa 481. **Ky.**—*Allen v. Shortridge*, 1 Ky. Op. 361. **Me.**—*Lyon v. Williamson*, 27 Me. 149. **Mass.**—*Town v. Trow*, 24 Pick. 168. **Miss.**—*Besancon v. Shirley*, 9 Smed. & M. 457. **Mo.**—*Henderson v. Cass*, 107 Mo. 50, 18 S. E. 992. **N. H.**—*Clough v. Clough*, 26 N. H. 24. **N. J.**—*Levan v. Sternfeld*, 55 N. J. L. 41, 25 Atl. 854. **N. Y.**—*Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Roosevelt v. Bull's Head Bank*, 45 Barb. 579. **N. C.**—*De Bruhl v. Hood*, 156 N. C. 52, 72 S. E. 83; *Lee v. Manley*, 154 N. C. 244, 70 S. E. 385. **S. C.**—*Walker v. Walker*, 17 S. C. 329. **Tenn.**—*Miller v. McClain*, 10 Yerg. 245. **Eng.**—*Dixon v. Clark*, 5 M. G. & S. 365, 57 E. C. L. 365, 376.

**79. U. S.**—*Stanley v. Gadsby*, 10 Pet. 521, 9 L. ed. 518. **Ga.**—*Cothran v. Scanlan*, 34 Ga. 555. **Ky.**—Page v. Hughes, 2 B. Mon. 439. **Minn.**—See *Thompson v. Foster*, 21 Minn. 319. **N. C.**—*McRae v. Atlantic, etc. R. Co.*, 58 N. C. 395.

[a] **An indefinite offer**, such as that the affiant will meet the obligation as soon as his affairs will admit of it, is insufficient. *Brown v. Swan*, 10 Pet. (U. S.) 497, 9 L. ed. 508.

**80. Ind.**—*Mitchell v. Merrill*, 2 Blackf. 87, 18 Am. Dec. 128. **Ky.**—*Mitchell v. Gregory*, 1 Bibb 449, 4 Am. Dec. 655. **N. Y.**—*Slingerland v. Morse*, 8 Johns. 474. **N. C.**—*Patton v. Hunt*, 64 N. C. 163. **Tex.**—*Deweese v. Lockhart*, 1 Tex. 535. **Vt.**—*Barney v. Bliss*, 1 D. Chipm. 399, 12 Am. Dec. 696.

**81.** *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Wagenblast v. McKean*, 2 Grant Cas. (Pa.) 393.

**82. Cal.**—*Heine v. Treadwell*, 72 Cal. 217, 13 Pac. 503; *Englander v. Rogers*, 41 Cal. 420. **Ind.**—*Jones v. Frost*, 31 Ind. 69. **Ky.**—*Boone v. Shackelford*, 4 Bibb 67; *Wickliffe v. Handley*, 2 Bibb 247. **Miss.**—*Guion v. Doherty*, 43 Miss. 538. **N. H.**—*Clough v. Clough*, 26 N. H. 24. **N. Y.**—*Bronson v. Chicago, R. I. & P. R. Co.*, 40 How. Pr. 48. **Ohio.**—*Cincinnati Gas-Light & C. Co. v. Avondale*, 43 Ohio St. 257, 1 N. E. 527.

**83.** *Greeley v. Whitehead*, 35 Fla. 523, 17 So. 643, 48 Am. St. Rep. 258, 28 L. R. A. 286; *Carley v. Vance*, 17 Mass. 389.

**84.** *Cone v. Wood*, 108 Iowa 260, 79 N. W. 86, 75 Am. St. Rep. 223.

**85.** *Cone v. Wood*, 108 Iowa 260, 79

### III. OBJECTIONS, DEMURRER, ANSWER AND REPLY.

The person to whom a tender is made must, at the time, specify any objection he may have to the tender, or be deemed to have waived it,<sup>86</sup> such, *e. g.*, as that the amount tendered did not include interest,<sup>87</sup> or was not legal tender,<sup>88</sup> but such objection need not be made to a premature tender,<sup>89</sup> nor to a tender which cannot be made good.<sup>90</sup> Likewise, if no objection is made to the sufficiency of a plea of tender, any irregularity therein is waived.<sup>91</sup> An objection to the sufficiency

N. W. 86, 75 Am. St. Rep. 223; Nicodemus v. Young, 90 Iowa 423, 57 N. W. 906. Compare *supra*, II, A, 1.

86. Cal.—Bradford v. Fidelity Sav. & Loan Society, 177 Cal. 247, 170 Pac. 404; Allen v. Chatfield, 172 Cal. 60, 156 Pac. 47; Colton v. Oakland Bank, 137 Cal. 376, 70 Pac. 225. Ill.—Gradle v. Warner, 140 Ill. 123, 29 N. E. 1118. Ind.—Beatty v. Miller, 47 Ind. App. 494, 94 N. E. 897. Mo.—Smith v. Reserve Loan Life Ins. Co., 267 Mo. 342, 184 S. W. 464. N. Y.—Cleveland v. Toby, 36 Misc. 319, 73 N. Y. Supp. 544; Wright v. Robinson & Co., 84 Hun 172, 32 N. Y. Supp. 463. N. C.—Owens v. North State Life Ins. Co., 173 N. C. 273, 92 S. E. 168. Utah.—Hirsh v. Ogden Furniture & Carpet Co., 48 Utah 424, 160 Pac. 283.

But see Hall v. Appel, 67 Conn. 585, 35 Atl. 524.

[a] A definite tender under an indefinite option is not binding for a failure to specify objections when the tender is made. Klein v. Markarian, 175 Cal. 37, 165 Pac. 3.

[b] "Due" Offer.—An offer of ten dollars is not a due offer of payment of a debt of nearly \$20,000 within the meaning of the statute providing that an obligation for the payment of money is extinguished by a due offer of payment, etc. Colton v. Oakland Bank, 137 Cal. 376, 70 Pac. 225. See also Allen v. Chatfield, 172 Cal. 60, 156 Pac. 47.

[c] Waiver Goes Only to Sufficiency of Tender.—It is no doubt true that a failure to object to the amount of the tender is a waiver of the objection that it was less than the amount due, but in considering the sufficiency of the tender the court may consider that fact. The estoppel only goes to the question of the sufficiency of the tender, and does not affect the question of the amount actually due. Bradford v. Fidelity Sav. & Loan Society, 177 Cal. 247, 170 Pac. 404.

[d] Change of Objection.—Where a tender is made and refused, the grounds for refusal being specified, the objection raised cannot be changed and the tonderee at the trial permitted to advance other unspecified objections. Owens v. North State Life Ins. Co., 173 N. C. 373, 92 S. E. 168.

87. Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82; Hirsh v. Ogden Furniture & Carpet Co., 48 Utah 434, 160 Pac. 283.

88. Ritchie v. Ege, 58 Minn. 291, 59 N. W. 1020; Smith v. Reserve Loan Life Ins. Co., 267 Mo. 342, 184 S. W. 464.

[a] Tender by check instead of cash. Beatty v. Miller, 47 Ind. App. 494, 94 N. E. 897.

89. Ala.—Powe's Admrs. v. Powe, 42 Ala. 113. Cal.—Allen v. Chatfield, 172 Cal. 60, 156 Pac. 47; Rhorer v. Billa, 83 Cal. 51, 23 Pac. 274. Ind. Bowen v. Julius, 141 Ind. 310, 40 N. E. 700. Me.—Portland v. Atlantic, etc. R. Co., 74 Me. 241. Mo.—Illingworth v. Miltenberger, 11 Mo. 80. Mont. Schultz v. O'Rourke, 18 Mont. 418, 45 Pac. 634. Neb.—Moore v. Kime, 43 Neb. 517, 61 N. W. 736. N. J.—Tillou v. Britton, 9 N. J. L. 120. N. Y.—Ellis v. Craig, 7 Johns. Ch. 7. S. C. Rogers v. Morrell, 82 S. C. 402, 64 S. E. 143, 129 Am. St. Rep. 899.

90. Cal.—Allen v. Chatfield, 172 Cal. 60, 156 Pac. 47; Doak v. Bruson, 152 Cal. 17, 91 Pac. 1001. N. Y. Eddy v. Davis, 116 N. Y. 247, 22 N. E. 362; Bigler v. Morgan, 77 N. Y. 312. Ore.—McCourt v. Johns, 33 Ore. 561, 53 Pac. 601; Holladay v. Holladay, 13 Ore. 523, 11 Pac. 260, 12 Pac. 821; Ladd v. Mason, 10 Ore. 308. Utah. Hyams v. Bamberger, 10 Utah 3, 36 Pac. 202.

91. Wilson v. Doran, 110 N. Y. 101, 17 N. E. 688 (*reversing* 39 Hun 88); Platner v. Lehman, 26 Hun (N. Y.) 374; Shepherd v. Wysong, 3 W. Va. 46.

of a plea of tender may be taken, as a rule, at the trial of the case,<sup>92</sup> but not after judgment.<sup>93</sup> But when the objection is to the sufficiency of the tender for failure to make a deposit in court, it must as a general rule, be made not only in the lower court,<sup>94</sup> but before trial,<sup>95</sup> and, according to which party is in default, before answering,<sup>96</sup> or pleading over.<sup>97</sup>

**Demurrer and Answer.**—When an allegation of tender is insufficient, if the defect is not one to be met by a motion to make more definite and certain,<sup>98</sup> it may be tested by a demurrer.<sup>99</sup> Where plaintiff alleges tender, the defendant, if he wishes to raise an issue on it, must deny or answer in the usual way.<sup>1</sup>

**Reply.**<sup>2</sup>—In jurisdictions where a denial of affirmative allegations in the answer is not presumed, a plea of tender should be denied, or otherwise answered in a reply or replication,<sup>3</sup> and, when made an

[a] **Notice of Payment Into Court.** When a plea of tender and payment into court is irregular because not accompanied by notice of such payment to the adverse party, the irregularity is waived if not objected to. *Wilson v. Doran*, 110 N. Y. 101, 17 N. E. 688, reversing 39 Hun 88.

92. *Levine v. Brooklyn Union Gas Co.*, 146 App. Div. 464, 131 N. Y. Supp. 255; *Wilson v. Wilson*, 131 N. Y. Supp. 81; *Diebold Safe & Lock Co. v. Holt*, 4 Okla. 479, 46 Pac. 512.

93. *Diebold Safe & L. Co. v. Holt*, 4 Okla. 479, 46 Pac. 512.

94. *Storer v. McGaw*, 1 Allen (Mass.) 527; *Wetherbee v. Kusterer*, 41 Mich. 359, 2 N. W. 45.

95. **Ia.**—*Freeman v. Fleming*, 5 Iowa 460. **Mass.**—*Storer v. McGaw*, 11 Allen 527. **N. Y.**—*Knight v. Beach*, 7 Abb. Pr. (N. S.) 241; *Wood v. Rabe*, 20 Jones & S. 479. **Tenn.**—*Knoxville C. G. & L. R. Co. v. Acuff*, 92 Tenn. 26, 20 S. W. 348.

96. *Rogers v. Tindell*, 99 Tenn. 356, 42 S. W. 86; *Polk v. Mitchell*, 85 Tenn. 634, 4 S. W. 221.

97. **Me.**—*Gilpatrick v. Ricker*, 82 Me. 185, 19 Atl. 165. **N. J.**—*Earle v. Earle*, 16 N. J. L. 273; *Ryerson v. Kitchell*, 2 N. J. L. 154. **N. Y.**—*Roosevelt v. New York, etc. R. Co.*, 45 Barb. 554, 30 How. Pr. 226; *Sheriden v. Smith*, 2 Hill 538.

[a] **In Justice's Court.**—Where by pleading over a plaintiff waives the failure to pay the money into court, in a justice's court, since there are no pleadings subsequent to the answer, this rule does not apply: *Johnson v.*

*Gillette*, 16 Misc. 431, 39 N. Y. Supp. 733.

98. *Bateman v. Johnson*, 10 Wis. 1. See generally the title "**Certainty in Pleading.**"

99. **Ala.**—*Gardner v. Black*, 98 Ala. 638, 12 So. 813. **Cal.**—*Haile v. Smith*, 113 Cal. 656, 45 Pac. 872. **Conn.**—*Hall v. Norwalk Fire Ins. Co.*, 57 Conn. 105, 17 Atl. 356. **Mass.**—*Brickett v. Wallace*, 98 Mass. 528. **Miss.**—*Lanier v. Trigg*, 6 Smed. & M. 641, 45 Am. Dec. 293. **N. H.**—*Clough v. Clough*, 26 N. H. 24. **Pa.**—*Rennyson v. Reifsnnyder*, 11 Pa. Co. Ct. 157. **Va.**—*Skipwith v. Morton*, 2 Call. (6 Va.) 277.

[a] **An averment of tender "on or about"** a certain day may be objected to for uncertainty by a special, not a general demurrer. *Haile v. Smith*, 113 Cal. 656, 45 Pac. 872.

1. See *infra*, this note, and generally the titles "**Answers;**" "**Confession and Avoidance;**" "**Denials.**"

[a] **Denial that a sum was "duly tendered"** as to all matters essential to a tender, including keeping tender good, where that is necessary, raises an issue. *McNeil v. Sun, etc. Co.*, 75 App. Div. 290, 78 N. Y. Supp. 90. But that denial of a legal conclusion raises no issue, see 7 STANDARD PROC. 34; 5 STANDARD PROC. 207, note.

2. See generally the title "**Replication and Reply.**"

3. *Davis v. Henry*, 63 Miss. 110; *Mahan v. Waters*, 60 Mo. 167. See also *Hampshire Mfgs. Bank v. Billings*, 17 Pick. (Mass.) 87; *Williams v. Price*, 3 B. & Ad. 695, 23 E. C. L. 306, 110 Eng. Reprint 254.



issue by defendant, the failure to make a tender must be excused.<sup>4</sup>

**IV. PAYMENT OR DEPOSIT IN COURT.**<sup>5</sup> — A. IN GENERAL. It is a general rule that where a tender is made which, if accepted, is intended to operate as a discharge of an obligation, the tender, if rejected, must be kept good,<sup>6</sup> and, in the event of an action brought on the obligation, this is accomplished by bringing or depositing in court the thing tendered.<sup>7</sup> When the plaintiff's right to relief does

[a] **Profert in curiam** is not a traversable part of a plea of tender. **Me.**—*Gilpatrick v. Ricker*, 82 Me. 185, 19 Atl. 165. **N. J.**—*Earle v. Earle*, 16 N. J. L. 273. **N. Y.**—*Platner v. Lehman*, 26 Hun 374.

[b] **Subsequent Demand.**—In cases where the plaintiff's right is not abrogated by a tender, and a plea of tender to be sufficient does not have to be accompanied by a deposit in court, such plea may be avoided by alleging in reply a subsequent demand and refusal. *Berthold v. Reyburn*, 37 Mo. 586; *Rivers v. Griffiths*, 5 B. & Ald. 630, 7 E. C. L. 344, 106 Eng. Reprint 1321.

4. *Wessel v. Wm. Waltke & Co.*, 196 Mo. App. 582, 190 S. W. 628.

[a] **Excusing Failure To Make Tender.**—When tender is necessary as a condition precedent to maintaining the action, but has not been performed, and timely objection is made by the defendant, the plaintiff, in order to bring himself within an exception to the rule of tender, must affirmatively plead, in his reply, or replication, the facts which bring him within the exception, *e. g.*, that it would have been useless, or some other fact showing an excuse for failure to make tender. *Wessel v. Wm. Waltke & Co.*, 196 Mo. App. 582, 190 S. W. 628.

5. **As to deposit in court generally**, see the title "**Deposit in Court.**"

6. **U. S.**—*Bissell v. Heyward*, 96 U. S. 580, 24 L. ed. 678; *Ramirez v. Mexican S. S. Co.*, 107 Fed. 530. **Ill.**—*Wagner v. Heckenkamp*, 84 Ill. App. 323. **Ia.**—*Isaacson v. Mason Motor Co.*, 157 N. W. 891. **Kan.**—*Saum v. La Shell*, 45 Kan. 205, 25 Pac. 561. **N. Y.**—*Wagman v. Bakst*, 99 Misc. 276, 164 N. Y. Supp. 28. **N. C.**—*Dr. Shoop F. M. Co. v. Davenport*, 163 N. C. 294, 79 S. E. 602. **Vt.**—*Davis v. Nelson's Est.*, 73 Vt. 328, 50 Atl. 1094.

See also the cases cited under the next note.

[a] **Effect on Interest and Costs.**

To have the effect of stopping interest or costs a tender must be kept good. *Bissell v. Heyward*, 96 U. S. 580, 24 L. ed. 678.

[b] **Useless Tender.**—Ordinarily a tender need not be kept good when it appears that it would not be accepted. *Cleveland, C. C. & St. L. R. Co. v. Anderson Tool Co.*, 180 Ind. 453, 103 N. E. 102, Ann. Cas. 1916B, 1217, 49 L. R. A. (N. S.) 749.

7. **U. S.**—*Wallace v. McConnell*, 13 Pet. 136, 10 L. ed. 95; *Sheredine v. Gaul*, 2 Dall. 190, 1 L. ed. 344; *Coghlan v. South Carolina R. Co.*, 32 Fed. 316; *The Rossend Castle*, 30 Fed. 462. But see *Donaldson v. Severn River Glass Sand Co.*, 138 Fed. 691, holding that a showing of continued readiness and willingness is sufficient without production of the money. **Ala.**—*Manning v. Carter*, 77 So. 744; *Frank v. Pickens*, 69 Ala. 369. **Ark.**—*Hamlett v. Tallman*, 30 Ark. 505. **Del.**—*Cullen v. Green*, 5 Harr. 17. **Fla.**—*Franklin v. Ayer*, 22 Fla. 654. **Ga.**—*Mason v. Croom*, 24 Ga. 211. **Ill.**—*Gage v. Goudy*, 141 Ill. 215, 30 N. E. 320; *O'Riley v. Suver*, 70 Ill. 85. **Ind.**—*Bundy v. Summerland*, 142 Ind. 92, 41 N. E. 322; *Morrison v. Jacoby*, 114 Ind. 84, 14 N. E. 546, 15 N. E. 806; *Webb v. Citizens' Nat. Bank* (Ind. App.), 115 N. E. 799. **Ia.**—*West v. Farmers' Mut. Ins. Co.*, 117 Iowa 147, 90 N. W. 523; *Warrington v. Pollard*, 24 Iowa 281, 95 Am. Dec. 727. **Kan.**—*Saum v. La Shell*, 45 Kan. 205, 25 Pac. 561. **Ky.**—*Haddix v. Wilson*, 3 Bush 523. **La.**—*Bonnabel v. Metairie Cypress Co.*, 129 La. 928, 57 So. 271. **Me.**—*Gilpatrick v. Ricker*, 82 Me. 185, 19 Atl. 165. **Md.**—*Soper v. Jones*, 56 Md. 503. **Mass.**—*Babbitt v. Shearer*, 192 Mass. 600, 78 N. E. 769. **Mich.**—*Cowles v. Marble*, 37 Mich. 158. **Minn.**—*Balme v. Wambaugh*, 16 Minn. 116. **Miss.**—*Smith v. Williams-Brooke Co.*, 111 Miss. 393, 71 So. 648. **Mo.**—*Raymond, K. & Co. v. McKinney Bros. & Co.*, 58 Mo. App. 303. **Neb.**—*Portsmouth Sav. Bank v.*

not depend upon a tender there need not be a deposit in court;<sup>8</sup> but as a rule the thing tendered should be brought in when a tender is a condition precedent to recovery,<sup>9</sup> as, for example, when it is made the basis of an affirmative claim and the rule which is founded on the principle that he who seeks equity must do equity, is called into action.<sup>10</sup> In all cases where the effect of a tender is to destroy a lien, which is subsequently made the basis of an action, it is not

Yeiser, 81 Neb. 343, 116 N. W. 38. **N. H.**—Felker v. Hazelton, 68 N. H. 304, 38 Atl. 1051. **N. J.**—Whittaker v. Belvidere Roller-Mill Co., 55 N. J. Eq. 674, 38 Atl. 289. **N. Y.**—Halpin v. Phenix Ins. Co., 118 N. Y. 165, 23 N. E. 482; Breunich v. Weselman, 100 N. Y. 609, 2 N. E. 385; Tuthill v. Morris, 81 N. Y. 94. **N. C.**—Owens v. North State Life Ins. Co., 173 N. C. 373, 92 S. E. 168; De Bruhl v. Hood, 156 N. C. 52, 72 S. E. 83; Lee v. Manley, 154 N. C. 244, 70 S. E. 385. **Ohio.**—Conklin v. Tyler, 20 Ohio C. C. (N. S.) 133. **Okla.**—Berry v. Second Baptist Church, 37 Okla. 117, 130 Pac. 585. **Pa.**—Seibert v. Kline, 1 Pa. 38; Harvey v. Hackley, 6 Watts 264. **S. C.**—Fishburne v. Sanders, 1 Nott & McC. 242. **Tenn.**—Keys v. Roder, 1 Head 19. **Tex.**—Floyd v. Illinois Bankers' Life Assn. (Tex. Civ. App.), 192 S. W. 607. **Utah.**—Hirsh v. Ogden Furniture & Carpet Co., 48 Utah 434, 160 Pac. 283. **Vt.**—Strusguth v. Pollard, 62 Vt. 157, 19 Atl. 228. **Va.**—Shumaker v. Nichols, 6 Gratt. (47 Va.) 592. **W. Va.**—Gilkeson v. Smith, 15 W. Va. 44. **Wis.**—Smith v. Phillips, 47 Wis. 202, 2 N. W. 285.

[a] **A surety**, who is released by making a valid and sufficient tender of his principal's debt, need not keep the tender good nor supplement his plea of tender by paying the money into court. Lee v. Manley, 154 N. C. 244, 70 S. E. 385.

[b] **Ponderous Articles.**—Specific articles, especially when of a ponderous nature, need not be brought into court when tender of them is pleaded. **N. Y.**—Simpson v. French, 25 How. Pr. 464. **Tex.**—Deweese v. Lockhart, 1 Tex. 535. **W. Va.**—Gilkeson v. Smith, 15 W. Va. 44.

[c] **At common law** a plea of tender, since it admits the plaintiff's cause of action, is not a good plea in bar unless the money is brought into court to discharge the admitted liabil-

ity. Rowell v. Ross, 87 Conn. 157, 87 Atl. 355; Browning, King & Co. v. Chamberlain, 210 N. Y. 270, 104 N. E. 627; Wagman v. Bakst, 99 Misc. 276, 164 N. Y. Supp. 28.

[d] **Effect of Failure To Pay Into Court.**—A plea of tender without a proffer in curiam is bad and may be stricken out on plaintiff's motion. **Md.** Soper v. Jones, 56 Md. 503. **N. C.** De Bruhl v. Hood, 156 N. C. 52, 72 S. E. 83; Lee v. Manley, 154 N. C. 244, 70 S. E. 385. **Eng.**—Dixon v. Clark, 5 M. G. & S. 365, 57 E. C. L. 365, 376.

**8. Ala.**—Beebe v. Buxton, 99 Ala. 117, 12 So. 567; Miller v. Louisville, etc. R. Co., 83 Ala. 274, 4 So. 842, 3 Am. St. Rep. 722. **Ind.**—Ruckle v. Barbour, 48 Ind. 274. **Ia.**—Hayward v. Munger, 14 Iowa 516. **Mo.**—Whelan v. Reilly, 61 Mo. 565. **Mont.**—Ashley v. Rocky Mt. Bell Tel. Co., 25 Mont. 286, 64 Pac. 765. **Wis.**—Mankel v. Belscamper, 84 Wis. 218, 54 N. W. 500; Breitenbach v. Turner, 18 Wis. 140.

**9. Ala.**—Commercial Bank v. Crenshaw, 103 Ala. 497, 15 So. 741. **Ill.** De Wolf v. Long, 7 Ill. 679. **Mo.** Woolner v. Levy, 48 Mo. App. 469. **N. H.**—Frost v. Flanders, 37 N. H. 549. **N. J.**—Shields v. Lozeau, 22 N. J. Eq. 447. **N. Y.**—Werner v. Tuch, 127 N. Y. 217, 27 N. E. 845, 24 Am. St. Rep. 443. **Pa.**—Summerson v. Hicks, 134 Pa. 566, 19 Atl. 808; Bell v. Clark, 111 Pa. 92, 2 Atl. 80. **Vt.**—Perry v. Ward, 20 Vt. 92. **W. Va.**—Shank v. Groff, 45 W. Va. 543, 32 S. E. 248.

But see Grand Rapids & I. R. Co. v. Diether, 10 Ind. App. 206, 37 N. E. 39, 1069, 53 Am. St. Rep. 385.

**10. Werner v. Tuch**, 127 N. Y. 217, 27 N. E. 845, 24 Am. St. Rep. 443 (*affirming*, 52 Hun 269, 5 N. Y. Supp. 219, 25 N. Y. St. 680, *distinguishing* Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145); Tuthill v. Morris, 81 N. Y. 94.

necessary to pay the money into court;<sup>11</sup> but it is otherwise, of course, when the tender must be kept good in order to extinguish the lien.<sup>12</sup>

**B. PERMISSION.**—The practice of requiring an order permitting the deposit in court of the amount of a tender has been followed in certain jurisdictions,<sup>13</sup> but this is a matter which is largely regulated by local rules or statutes.<sup>14</sup>

**C. TIME.**—Unless regulated by statute,<sup>15</sup> the payment or deposit in court in order to keep a tender good should be made, as a general rule, when the plea is made.<sup>16</sup>

**D. TO WHOM PAID.**—The money deposited to keep a tender good should be deposited "in court,"<sup>17</sup> unless the statute<sup>18</sup> provides other-

11. **U. S.**—*Crowe v. Baumann*, 190 Fed. 399. **Cal.**—*Loughborough v. Mc-Nevin*, 74 Cal. 250, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435. **Mich.**—*Hill v. Carter*, 101 Mich. 158, 59 N. W. 413; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468. **N. Y.**—*Cass v. Higenbotam*, 100 N. Y. 248, 3 N. E. 189; *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145. **Can.**—*Willis v. Sweet*, 20 Nova Scotia 449.

12. **Mass.**—*Roberts v. White*, 146 Mass. 256, 15 N. E. 568. **Mo.**—*Landis v. Saxton*, 89 Mo. 375, 1 S. W. 359; *Woolner v. Levy*, 48 Mo. App. 469; *Campbell v. Seeley*, 38 Mo. App. 298. **Wis.**—*Musgat v. Pumpelly*, 46 Wis. 660, 1 N. W. 410.

13. **Ill.**—*Hammer v. Kaufman*, 39 Ill. 87. **Mass.**—*Hart v. Goldsmith*, 1 Allen 145. **Minn.**—*Davidson v. Lamprey*, 16 Minn. 445. **N. J.**—*Whittaker v. Belvidere Roller-Mill Co.*, 55 N. J. Eq. 674, 38 Atl. 289; *Levan v. Sternfeld*, 55 N. J. L. 41, 25 Atl. 854. **N. Y.**—*Baker v. Hunt*, 1 Wend. 103. **N. C.**—*Murray v. Windley*, 29 N. C. 201, 47 Am. Dec. 324. **Pa.**—*Harvey v. Hackley*, 6 Watts 264.

[a] Where a plea of tender before suit is made no order of court is necessary to authorize a payment into court. *Neldon v. Root*, 55 N. J. Eq. 608, 38 Atl. 429.

[b] At common law the deposit in court of a tender was made under a general order before plea, but a special order after plea. *Browning, King & Co. v. Chamberlain*, 210 N. Y. 270, 104 N. E. 627.

14. See the statutes and rules.

15. *Arthur v. Arthur*, 38 Kan. 691, 17 Pac. 187; *Berry v. Second Baptist Church*, 37 Okla. 117, 130 Pac. 585.

[a] Under some statutes, when a tender of money is alleged in any

pleading, it is sufficient if a deposit in court is made at the trial or when ordered by the court. *Berry v. Second Baptist Church*, 37 Okla. 117, 130 Pac. 585.

16. **Ala.**—*Commercial Bank v. Crenshaw*, 103 Ala. 497, 15 So. 741. **Fla.**—*Franklin v. Ayer*, 22 Fla. 654. **Mass.**—*Brickett v. Wallace*, 98 Mass. 528; *Warren v. Nichols*, 6 Mete. 261. **N. Y.**—*Heywood B. & S. Co. v. Ralph*, 82 Hun 418, 31 N. Y. Supp. 263, 63 N. Y. St. 580. **Vt.**—*Sargent v. Slack*, 47 Vt. 674, 19 Am. Rep. 136. **W. Va.**—*Gilkeson v. Smith*, 15 W. Va. 44.

[a] Before objection the defect in a tender caused by failure to deposit the money in court is cured if the money is brought in before any rights of the adverse party are affected by the irregularity. *Gilpatrick v. Ricker*, 82 Me. 185, 19 Atl. 165.

[b] On objection being made to the plea, the court may order the amount of the tender deposited in court. *Knox v. Light*, 12 Ill. 86.

[c] Not After Issue Joined.—The amount of a tender cannot be paid into court after answering, or during the trial of the case. *Stieglitz v. Cohen*, 69 Misc. 634, 126 N. Y. Supp. 145.

17. *Commercial Inv. Co. v. Peck*, 53 Neb. 204, 73 N. W. 452, 68 Am. St. Rep. 598.

18. See the statutes.

[a] In Missouri, (1) the statute authorizes payment to the constable. *Voss v. McGuire*, 26 Mo. App. 452.

(2) The constable is not authorized to turn the money over to the clerk. If he should do so, the clerk holds it as a mandatory for the constable, and the latter alone can demand it of the clerk. *Voss v. McGuire*, 26 Mo. App. 452.



wise. It may be deposited with the judge;<sup>19</sup> or it may be deposited with the clerk of court,<sup>20</sup> unless the action is one in which a tender is not proper,<sup>21</sup> or unless leave of court is necessary and has not been obtained,<sup>22</sup> in which latter cases, if the clerk accept the deposit, he acts as the private agent of the depositor.<sup>23</sup> Payment to the referee is not payment into court.<sup>24</sup>

**E. MEDIUM.**—Since tender must be made in the legal tender notes or coin, it is generally necessary that the money brought into court to keep a tender good be in legal tender.<sup>25</sup> But it is not necessary that the identical money tendered be brought into court.<sup>26</sup> However, any objections to the character of the money tendered may be waived, and are waived by a withdrawal of the money by the tenderer.<sup>27</sup>

**F. NOTICE.**—Notice to the adverse party of payment into court is necessary in some jurisdictions,<sup>28</sup> and should accompany the plea of tender.<sup>29</sup>

**G. WAIVER.**—The irregularity of failing to make a deposit in court is waived by the adverse party not objecting to the sufficiency of the tender,<sup>30</sup> especially in a case where the tender is by check and it is shown that sufficient funds have always been in the bank to pay it on

19. *Arthur v. Arthur*, 38 Kan. 691, 696, 17 Pac. 187.

20. *De Wolf v. Long*, 7 Ill. 679.

21. *Sowle v. Holdridge*, 25 Ind. 119, 125.

22. *Hammer v. Kaufman*, 39 Ill. 87; *Commercial Inv. Co. v. Peck*, 53 Neb. 204, 73 N. W. 452, 68 Am. St. Rep. 598, where the deposit was made in vacation. See *Mazyek v. McEwen*, 2 Bailey (S. C.) 28.

23. *Sowle v. Holdridge*, 25 Ind. 119.

[a] **Effect of Deposit.**—The deposit is not a payment to the plaintiff in such case, and is not at his risk. *Sowle v. Holdridge*, 25 Ind. 119; *Commercial Inv. Co. v. Peck*, 53 Neb. 204, 73 N. W. 452, 68 Am. St. Rep. 598.

24. *Becker v. Boon*, 61 N. Y. 317, as he is not the court for this purpose but simply for the trial and decision of the action.

25. *Martin v. Bott*, 17 Ind. App. 444, 46 N. E. 151.

[a] **The deposit of a check** is insufficient. *Lewis v. Larson*, 45 Wis. 353.

[b] **But where a certificate of deposit** for the amount of the tender is deposited with the clerk because he prefers it to money, and the money is at all times subject to his order and under his control, the tender is kept good. *Steckel v. Standley*, 107 Iowa 694, 77 N. W. 489. But see *Smith v.*

*Merchants' & Farmers' Bank*, 14 Ohio C. C. 199, 8 Ohio Cir. Dec. 176.

26. **Ind.**—*Grand Rapids & Indiana R. Co. v. Diether*, 10 Ind. App. 206, 212, 37 N. E. 39, 1069, 53 Am. St. Rep. 385. **N. H.**—*Colby v. Stevens*, 38 N. H. 191. **W. Va.**—*Thompson v. Lyon*, 40 W. Va. 87, 20 S. E. 812.

[a] **When a tender is made by check**, and the amount thereof is deposited in court, the check need not be deposited in court. *Wright v. Robinson & Co.*, 84 Hun 172, 32 N. Y. Supp. 463.

27. *Wells's Admr. v. Robb*, 9 Bush (Ky.) 26.

**As to withdrawal**, see *infra*, IV, I.

28. **Mo.**—See *Crawford v. Armstrong*, 58 Mo. App. 214; *Voss v. McGuire*, 26 Mo. App. 452. **N. Y.**—*Wilson v. Doran*, 110 N. Y. 101, 17 N. E. 688; *Brown v. Ferguson*, 2 Denio 196. **W. Va.**—*Shepherd v. Wysong*, 3 W. Va. 46. **Eng.**—*Dixon v. Clark*, 5 M. G. & S. 365, 57 E. C. L. 365.

29. *Wilson v. Doran*, 110 N. Y. 101, 17 N. E. 688; *Wilson v. Wilson*, 131 N. Y. Supp. 81; *Sheridan v. Smith*, 2 Hill (N. Y.) 538.

30. **Ill.**—See *Davis v. Isenstein*, 257 Ill. 260, 100 N. E. 940, 45 L. R. A. (N. S.) 52. **Ind.**—See *Cleveland, C. C. & St. L. R. Co. v. Anderson Tool Co.*, 180 Ind. 453, 103 N. E. 102, Ann. Cas. 1916B, 1217, 49 L. R. A. (N. S.) 749. **Ia.**—*Steckel v. Standley*, 107 Iowa 694,

presentation,<sup>31</sup> and where tender and continued readiness to pay are admitted by the pleadings.<sup>32</sup>

II. EFFECT OF PAYMENT INTO COURT. — A plea of tender and payment into court is an admission of the tenderee's claim or demand to the extent of the amount tendered.<sup>33</sup> And hence the bringing of the amount tendered into court, even if not accepted by the tenderee, is an absolute transfer of the money to him, whatever the fate of the action.<sup>34</sup> When payment in court is made for the benefit of a creditor suing to

77 N. W. 489. **Me.**—*Gilpatrick v. Ricker*, 82 Me. 185, 19 Atl. 165. **Mass.** *Storer v. McGaw*, 11 Allen 527. **Mich.** *Wetherbee v. Kusterer*, 41 Mich. 359, 2 N. W. 45. **Miss.**—*Connell v. Mulligan*, 13 Smed. & M. 388. **N. H.** *Heywood v. Hartshorn*, 55 N. H. 476. **N. J.**—*Earle v. Earle*, 16 N. J. L. 273. **N. Y.**—*Roosevelt v. New York, etc. R. Co.*, 45 Barb. 554, 30 How. Pr. 226; *Hull v. Peters*, 7 Barb. 331, 3 Code Rep. 255; *Platner v. Lehman*, 26 Hun 374. **Ore.**—*Southern Pac. Co. v. Siemens*, 77 Ore. 62, 150 Pac. 290. **Tenn.** *Rogers v. Tindell*, 99 Tenn. 356, 42 S. W. 86. **Utah.**—*Hirsh v. Ogden Furniture & Carpet Co.*, 48 Utah 434, 160 Pac. 283. **W. Va.**—*Shepherd v. Wy-song*, 3 W. Va. 46.

Waiver of objection to character of money deposited, see *supra*, IV, E.

31. *Hirsh v. Ogden Furniture & Carpet Co.*, 48 Utah 434, 160 Pac. 283.

32. *Southern Pac. Co. v. Siemens*, 77 Ore. 62, 150 Pac. 290.

33. **Colo.**—*Supply Ditch Co. v. Elliott*, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586. **Mass.**—*Currier v. Jordan*, 117 Mass. 260. **Mo.**—*Kansas City Transfer Co. v. Neiswanger*, 27 Mo. App. 356. **Pa.**—*Berkheimer v. Geise*, 82 Pa. 64; *Bailey v. Bucher*, 6 Watts 74. **Wash.**—*Sanborn v. Dentler*, 97 Wash. 149, 166 Pac. 62. **Wis.**—*Fox v. Williams*, 92 Wis. 320, 66 N. W. 357.

See also 12 ENCY. OF EV. 495.

[a] In a suit in equity, the rule is the same. *Fox v. Williams*, 92 Wis. 320, 66 N. W. 357.

[b] The fact that the tender is not essential to the plaintiff's right to relief does not affect the rule that a tender and payment into court by him is an admission of the amount due the defendant. *Fox v. Williams*, 92 Wis. 320, 66 N. W. 357, action to cancel a cloud on title.

[c] In action for Personal Injuries. The payment of a given sum into court

and its tender thereby to the plaintiff as a sufficient compensation for personal injuries operates as a solemn and conclusive admission of every fact essential to maintain his action, and the extent of his injuries and consequent amount of plaintiff's damages only remain. *Wells v. Missouri-Edison Elec. Co.*, 108 Mo. App. 607, 616, 84 S. W. 204.

[d] The admission is conclusive to the extent of the tender, regardless of the final result of the action. *Mann v. Sprout*, 185 N. Y. 109, 77 N. E. 1018, 5 L. R. A. (N. S.) 561.

[e] The tenderer denies only the tenderee's claim to a further amount. *Bailey v. Bucher*, 6 Watts (Pa.) 74.

[f] Only legal demands are admitted. *Ribbans v. Crickett*, 1 Bos. & P. 264, 126 Eng. Reprint 896.

34. **U. S.**—*The Rossend Castle*, 30 Fed. 462. **Ala.**—*Birmingham Paint & Roofing Co. v. Crampton*, 39 So. 1020. **Ind.**—*Sowle v. Holdridge*, 20 Ind. 204; *Munk v. Kanzler*, 26 Ind. App. 105, 113, 58 N. E. 543. **Mo.**—*Kansas City Transfer Co. v. Neiswanger*, 27 Mo. App. 356; *Voss v. McGuire*, 26 Mo. App. 452. **N. Y.**—*Mann v. Sprout*, 185 N. Y. 109, 77 N. E. 1018, 5 L. R. A. (N. S.) 561; *Becker v. Boon*, 61 N. Y. 317; *Bernstein v. Traverso*, 82 Misc. 411, 143 N. Y. Supp. 1091. **Ore.**—*Dechenbach v. Rima*, 50 Ore. 540, 93 Pac. 464. **Pa.** *Sheehan v. Rosen*, 12 Pa. Super. 298. **Wis.**—*Fox v. Williams*, 92 Wis. 320, 66 N. W. 357.

[a] The acceptance by the court for the plaintiff has the same effect as acceptance by the plaintiff himself. *Mann v. Sprout*, 185 N. Y. 109, 77 N. E. 1018, 5 L. R. A. (N. S.) 561.

[b] Whether the action is in tort or contract, the title passes by the bringing of the money into court. *Mann v. Sprout*, 185 N. Y. 109, 77 N. E. 1018, 5 L. R. A. (N. S.) 561.

[c] Even if the verdict is for a less amount or for nothing at all, the

recover a debt, it is treated as paying<sup>35</sup> and striking from the complaint<sup>36</sup> the amount tendered and deposited. If more is claimed by him, he proceeds for the excess of his demand above the tender only,<sup>37</sup> as though the action had been originally commenced for that only,<sup>38</sup> and judgment will be for the defendant unless he proves that more is due him.<sup>39</sup> It follows from the nature of a plea of tender and a payment into court of the amount tendered that the defendant is thereafter

title to the money has irrevocably passed and the result of the action has no effect thereon. *Mann v. Sprout*, 185 N. Y. 109, 77 N. E. 1018, 5 L. R. A. (N. S.) 561. To the same effect, see *Sanders v. Mosbarger & Son*, 159 Mo. App. 488, 495, 141 S. W. 720; *Vaughan v. Barnes*, 2 Bos. & P. 392, 126 Eng. Reprint 1346.

35. Ala.—*Birmingham Paint & Roofing Co. v. Crampton*, 39 So. 1020; *Gardner v. Black*, 98 Ala. 638, 12 So. 813. Colo.—*Supply Ditch Co. v. Elliott*, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586. Ind.—*Reed v. Armstrong*, 18 Ind. 446. Ia.—*Ahrens v. Fenton*, 138 Iowa 559, 115 N. W. 233. Mo. *Sanders v. Mosbarger & Son*, 159 Mo. App. 488, 141 S. W. 720. N. Y.—*Mann v. Sprout*, 185 N. Y. 109, 113, 77 N. E. 1018, 5 L. R. A. (N. S.) 561; *Taylor v. Brooklyn El. R. Co.*, 119 N. Y. 561, 23 N. E. 1106; *Wilson v. Doran*, 39 Hun 88.

[a] "Payment into court is payment to the plaintiff." *Ahrens v. Fenton*, 138 Iowa 559, 115 N. W. 233.

[b] **Rationale of Rule.**—A tender is not effectual under the code unless the money is accepted or is paid into court. The payment into court is equivalent to an acceptance of the amount tendered and is deemed a payment to the plaintiff on account of the contract obligation or of a conceded liability for the injury. *Taylor v. Brooklyn El. R. Co.*, 119 N. Y. 561, 23 N. E. 1106.

[c] **Where There Are Several Counts.**—"We, therefore, understand the rule to be, that where a party pays money into court, on a declaration which sets out a special contract, he thereby admits the contract as alleged, and a breach thereof with damages to the amount paid in. But where such payment is made in an action of *indebitatus assumpsit*, containing the money counts, the defendant thereby admits only some liability on some con-

tract under the money counts, and if the plaintiff seeks to recover any further sum, he is bound to prove a contract or liability on the part of the defendant, as well as a larger sum due." *Hubbard v. Knous*, 7 Cush. (Mass.) 556. See also *Bacon v. Charlton*, 7 Cush. (Mass.) 581; *Jones v. Hoar*, 5 Pick. (Mass.) 285.

36. *Birmingham Paint & Roofing Co. v. Crampton* (Ala.), 39 So. 1020; *Amberson v. Johnson*, 127 Ala. 490, 29 So. 176; *Gardner v. Black*, 98 Ala. 638, 12 So. 813; *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586.

[a] **Rule Stated.**—"Formerly, the defendant obtained a rule which permitted him to pay into court what he considered to be due, and whereby it was directed that unless the plaintiff accepted it, it should be struck out of the declaration and paid to the plaintiff or his attorney and that the plaintiff should not be permitted to give evidence of it. . . . The statutes of many of the states now authorize a deposit in court of the amount tendered, without obtaining a rule against the plaintiff. . . . The effect of the deposit under the statute is, practically, the same as under the rule." *Sanders v. Mosbarger & Son*, 159 Mo. App. 488, 493, 141 S. W. 720.

37. *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586. See also *Reed v. Armstrong*, 18 Ind. 446; *Martin v. Bott*, 17 Ind. App. 444, 46 N. E. 151. But see *Jonathan Turner's Sons v. Lee Gin & Machine Co.*, 98 Tenn. 604, 41 S. W. 57, 38 L. R. A. 549.

[a] **The only issue**, after a deposit of the money in court, is the excess owing by the defendant above the sum tendered. *Voss v. McGuire*, 26 Mo. App. 452.

38. *Sanders v. Mosbarger & Son*, 159 Mo. App. 488, 141 S. W. 720.

39. As to judgment, see *infra*, VI.



precluded from objecting to the form of action.<sup>40</sup> But it does not preclude him from maintaining a counterclaim on a wholly independent cause of action.<sup>41</sup>

I WITHDRAWAL OF. — Since the money paid into court becomes the property of the tenderer,<sup>42</sup> he may withdraw it at any time,<sup>43</sup> upon order of court,<sup>44</sup> though it is the modern practice in equity to treat the money paid in as security for the final decree.<sup>45</sup> The power of the debtor or tenderer over the money ceases and he cannot withdraw it, as a rule,<sup>46</sup> unless for some reason the clerk does not receive the money in his official capacity.<sup>47</sup> Not only does the tenderer lose all right to the money paid in, but a court of law itself has no power to make an order in the same action which in effect retransfers the title.<sup>48</sup> The rule may be otherwise, however, in equity under special circum-

40. *Bailey v. Bucher*, 6 Watts (Pa.) 74, because the payment is an admission of the cause of action.

[a] But a tender and payment of a certain sum by way of compromise to end the litigation accompanied by a denial of indebtedness will not have this effect. *Coltrane v. Peacock* (Tex. Civ. App.), 91 S. W. 841.

41. *Ahrens v. Fenton*, 138 Iowa 559, 115 N. W. 233.

42. See *supra*, IV, H.

43. *Ind.*—*Sowle v. Holdridge*, 20 Ind. 204. *Mo.*—*Kansas City Transfer Co. v. Neiswanger*, 27 Mo. App. 356. *N. Y.*—*Murray v. Bethune*, 1 Wend. 191.

44. *Caesar v. Capell*, 83 Fed. 403, 435.

[a] In equity, the application for an order of court for the payment of the money to the plaintiff should be made by petition, and not by motion, though it is not material which course is pursued except where the petitioner wishes to offer to take it upon certain suggested conditions. *Caesar v. Capell*, 83 Fed. 403, 435.

[b] The court cannot require the tenderer to pay costs as a condition to the withdrawal of the tender. *Kelley v. Fielding*, 180 Ill. App. 705.

45. *Caesar v. Capell*, 83 Fed. 403, 433.

46. *Ind.*—*Sowle v. Holdridge*, 20 Ind. 204; *Reed v. Armstrong*, 18 Ind. 446; *Munk v. Kanzler*, 26 Ind. App. 105, 113, 58 N. E. 543. *Mo.*—*Kansas City Transfer Co. v. Neiswanger*, 27 Mo. App. 356. *N. Y.*—*Murray v. Bethune*, 1 Wend. 191. *Pa.*—*Berkheimer v. Geise*, 82 Pa. 64. *S. C.*—*Black v. Rose*, 14 S. C. 274.

[a] In equity (1) the rule is the

same. *Caesar v. Capell*, 83 Fed. 403, 432; *Fox v. Williams*, 92 Wis. 320, 66 N. W. 357. (2) Even if the defendant, making a voluntary payment of the amount admitted to be due imposes or attaches conditions, the court has not authority to allow him to withdraw it because the conditions are not accepted, and force the plaintiff to the execution of his decree by other means. *Caesar v. Capell*, 83 Fed. 403, 432. (3) But when a plaintiff, in an action to compel a redemption from a foreclosure sale, makes a tender, but fails to keep it good between the time thereof and the time of payment into court, and consequently loses the benefit thereof, and fails in the action, he may withdraw the tender, though sufficient to cover the defendant's costs may be impounded. *Dunn v. Hunt*, 76 Minn. 196, 78 N. W. 1110. See also *Putnam v. Putnam*, 13 Pick. (Mass.) 129.

47. *Hammer v. Kaufman*, 39 Ill. 87.

As to when clerk receives money in his individual capacity, see *supra*, IV, D.

48. *Voss v. McGuire*, 26 Mo. App. 452; *Mann v. Sprout*, 185 N. Y. 109, 77 N. E. 1018, 5 L. R. A. (N. S.) 561; *Browning, King & Co. v. Chamberlain*, 150 App. Div. 391, 134 N. Y. Supp. 1104.

[a] As Incident to Amendment. A court has not the power to permit the withdrawal of the money as incidental to its power to permit amendments to the answer, as the act of making payment into court wholly independent of the answer. *Mann v. Sprout*, 185 N. Y. 109, 113, 77 N. E. 1018, 5 L. R. A. (N. S.) 561.

stances,<sup>49</sup> as where the money is paid in under mistake.

**J. PLEA OF DEPOSIT IN COURT.**—It is a general rule that in all cases where a tender must be kept good by a payment into court, such payment must be pleaded.<sup>50</sup> The averment is to the effect that the money has been deposited in court, or is now brought into court, to be paid to the adverse party.<sup>51</sup> The amount alleged must equal the amount of the tender, but need not be averred to be the identical money used in making the tender.<sup>52</sup>

**Profert of Specific Articles.**—While in some cases the allegation of

**49. Caesar v. Capell, 83 Fed. 403.**

[a] **Rule Stated.**—After reviewing the equity practice with respect to tenders, the court in *Caesar v. Capell*, 83 Fed. 403, 434 says: "It is another result of these cases, and their authorities to which they lead, that, where money has been paid into court upon an admission that that amount is due, the defendant will not be allowed to retake it, scarcely under any circumstances, though it might be that under some peculiar conditions it could be repaid to him. It would not do to say that the court has not the power to refund it to the party who paid it in, even upon such an admission, if it should turn out that the voluntary payment had been made under some misapprehension that would excuse its force and effect as being a voluntary appropriation of an amount that was due; but, except under special and irregular emergencies, it would not be repaid."

**50. U. S.**—*Sheredine v. Gaul*, 2 Dall. 190, 1 L. ed. 344; *Coghlan v. South Carolina R. Co.*, 32 Fed. 316. **Ala.**—*Christian v. Niagara Fire Ins. Co.*, 101 Ala. 634, 14 So. 374. **Colo.**—*Westcott v. Patton*, 10 Colo. App. 544, 51 Pac. 1021. **Del.**—*Cullen v. Green*, 5 Harr. 17. **Fla.**—*Matthews v. Lindsay*, 20 Fla. 962. **Ind.**—*Morrison v. Jacoby*, 114 Ind. 84, 14 N. E. 546, 15 N. E. 806. **Ia.**—*Hayden v. Anderson*, 17 Iowa 158. **Ky.**—*Slack v. Price*, 1 Bibb 272. **Me.**—*Gilpatrick v. Ricker*, 82 Me. 185, 19 Atl. 165. **Md.**—*Soper v. Jones*, 56 Md. 503. **Mass.**—*Storer v. McGaw*, 11 Allen 527. **N. J.**—*Neldon v. Root*, 55 N. J. Eq. 608, 38 Atl. 429. **N. Y.**—*Wilson v. Doran*, 110 N. Y. 101, 17 N. E. 688; *Stieglitz v. Cohen*, 69 Misc. 634, 126 N. Y. Supp. 145; *People v. Banker*, 8 How. Pr. 258. **N. C.**—*Parker v. Beasley*, 116 N. C. 1, 21 S. E. 955, 33 L. R. A. 231. **Ore.**—*Jacobs v. Oren*, 30 Ore. 593, 48 Pac.

**431. Pa.**—*Bailey v. Bucher*, 6 Watts 74. **Tex.**—*Tooke v. Bonds*, 29 Tex. 419. **Va.**—*Robinson v. Gaines*, 3 Call (7 Va.) 243. **Wash.**—*Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760. **Eng.**—*Dixon v. Clark*, 5 M. G. & S. 365, 57 E. C. L. 365.

[a] **Plea of Tender as Sole Defense.** A plea of tender as a sole defense is irregular unless it alleges a payment of the amount into court, with notice to the plaintiff. *Wilson v. Wilson*, 131 N. Y. Supp. 81.

[b] **On Appeal from Justice's Court.** In a justice's court, where the pleading is informal, and payment into court by deposit of the amount with the constable is pleaded orally, on appeal to a superior court, where an answer is filed, such answer is defective unless it contains a plea of payment to the lower court. *Brickett v. Wallace*, 98 Mass. 528.

[c] **Readiness To Pay in Lieu of Tender.**—Where the defendant was unable to make a proper tender before the commencement of the action through the fault of the plaintiff, he is not excused thereby from making and pleading a payment into court, and it is not sufficient to plead a readiness to pay. *Greeley v. Whitehead*, 35 Fla. 523, 17 So. 643, 48 Am. St. Rep. 258, 28 L. R. A. 286; *Carley v. Vance*, 17 Mass. 389.

[d] **At common law** the fact of payment into court had to be pleaded. *Wah Kee v. Clark*, 48 Ind. App. 462, 96 N. E. 18; *Browning, King & Co. v. Chamberlain*, 210 N. Y. 270, 104 N. E. 627; *Stieglitz v. Cohen*, 69 Misc. 634, 126 N. Y. Supp. 145.

**51.** See *Wilson v. Doran*, 110 N. Y. 101, 17 N. E. 688, and the cases cited in the last note.

**52.** *Colby v. Stevens*, 38 N. H. 191; *Thompson v. Lyon*, 40 W. Va. 87, 20 S. E. 812.

profert of a deed may be required,<sup>53</sup> it is not ordinarily necessary to aver the bringing into court of specific articles.<sup>54</sup>

**V. PROVINCE OF JUDGE AND JURY.**—Where payment into court is pleaded, the court must determine the truth of the averment by a proper investigation; it is not a matter for the jury.<sup>55</sup> Under conflicting evidence, waiver of objections to a tender is a question of fact for the jury,<sup>56</sup> likewise whether a tender was made<sup>57</sup> to the proper person,<sup>58</sup> or waived,<sup>59</sup> and whether the amount, if accepted, was tendered in full settlement of the demand,<sup>60</sup> are ordinarily matters for the jury.

**VI. JUDGMENT.**—**A. IN GENERAL.**—A lone plea of tender, unaccompanied by payment into court, when such payment is necessary, authorizes a judgment in plaintiff's favor for the amount of the tender.<sup>61</sup>

**B. WHEN DEPOSIT IS MADE.**—When a tender, accompanied by a deposit in court, is accepted, a judgment of dismissal may be entered.<sup>62</sup> When the tender is refused and proves to be less than the recovery, in some jurisdictions the judgment should be entered for the full amount found to be due and the deposit credited thereon;<sup>63</sup> in other jurisdictions the judgment is entered for the amount found to be due in excess of the tender.<sup>64</sup> But if the sum brought into court equals the amount recovered, the judgment should be for the defendant, the

53. *Sook v. Knowles*, 1 Bibb (Ky.) 283; *Taylor v. Browder*, 1 Ohio St. 225.

54. Fla.—*Spann v. Baltzell*, 1 Fla. 301, 46 Am. Dec. 346. Ind.—*Mitchell v. Merrill*, 2 Blackf. 87, 18 Am. Dec. 128. N. C.—*Patton v. Hunt*, 64 N. C. 163.

55. Ill.—*Knox v. Light*, 12 Ill. 86. Me.—*Gilpatrick v. Ricker*, 82 Me. 185, 19 Atl. 165. Wis.—*Newton v. Allis*, 16 Wis. 197.

56. *Wiggins v. Sheppard*, 145 Ga. 835, 90 S. E. 56; *Smith v. Reserve Loan Life Ins. Co.*, 267 Mo. 342, 184 S. W. 464.

57. *Nedow v. Porter*, 122 Mich. 456, 81 N. W. 256; *Smith v. Reserve Loan Life Ins. Co.*, 267 Mo. 342, 184 S. W. 464.

[a] When the facts are uncontroverted the question whether a tender has been made is for the court. *Wheelock v. Tanner*, 39 N. Y. 481.

58. *Wilson v. Doran*, 110 N. Y. 101, 17 N. E. 688.

59. Me.—*Wheelden v. Lowell*, 50 Me. 499. Mass.—*Schayer v. Commonwealth Loan Co.*, 163 Mass. 322, 39 N. E. 1110. Minn.—*Nelson v. Robson*, 17 Minn. 284. Neb.—*Guthman v. Kearns*, 8 Neb. 502, 1 N. W. 129.

60. *Jenks v. Burr*, 56 Ill. 450;

*Floerke v. Teuscher Dist. Co.*, 20 Mo. App. 76.

61. *Rowell v. Ross*, 87 Conn. 157, 87 Atl. 355; *Knox v. Light*, 12 Ill. 86.

62. Ala.—*Gardner v. Black*, 98 Ala. 638, 12 So. 813. Ill.—*Monroe v. Chaldeck*, 78 Ill. 429. Mo.—*Haeussler v. Duross*, 14 Mo. App. 103. Tenn.—*Turner's Sons v. Lee Gin & M. Co.*, 98 Tenn. 604, 41 S. W. 57, 38 L. R. A. 549.

63. Ga.—*Bennett v. Odom*, 30 Ga. 940. Ind.—*Martin v. Bott*, 17 Ind. App. 444, 46 N. E. 151. N. Y.—*Taylor v. Brooklyn El. R. Co.*, 119 N. Y. 561, 23 N. E. 1106; *Linker v. Folz*, 170 N. Y. Supp. 436; *Tenenbaum v. Goldman*, 169 N. Y. Supp. 674. Pa.—*Scott v. Pa. Casualty Co.*, 240 Pa. 341, 87 Atl. 963. Tex.—*Erie Tel. & Tel. Co. v. Grimes*, 82 Tex. 89, 17 S. W. 831. Wis.—*Schnur v. Hickox*, 45 Wis. 200.

[a] Where an insufficient tender belongs to the tenderer it is error to apply it in part satisfaction of the judgment. *Meeker v. Hurd*, 31 Vt. 639.

64. Ill.—*McConaughy v. Huston*, 142 Ill. App. 230 (containing form of verdict and judgment); *Dickinson v. Boyd*, 82 Ill. App. 251. Me.—*Dresser v. Witherle*, 9 Greenl. 111; *Call v. Lath-*



money tendered being ordered paid to the plaintiff.<sup>65</sup>

C. **INTEREST.**—Interest accruing after a tender, on an interest bearing obligation, may be recovered on the full amount if the tender falls short of the sum found to be due,<sup>66</sup> or if there is not a sufficient allegation of tender in the pleadings and the offer is not kept good,<sup>67</sup> but not if the full amount found to be due is tendered, and the tender kept good by a deposit in court.<sup>68</sup>

**VII. COSTS.**<sup>69</sup>—A. **IN GENERAL.**—The acceptance of a tender made before the commencement of an action and kept good by bringing the money into court entitles the defendant to costs,<sup>70</sup> but he is liable for accrued costs when the accepted tender is made after commencement of the action.<sup>71</sup> In some jurisdictions, proof of tender entitles the party pleading it to costs only when it is pleaded as a sole defense.<sup>72</sup>

B. **IN CASES OF SUFFICIENT TENDER.**—1. **Before Suit.**—Costs will not be awarded to the plaintiff,<sup>73</sup> but will be granted to the de-

rop, 39 Me. 434. **Mass.**—Clarke v. Cowan, 206 Mass. 252, 92 N. E. 474, 138 Am. St. Rep. 388; Boyden v. Moore, 5 Mass. 365. **N. H.**—Drew v. Towle, 30 N. H. 531, 64 Am. Dec. 309.

65. **Ala.**—Foster v. Napier, 74 Ala. 393; Jaffre Jewelry Co. v. Ellsworth, 1 Ala. App. 466, 55 So. 457. **Cal.**—Bailey v. Moshier, 35 Cal. App. 345, 169 Pac. 913. **Colo.**—Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586. **Ill.**—Monroe v. Chaldeck, 78 Ill. 429. **Ind.**—Reed v. Armstrong, 18 Ind. 446. **Ia.**—Warrington v. Pollard, 24 Iowa 281, 95 Am. Dec. 727. **Kan.**—Elder v. Elder, 43 Kan. 514, 23 Pac. 600. **Ky.**—Slack v. Price, 1 Bibb 272. **Me.**—Call v. Lothrop, 39 Me. 434. **Mich.**—Wetherbee v. Kusterer, 41 Mich. 359, 2 N. W. 45. **Miss.**—Le Flore v. Miller, 64 Miss. 204, 1 So. 99. **Mo.**—Sanders v. Mosbarger & Son, 159 Mo. App. 488, 141 S. W. 720; Johnson v. Garlichs, 63 Mo. App. 578. **N. J.**—Levan v. Sternfeld, 55 N. J. L. 41, 25 Atl. 854. **N. Y.**—Wilson v. Doran, 110 N. Y. 101, 17 N. E. 688. **N. C.**—Pollock v. Warwick, 104 N. C. 638, 10 S. E. 699. **Ohio.**—Foote v. Palmer, Wright 336. **Pa.**—Wheeler v. Woodward, 66 Pa. 158; Pennypacker v. Umberger, 22 Pa. 492; Dannenhauer v. Woods, 16 Pa. Dist. 226. **Tenn.**—Turner's Sons v. Lee Gin & M. Co., 98 Tenn. 604, 41 S. W. 57, 38 L. R. A. 549. **Wis.**—Schnur v. Hickox, 45 Wis. 200.

66. Hoffman v. Rose Dress Co., 179 App. Div. 57, 166 N. Y. Supp. 172;

West Republic Mining Co. v. Jones, 108 Pa. 55.

67. Pring v. Swarm, 176 Iowa 153, 157 N. W. 734.

68. Hoffman v. Rose Dress Co., 179 App. Div. 57, 166 N. Y. Supp. 172.

69. Right as Affected by Offer of Judgment, see 5 STANDARD PROC. 850.

In admiralty, see 1 STANDARD PROC. 530, 577.

70. **Ala.**—Hanson v. Todd, 95 Ala. 328, 10 So. 354. **Ill.**—Monroe v. Chaldeck, 78 Ill. 429. **Mo.**—Haeussler v. Duross, 14 Mo. App. 103. **N. Y.**—Mela v. Geis, 3 N. Y. Civ. Proc. 152. **Ohio.**—Foote v. Palmer, Wright 336. **Can.**—American Aristotype Co. v. Eakins, 7 Ont. L. Rep. 127.

71. **Neb.**—McEldon v. Patton, 4 Neb. (Unof.) 259, 93 N. W. 938. **N. Y.**—Moran v. Midville Realty Co., 162 N. Y. Supp. 117. **N. C.**—Murray v. Windley, 29 N. C. 201, 47 Am. Dec. 324.

72. Hatch v. Thompson, 67 Conn. 74, 34 Atl. 770.

73. **U. S.**—Florence Oil & Ref. Co. v. Farrar, 119 Fed. 150, 55 C. C. A. 656; Wilcox v. Richmond & D. R. Co., 52 Fed. 264, 3 C. C. A. 73, 17 L. R. A. 804. **Ark.**—King v. Boles, 124 Ark. 112, 186 S. W. 607. **Colo.**—Leis v. Hodgson, 1 Colo. 393. **Del.**—Donovan v. Maloney, 3 Boyce 453, 34 Atl. 1032. **Ill.**—Grommet v. Sawyer, 133 Ill. App. 249. **Ia.**—Saunders v. King, 119 Iowa 291, 93 N. W. 272. **Ky.**—Higgins v. Conner, 3 Dana 1. **Md.**—Columbian Bldg. Assn. v. Crump, 42 Md. 192. **Miss.**—Cook v. Martin, 5 Smed. & M.

fendant,<sup>74</sup> when a sufficient tender is made by the latter before the commencement of the action and kept good by a deposit in court.

2. **After Suit Brought.**—After the commencement of the action, if the defendant makes a sufficient tender of an amount equal to the sum due and accrued costs, that is, an amount sufficient to satisfy the judgment, he should be held exempt from costs accruing subsequent to the tender.<sup>75</sup> A tender, made and pleaded for the first time after suit has been brought, does not entitle the defendant to costs already accrued.<sup>76</sup>

C. IN CASES OF INSUFFICIENT TENDER.—An insufficient tender cannot be relied upon to throw the burden of costs upon the adverse party.<sup>77</sup> Thus a tender coupled with an unwarranted condition is ineffective.<sup>78</sup> The plaintiff is entitled to costs when the defendant's ten-

379. **Neb.**—Anderson *v.* Vallery, 39 Neb. 626, 58 N. W. 191. **N. H.**—Eastman *v.* Molineux, 14 N. H. 503. **N. Y.** Goldman *v.* Swartwout, 117 App. Div. 185, 102 N. Y. Supp. 302. **N. C.**—Coward *v.* Jackson, 137 N. C. 299, 49 S. E. 207. **Pa.**—Davis Regulator Co. *v.* Phoenix Iron Works Co., 17 Pa. Dist. 889.

74. **Ala.**—Schuessler *v.* Simon, 100 Ala. 422, 14 So. 203. **Ark.**—Shaffstall *v.* Downey, 87 Ark. 5, 112 S. W. 176. **Conn.**—Studwell *v.* Cooke, 38 Conn. 549. **Idaho.**—Nampa & M. Irrigation Dist. *v.* Briggs, 27 Idaho 84, 147 Pac. 75. **Ill.** Warth *v.* Loewenstein, 121 Ill. App. 71, affirming, 219 Ill. 222, 76 N. E. 379. **Ind.**—Prather *v.* Pritchard, 26 Ind. 65. **Ia.**—Johnson *v.* Triggs, 4 G. Gr. 97. **La.**—St. James *v.* Hunsaker, 28 La. Ann. 291. **Md.**—Gamble *v.* Sentman, 68 Md. 71, 11 Atl. 584. **Mass.**—Babbitt *v.* Shearer, 192 Mass. 600, 78 N. E. 769. **Mich.**—Bowser *v.* Birdsell, 49 Mich. 5, 12 N. W. 888. **Mo.**—Griffith *v.* Jackson, 45 Mo. App. 165. **N. Y.** Levy *v.* Loew, 107 N. Y. Supp. 620. **N. C.**—Pollock *v.* Warwick, 104 N. C. 638, 10 S. E. 699. **Pa.**—Walker *v.* West, 4 Pa. Dist. 85. **S. C.**—Shiel *v.* Randolph, 15 S. C. 146. **Tex.**—Moore *v.* Studebaker (Tex. Civ. App.), 136 S. W. 570. **Wash.**—Sanborn *v.* Dentler, 97 Wash. 149, 166 Pac. 62. **Wyo.**—Metcalf *v.* Hart, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122. **Can.** Hart *v.* Davies, 28 Nova Scotia 303.

[a] **Necessity of Deposit.**—Tender prior to the suit alone is not sufficient, but the amount must be brought into court if the party making the tender would avoid costs. Conklin *v.* Tyler, 20 Ohio Cir. Ct. (N. S.) 133.

75. **Ark.**—Refeld *v.* Ferrell, 27 Ark.

534. **Ill.**—Franti *v.* Rose, 89 Ill. 590; Sweetland *v.* Tuthill, 54 Ill. 215. **La.** Kessie *v.* Mayfield, 14 La. Ann. 90. **Me.**—Gould *v.* Whitmore, 79 Me. 383, 10 Atl. 60; Kennebec Purchase *v.* Davis, 2 Me. 352. **Md.**—Columbian Bldg. Assn. *v.* Crump, 42 Md. 192. **Miss.**—Le Flore *v.* Miller, 64 Miss. 204, 1 So. 99. **N. Y.** Hoffman *v.* Rose Dress Co., 179 App. Div. 57, 166 N. Y. Supp. 172. **Ohio.** Hay *v.* Ousterout, 3 Ohio 384. **Pa.** Scott *v.* Pa. Casualty Co., 240 Pa. 341, 87 Atl. 963. **Wash.**—Sanborn *v.* Dentler, 97 Wash. 149, 166 Pac. 62.

76. Jaffe Jewelry Co. *v.* Ellsworth, 1 Ala. App. 466, 55 So. 457.

[a] But when the amount due is trivial and not exactly known to defendant, yet it appears that he was willing to pay it, a tender and deposit in court after action commenced will relieve him of liability for costs. Bailey *v.* Moshier, 35 Cal. App. 345, 169 Pac. 913.

77. **Ala.**—Raiford *v.* Governor, 29 Ala. 382. **Ind.**—Kirkman *v.* Allen, 17 Ind. 216. **Ky.**—Garner *v.* Crosswait, 6 Mon. 426. **La.**—Mechanics' & Traders' Bank *v.* Barnett, 27 La. Ann. 177; Bayly *v.* McKnight, 23 La. Ann. 423. **N. J.**—Woodruff *v.* Depue, 14 N. J. Eq. 168. **N. C.**—Rand *v.* Harris, 83 N. C. 486. **Ohio.**—Cincinnati Gas-Light & C. Co. *v.* Avondale, 43 Ohio St. 257, 1 N. E. 527. **S. D.**—Stakke *v.* Chapman, 13 S. D. 269, 83 N. W. 261. **Vt.**—Strusguth *v.* Pollard, 62 Vt. 157, 19 Atl. 228. **Wis.**—Warden *v.* Sweeney, 86 Wis. 161, 56 N. W. 647. **Eng.**—Gammon *v.* Stone, 1 Ves. Sen. 339, 27 Eng. Reprint 1068.

78. Glos *v.* Goodrich, 175 Ill. 20, 51 N. E. 643; Moore's Admr. *v.* Vail, 13 N. J. Eq. 295.

der is insufficient to satisfy the judgment,<sup>79</sup> even though the excess of the judgment over the tender, when the litigation is not caused by an excessive demand,<sup>80</sup> is trifling.<sup>81</sup> Thus, subject to statutory changes,<sup>82</sup> as, for instance, where tender after suit brought, without accrued costs, is sufficient in the absence of demand before suit,<sup>83</sup> when the amount tendered does not include accrued costs, plaintiff is entitled to a judgment for such costs if he recovers an amount equal to or in excess of the tender,<sup>84</sup> though he is not, on a recovery which merely equals the tender, entitled to subsequent costs,<sup>85</sup> but in such case must pay the defendant's costs.<sup>86</sup>

**D. IN EQUITY.**—In equity the court will exercise its discretion in awarding costs, basing its decision on the conduct of the parties,<sup>87</sup> but

79. **Cal.**—Fell v. Frierson, 171 Cal. 351, 153 Pac. 229. **Conn.**—Wordin v. Bemis, 32 Conn. 268, 85 Am. Dec. 255. **Del.**—Donovan v. Maloney, 3 Boyce 453, 84 Atl. 1032. **Ill.**—Hess v. Peck, 111 Ill. App. 111. **Ia.**—Swails v. Cissna, 61 Iowa 693, 17 N. W. 39. **Kan.**—Matheney v. El Dorado, 82 Kan. 720, 109 Pac. 166, 28 L. R. A. (N. S.) 980. **La.**—First Municipality v. Bell, 4 La. Ann. 121. **Me.**—Dresser v. Witherle, 9 Greenl. 111. **Mass.**—Upton v. Foster, 148 Mass. 592, 20 N. E. 198. **Mich.**—Emerson v. Kinne, 110 Mich. 678, 68 N. W. 982. **Mo.**—Williams v. Chicago S. F. & C. R. Co., 153 Mo. 487, 54 S. W. 689. **N. H.**—Drew v. Towle, 30 N. H. 531, 64 Am. Dec. 309. **N. J.**—Wright v. Behrens, 39 N. J. L. 413. **N. Y.**—Hoffman v. Rose Dress Co., 179 App. Div. 57, 166 N. Y. Supp. 172; Tenenbaum v. Goldman, 169 N. Y. Supp. 674. **N. C.**—Wyatt v. Wilson, 152 N. C. 276, 67 S. E. 501. **Ohio.**—Tipton v. Tipton's Admr., 49 Ohio St. 364, 30 N. E. 826. **Pa.**—Coleman v. Ross, 46 Pa. 180. **R. I.**—Haley v. Newport Gas Light Co., 6 R. I. 582. **Can.**—Henderson v. Bk. of Hamilton, 25 Ont. 641.
80. McKibbin v. Peters, 6 Pa. Dist. 67.
81. **Ia.**—Swails v. Cissna, 61 Iowa 693, 17 N. W. 39. **Mass.**—Boyden v. Moore, 5 Mass. 365. **N. J.**—Wright v. Behrens, 39 N. J. L. 413. **Can.**—Henderson v. Bk. of Hamilton, 25 Ont. 641.
82. See the statutes.
83. Rosenberger v. Pacific Express Co., 129 Mo. App. 105, 107 S. W. 459.
84. **Ia.**—Gilliland v. Brantner, 145 Iowa 275, 121 N. W. 1047. **Kan.**—Kerr v. Coberly, 81 Kan. 376, 105 Pac. 520. **N. J.**—State Bank v. Holcomb, 7 N. J. L. 193, 11 Am. Dec. 549. **N. Y.**—Linker v. Folz, 170 N. Y. Supp. 436. **Okla.**—Talla v. Anderson, 53 Okla. 418, 156 Pac. 670. **Pa.**—Sharpless v. Dobbins, 1 Del. Co. 25. **Tex.**—Berry v. Davis, 77 Tex. 191, 13 S. W. 978, 19 Am. St. Rep. 748.
85. **Ark.**—Refeld v. Ferrell, 27 Ark. 534. **Ill.**—Frantz v. Rose, 89 Ill. 590; Wagner v. Heckenkamp, 84 Ill. App. 323. **Kan.**—Canfield v. Conn. Fire Ins. Co., 98 Kan. 92, 157 Pac. 405. **Ky.**—Bull v. Harragan, 17 B. Mon. 349. **La.**—Kessie v. Mayfield, 14 La. Ann. 90. **Me.**—Gould v. Whitmore, 79 Me. 383, 10 Atl. 60. **Md.**—Columbian Bldg. Assn. v. Crump, 42 Md. 192. **Minn.**—Watkins v. W. E. Neiler Co., 135 Minn. 343, 160 N. W. 864. **Miss.**—Collier v. White, 67 Miss. 133, 6 So. 618. **N. J.**—Wright v. Behrens, 39 N. J. L. 413. **N. Y.**—Bendit v. Annesley, 42 Barb. 192. **Ohio.**—Hay v. Ousterout, 3 Ohio 384. **Pa.**—Sharpless v. Dobbins, 1 Del. Co. 25.
86. **U. S.**—The Rossend Castle, 30 Fed. 462. **Ga.**—Wing v. Blocker, 115 Ga. 778, 42 S. E. 67. **Ill.**—Sweetland v. Tuthill, 54 Ill. 215; McWilliams v. Lavell, 175 Ill. App. 165. **Ia.**—Gilliland v. Brantner, 145 Iowa 275, 121 N. W. 1047. **Kan.**—Elder v. Elder, 43 Kan. 514, 23 Pac. 600. **Md.**—Columbian Bldg. Assn. v. Crump, 42 Md. 192. **Mich.**—Snyder v. Qarton, 47 Mich. 211, 10 N. W. 204. **N. H.**—Drew v. Towle, 30 N. H. 531, 64 Am. Dec. 309. **N. Y.**—Aikins v. Colton, 3 Wend. 326. **N. C.**—Murray v. Windley, 29 N. C. 201, 47 Am. Dec. 324. **Pa.**—Sharpless v. Dobbins, 1 Del. Co. 25. **Vt.**—Carpenter v. Welch, 40 Vt. 251. **Wis.**—Newton v. Allis, 16 Wis. 197.
87. **Ia.**—Bare v. Wright, 23 Iowa 101. See Elliott v. Parker, 72 Iowa 746, 32 N. W. 494. **Md.**—Columbian Bldg. Assn. v. Crump, 42 Md. 192. **N. J.**



as a general rule the complainant is not entitled to costs in the absence of a tender which is a condition precedent to equitable relief,<sup>88</sup> as in a suit for specific performance,<sup>89</sup> or to redeem from a tax sale,<sup>90</sup> unless such tender is waived by the defendant.<sup>91</sup> However, where he makes such tender, its refusal may cast the liability for costs upon the defendant,<sup>92</sup> providing it is sufficient,<sup>93</sup> and, when necessary, kept good by a deposit in court.<sup>94</sup> On the other hand, the complainant may properly be taxed with costs where the defendant makes a sufficient tender before the commencement of the suit,<sup>95</sup> or thereafter, providing it includes accrued costs.<sup>96</sup>

See *Hill v. White*, 1 N. J. Eq. 435. **N. Y.**—*Pratt v. Ramsdell*, 16 How. Pr. 59, 7 Abb. Pr. 340n.

**88. Cal.**—*Randolph v. Harris*, 28 Cal. 561, 87 Am. Dec. 139. **Ill.**—*Glos v. McKeown*, 141 Ill. 288, 31 N. E. 314. **Ky.**—*Butts v. Hazelrigg*, 5 Ky. Op. 221. **Mich.**—*McKenna v. Kirkwood*, 50 Mich. 544, 15 N. W. 898. **Minn.**—*Minneapolis, St. P. & S. S. M. Ry. Co. v. Chisholm*, 55 Minn. 374, 57 N. W. 63. **Ore.**—*Security Sav. & Tr. Co. v. Mackenzie*, 33 Ore. 209, 52 Pac. 1046.

**89. Minneapolis, St. P. & S. S. M. Ry. Co. v. Chisholm, 55 Minn. 374, 57 N. W. 63.**

**90. Gage v. Goudy, 141 Ill. 215, 30 N. E. 320.**

**91. Randolph v. Harris, 28 Cal. 561, 87 Am. Dec. 139.**

**92. Ill.**—*Glos v. Dyche*, 214 Ill. 417, 73 N. E. 757; *Gage v. Dupuy*, 137 Ill.

652, 24 N. E. 541, 26 N. E. 386; *Ennis v. Edgar*, 154 Ill. App. 543. **Ky.**—*Rucker v. Howard*, 2 Bibb 166. **Md.**—*Columbian Bldg. Assn. v. Crump*, 42 Md. 192. **Mich.**—*Lamb v. Jeffrey*, 47 Mich. 28, 10 N. W. 65. **N. C.**—*De Bruhl v. Hood*, 156 N. C. 52, 72 S. E. 83. **Tex.**—*Rogers v. Moore* (Tex. Civ. App.), 94 S. W. 114. **Utah.**—*Brunswick Realty Co. v. University Investment Co.*, 43 Utah 75, 134 Pac. 608.

**93. Cree v. Lord, 25 Vt. 498.**

**94. Ark.**—*Sneed v. Town*, 9 Ark. 535. **Ill.**—*Wright v. Glos*, 264 Ill. 261, 106 N. E. 200. **Ohio.**—*Galloway v. Barr*, 12 Ohio 354.

**95. Gallagher v. Witherington, 29 Ala. 420; *Metcalf v. Hart*, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122.**

**96. Tucker v. Tucker, 27 Mich. 204; *Hendee v. Howe*, 33 N. J. Eq. 92.**

**TERRITORIES.** — See **States and Territories; United States.**

# THEATERS AND SHOWS

By the Editorial Staff.

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- I. LICENSES AND CENSORSHIP, 785
- II. PROSECUTION OF UNLAWFUL EXHIBITIONS, 786
- III. REMEDIES WHERE ACTOR'S CONTRACT IS BROKEN, 786
- IV. REMEDIES ON REFUSING ADMISSION, 787
- V. REMEDIES FOR PERSONAL INJURIES, 787

## CROSS-REFERENCES:

Civil Rights;	Municipal Corporations;
Injuries to Persons and Property;	Personal Property;
Licenses;	Sunday and Holidays.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. LICENSES AND CENSORSHIP.** — The granting of licenses to theaters being discretionary, mandamus will not lie to compel the granting of a license, unless arbitrarily refused,<sup>1</sup> but the writ may issue to compel the consideration of an application therefor.<sup>2</sup> Similarly an interference with a production without a license will not be enjoined where the discretion in denying a license was not arbitrarily exercised.<sup>3</sup> The courts can review<sup>4</sup> the action of a board of censors

1. *State ex rel. Ducourneau v. Langan*, 149 Ala. 647, 43 So. 187; *Ormsby v. Bell*, 171 App. Div. 657, 157 N. Y. Supp. 533; *People ex rel. Moses v. Gaynor*, 77 Misc. 576, 137 N. Y. Supp. 196. See 18 STANDARD PROC. 976.

[a] Mayor and councilmen are not necessary parties to mandamus against

the clerk. *Krier v. Dick*, 26 Colo. App. 150, 141 Pac. 505.

2. *Ormsby v. Bell*, 171 App. Div. 657, 157 N. Y. Supp. 533. See 18 STANDARD PROC. 977.

3. *Edelstein v. Bell*, 91 Misc. 620, 155 N. Y. Supp. 590. See 18 STANDARD PROC. 985.

4. *Mid-West Photo Play Corp. v.*

only when the board acts fraudulently, arbitrarily or in excess of its authority.

By statute and charter, licenses to conduct concert rooms and theaters may be revoked upon petition to the courts.<sup>5</sup>

**II. PROSECUTION OF UNLAWFUL EXHIBITIONS.**—An indictment for unlawfully exhibiting theatrical performances or for exhibiting without a license must charge the offense in accordance with the general rules elsewhere treated.<sup>6</sup>

**III. REMEDIES WHERE ACTOR'S CONTRACT IS BROKEN.** While equity will not grant specific performance of a contract of an actor or performer,<sup>7</sup> it will restrain a breach by enjoining him from acting elsewhere, if his services are individual and peculiar because of their special merit or unique character,<sup>8</sup> unless the damages for a breach are liquidated in the contract.<sup>9</sup> Some courts limit their relief to cases where the contract contains a negative clause not to perform elsewhere,<sup>10</sup> but this limitation is not observed by others.<sup>11</sup>

An action will lie against a theater manager for maliciously procuring an actor to breach his contract with the plaintiff.<sup>12</sup> And in the case of a motion picture actor of unique and exceptional skill,

Miller, 102 Kan. 356, 169 Pac. 1154.  
Compare 18 STANDARD PROC. 977.

[a] But a reexamination of the picture by the court cannot be had as this is not a judicial function. *Mid-West Photo Play Corp. v. Miller*, 102 Kan. 356, 169 Pac. 1154.

5. *In re City of New York*, 102 N. Y. Supp. 950.

[a] Petition in name of police commissioner is sufficient. *In re City of New York*, 102 N. Y. Supp. 950.

[b] Personal notice is required. *Matter of Sullivan*, 31 Misc. 1, 64 N. Y. Supp. 586.

6. See *People v. Wacke*, 77 Misc. 196, 137 N. Y. Supp. 652; *State v. Fox*, 15 Vt. 22; 11 STANDARD PROC. 294; 18 STANDARD PROC. 973.

[a] Facts showing exhibition is unlawful must be stated. *Pike v. Com.*, 2 Duv. (Ky.) 89.

[b] That exhibition is for profit, must be charged. *Pike v. State*, 35 Ala. 419. And see *Mosby v. State*, 98 Ala. 50, 13 So. 148.

[c] The exhibition is sufficiently described by an allegation that it "purported" to be an exhibiton of a specified performance. *Com. v. Twitchell*, 4 Cush. (Mass.) 74.

[d] An allegation that accused "did unlawfully operate" a show is an allegation of a conclusion of law. *People v. Wacke*, 77 Misc. 196, 137 N. Y. Supp. 652.

[e] **Duplicity.**—An allegation that defendant did set up and promote an exhibiton is not duplicitous. *Com. v. Twitchell*, 4 Cush. (Mass.) 74.

7. *Cort v. Lassard*, 18 Ore. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 633; *Lumley v. Wagner*, 1 De Gex, M. & G. 604, 42 Eng. Reprint 687. See the title "Specific Performance."

8. **U. S.**—*McCaull v. Braham*, 21 Blatchf. 278, 16 Fed. 37. **N. Y.**—*Daly v. Smith*, 49 How. Pr. 150, 6 Jones & S. 158; *Carter v. Ferguson*, 58 Hun 569, 12 N. Y. Supp. 580, 20 Civ. Proc. 21, 36 N. Y. St. 1. **Ore.**—*Cort v. Lassard*, 18 Ore. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 633. **Eng.**—*Lumley v. Wagner*, 1 De Gex, M. & G. 604, 42 Eng. Reprint 687.

9. *McCaull v. Braham*, 21 Blatchf. 278, 16 Fed. 37; *Hahn v. Concordia Society*, 42 Md. 460.

10. *McCaull v. Braham*, 21 Blatchf. 278, 16 Fed. 37.

11. **N. Y.**—*Duff v. Russell*, 28 Jones & S. 80, 14 N. Y. Supp. 134, 39 N. Y. St. 266; See *Daly v. Smith*, 49 How. Pr. (N. Y.) 150, 6 Jones & S. 158. **Ore.**—*Cort v. Lassard*, 18 Ore. 221, 22 Pac. 1054, 17 Am. St. Rep. 726, 6 L. R. A. 633. **Eng.**—*Montague v. Flockton*, L. R. 16 Eq. 189, 42 L. J. Ch. 677, 28 L. T. N. S. 580.

12. *Lumley v. Gye*, 2 El. & Bl. 215, 75 E. C. L. 215, 118 Eng. Reprint 749. Compare 4 STANDARD PROC. 815.



equity will enjoin a production of any pictures in which he appeared.<sup>13</sup>

**IV. REMEDIES ON REFUSING ADMISSION.**—A ticket to a theater or show, being regarded as a revocable license, the remedy of a holder who is denied admission in accordance with its terms is for breach of contract.<sup>14</sup> He cannot recover in an action *ex delicto*,<sup>15</sup> unless his ejection was wrongful and with unnecessary force.<sup>16</sup> A ticket broker cannot enjoin a theater owner from refusing to accept tickets sold by him.<sup>17</sup>

**V. REMEDIES FOR PERSONAL INJURIES.**—A person who has received injuries in a theater or other place of amusement has a remedy by an action for damages.<sup>18</sup>

13. *Jesse L. Laskey Feature Play Co. v. Fox Vaudeville Co.*, 93 Misc. 364, 157 N. Y. Supp. 106.

14. **U. S.**—*Marrone v. Washington Jockey Club*, 227 U. S. 633, 33 Sup. Ct. 401, 57 L. ed. 679, 43 L. R. A. (N. S.) 961. **Ala.**—See *Interstate Amusement Co. v. Martin*, 8 Ala. App. 481, 62 So. 404. **Mass.**—*Burton v. Scherpf*, 1 Allen 133, 79 Am. Dec. 717. **Mo.**—*Pearce v. Spalding*, 12 Mo. App. 141. **N. J.**—*Shubert v. Nixon Amusement Co.*, 83 N. J. L. 101, 83 Atl. 369. **N. Y.**—*Luxenberg v. Keith & Proctor Amusement Co.*, 117 N. Y. Supp. 979. **Ore.**—*Taylor v. Cohn*, 47 Ore. 538, 84 Pac. 388, 8 Ann. Cas. 527. **Pa.**—*Horney v. Nixon*, 213 Pa. 20, 61 Atl. 1088, 110 Am. St. Rep. 520, 1 L. R. A. (N. S.) 1184, 5 Ann. Cas. 349. **Va.**—*W. W. V. Co. v. Black*, 113 Va. 728, 75 S. E. 82, Ann. Cas. 1913E, 558.

[a] **Form of complaint**, see *Taylor v. Cohn*, 47 Ore. 538, 84 Pac. 388, 8 Ann. Cas. 527.

**Discrimination as invasion of civil rights**, see the title "**Civil Rights**."

15. **U. S.**—*Marrone v. Washington Jockey Club*, 227 U. S. 633, 33 Sup. Ct. 401, 57 L. ed. 679, 43 L. R. A. (N. S.) 961. **Mass.**—*McCrea v. Marsh*, 12 Gray 211, 71 Am. Dec. 745. **Ore.**—*Taylor v. Cohn*, 47 Ore. 538, 84 Pac. 388, 8 Ann. Cas. 527. **Pa.**—*Horney v. Nixon*, 213 Pa. 20, 61 Atl. 1088, 110 Am. St. Rep. 520, 1 L. R. A. (N. S.) 1184, 5 Ann. Cas. 349. **Tex.**—*Weis v. Skinner* (Tex. Civ. App.), 178 S. W. 34. **Va.**—*W. W. V. Co. v. Black*, 113 Va. 728, 75 S. E. 82, Ann. Cas. 1913E, 558.

[a] **For humiliation and inconvenience** attending a refusal to permit a ticket holder to enter a theater, a tort action cannot be brought. *Taylor v. Cohn*, 47 Ore. 538, 84 Pac. 388, 8 Ann. Cas. 527.

16. *Drew v. Peer*, 93 Pa. 234. See also *Weber-Stair Co. v. Fisher* (Ky.), 119 S. W. 195, where a person given wrong tickets was violently ejected.

[a] **Complaint for expulsion from dancing hall or school held sufficient**, see *Smith v. Leo*, 92 Hun 242, 36 N. Y. Supp. 949, 72 N. Y. St. 314.

[b] **Whether Unnecessary Force Was Used Is a Question for the Jury.**—*Metts v. Charleston Theater Co.*, 105 S. C. 19, 89 S. E. 389.

17. *Collister v. Hayman*, 71 App. Div. 316, 75 N. Y. Supp. 1102.

18. **U. S.**—*Parker v. Cushman*, 195 Fed. 715, 117 C. C. A. 71, instruction. **Minn.**—*Wells v. Minneapolis Baseball & A. Assn.*, 122 Minn. 327, 142 N. W. 706, Ann. Cas. 1914D, 922, 46 L. R. A. (N. S.) 606, complaint for injury to spectator at ball game held sufficient. **Mo.**—*Nephler v. Woodward*, 200 Mo. 179, 98 S. W. 488 (instruction); *Kepley v. Park Circ. & R. Co.* (Mo. App.), 200 S. W. 750.

[a] **General allegation of negligence** is sufficient. *Sharpless v. Pantages* (Cal.), 172 Pac. 384; *Brown v. Batchellor*, 29 R. I. 116, 69 Atl. 295. See the title "**Negligence**."

[b] **Relation between theater owner and a performer**, through whose negligence a spectator was injured, is sufficiently shown by an allegation that exhibitions of skill were given by and under the supervision of the defendant and his agents. *Brown v. Batchellor*, 29 R. I. 116, 69 Atl. 295.

[c] **Negligence a Question of Fact.** **Ia.**—*Williams v. Mineral City Park Assn.*, 128 Iowa 32, 102 N. W. 783, 111 Am. St. Rep. 184, 1 L. R. A. (N. S.) 427. **Minn.**—*Wells v. Minneapolis Baseball & A. Assn.*, 122 Minn. 327, 142 N. W. 706, Ann. Cas. 1914D, 922, 46 L. R. A. (N. S.) 606, negligence in

guarding against dangers. **Mo.**—Edling *v.* Kansas City B. & E. Co., 181 Mo. App. 327, 168 S. W. 908, negligence of witness at ball game. **N. Y.**—Griswold *v.* Ringling, 165 App. Div. 737, 150 N. Y. Supp. 1022; Lusk *v.* Peck, 132 App. Div. 426, 116 N. Y. Supp. 1051, negligence in inspecting theater. **Tex.**—Dalton *v.* Hooper (Tex. Civ. App.), 168 S. W. 84. But see Bole *v.* Pittsburgh Athletic Co., 205 Fed. 468, 123 C. C. A. 536, 46 L. R. A. (N. S.) 602. [d] Whether plaintiff assumed the risk, sometimes a question for the jury. Whyte *v.* Idora Park Co., 29 Cal. App. 342, 155 Pac. 1018.

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**THEORY OF ACTION.** — See Construction and Theory of Pleadings.

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**THIRD PARTY CLAIMS.** — See Attachment; Garnishment; Judgments and Decrees, Enforcement of; Intervention.

Vol. XXIV

# THREATS

By the Editorial Staff.

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## I. CRIMINAL PROSECUTION, 789

## II. CIVIL REMEDIES, 791

### CROSS-REFERENCES:

Duress;	Rescission and Cancellation;
Extortion;	Security To Keep the Peace.
Post Office;	

For forms, see 9 STANDARD PROC. 1201, et seq.

Instruction as to threat in homicide cases, see 11 STANDARD PROC. 676.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. CRIMINAL PROSECUTION.** — Indictment or Information. — An indictment or information for the crime of threat must charge the offense in accordance with the general rules,<sup>1</sup> setting out every element essential to constitute the offense.<sup>2</sup> The indictment or information

1. **Ill.**—*Rank v. People*, 80 Ill. App. 40. **Mass.**—*Com. v. Moulton*, 108 Mass. 307. **Tex.**—*Bettis v. State*, 48 Tex. Crim. 22, 85 S. W. 1074; *Dunn v. State*, 43 Tex. Crim. 25, 63 S. W. 571, white capping.

See the title, "Indictment and Information."

[a] **Language of Statute May Be Followed.**—**Ill.**—*Glover v. People*, 204 Ill. 170, 68 N. E. 464. **Mo.**—*State v. Stewart*, 90 Mo. 507, 2 S. W. 790. **Tex.**—*Longley v. State*, 43 Tex. 490. But see *People v. Schmitz*, 153 Cal. xviii, 94 Pac. 419.

[b] **Precise words of statute need not be used.** **Ala.**—*Brown v. State*, 15 Ala. App. 180, 72 So. 757. **Ia.**—*State v. Waite*, 101 Iowa 377, 70 N. W. 596. **Mich.**—*People v. Campbell*, 173 Mich. 381, 139 N. W. 24.

[c] **The use of the word "extortion" in designating the offense may be disregarded.** *People v. Brennan*, 121 Cal. 495, 53 Pac. 1098.

2. *Robinson v. Com.*, 101 Mass. 27; *State v. Harper*, 94 N. C. 936.

[a] **Forms of Indictments and Informations.**—**Ark.**—*State v. Scott*, 114 Ark. 38, 169 S. W. 314, night riding.



must allege the threat and its character,<sup>3</sup> the date on which it was made,<sup>4</sup> the statutory intent,<sup>5</sup> wilfulness or malice,<sup>6</sup> the persons to whom

**Cal.**—*People v. Tonielli*, 81 Cal. 275, 22 Pac. 678, threatening letter. **Ga.**—*Cook v. State*, 22 Ga. App. 770, 97 S. E. 264, threat to accuse a person of sexual crimes with intent to extort money. **Ia.** *State v. Browning*, 153 Iowa 37, 133 N. W. 330 (threat to injure person); *State v. Young*, 26 Iowa 122, threatening to compel person to do an act against his will. **La.**—*State v. Allen*, 129 La. 733, 56 So. 655, Ann. Cas. 1913B, 454, threatening letter to member of family. **Me.**—*State v. Patterson*, 271 Mo. 99, 196 S. W. 3, threatening to accuse of crime. **Mich.**—*People v. Campbell*, 173 Mich. 381, 139 N. W. 24, threat to injure property. **N. Y.**—*People v. Wightman*, 104 N. Y. 598, 11 N. E. 135, sending threatening letter. **N. C.**—*State v. Harper*, 94 N. C. 936, sending threatening letter.

3. **Ia.**—*State v. McGlasson*, 88 Iowa 667, 56 N. W. 293; *State v. O'Mally*, 48 Iowa 501. **Mass.**—*Com. v. Moulton*, 108 Mass. 307. **Mich.**—*People v. Jones*, 62 Mich. 304, 28 N. W. 839. **N. M.**—*State v. Strickland*, 21 N. M. 411, 21 Pac. 719, that defendant maliciously threatened injury to the person or property of another must be stated. **Tex.**—See *Ateley v. State*, 56 Tex. Crim. 569, 120 S. W. 1010, as to use of innuendo.

[a] That threat was made verbally or by written communication must be shown. *Robinson v. Com.*, 101 Mass. 27; *People v. Whittemore*, 102 Mich. 519, 61 N. W. 13.

[b] Language of threat need not be stated. **Ill.**—*Glover v. People*, 204 Ill. 170, 68 N. E. 464. **Ia.**—*State v. O'Mally*, 48 Iowa 501. **Me.**—*State v. Blackington*, 111 Me. 229, 88 Atl. 726; *State v. Robinson*, 85 Me. 195, 27 Atl. 99. **Mass.**—*Com. v. Goodwin*, 122 Mass. 19; *Com. v. Moulton*, 108 Mass. 307. **Tex.** *Diggs v. State*, 64 Tex. Crim. 122, 141 S. W. 100. **Vt.**—*Grimes v. Gates*, 47 Vt. 594, 19 Am. Rep. 129.

[c] Substance of threat should be stated. *Glover v. People*, 204 Ill. 170, 68 N. E. 464; *Com. v. Moulton*, 108 Mass. 307.

[d] The threatening letter or its substance should be set out. **Ky.**—*Com. v. Patrick*, 127 Ky. 473, 105 S. W. 981. **La.**—*State v. Conradi*, 128 La. 105, 54 So. 577. **Mo.**—*State v. Stew-*

*art*, 90 Mo. 507, 2 S. W. 790. **N. Y.** *People v. Misiani*, 148 App. Div. 797, 133 N. Y. Supp. 291. **Tex.**—*Rudy v. State*, 81 Tex. Crim. 272, 195 S. W. 187 (letter must be set out); *Tynes v. State*, 17 Tex. App. 123. Compare *Bradfield v. State*, 73 Tex. Crim. 353, 166 S. W. 734.

[e] An English translation of the letter should be set out if the letter is in a foreign language. *State v. Conradi*, 128 La. 105, 54 So. 577. See 12 STANDARD PROC. 386.

[f] The particular offense of which an accusation was threatened (1) should be specified. *Cohen v. State*, 37 Tex. Crim. 118, 38 S. W. 1005. See **Ill.**—*People v. Avery*, 192 Ill. App. 128. **Me.**—*State v. Robinson*, 85 Me. 195, 27 Atl. 99. **Mo.**—*State v. Sekrit*, 130 Mo. 401, 32 S. W. 977. (2) But technical accuracy in describing the offense is not required. **Ariz.**—*Lee v. State*, 16 Ariz. 291, 145 Pac. 244, Ann. Cas. 1917B, 131. **Mass.**—*Com. v. Goodwin*, 122 Mass. 19; *Com. v. Murphy*, 12 Allen 449. **Mo.**—*State v. Patterson*, 271 Mo. 99, 196 S. W. 3. **Tex.**—*Cohen v. State*, 37 Tex. Crim. 118, 38 S. W. 1005. (3) Use of generic name in specifying the offense is sufficient. *Lee v. State*, 16 Ariz. 291, 145 Pac. 244, Ann. Cas. 1917B, 131. (4) But describing the offense as a "misdemeanor" merely is not sufficient. *Rank v. People*, 80 Ill. App. 40.

[g] The use of the word "accuse" shows a threat to prefer charges against a person. *People v. Frey*, 112 Mich. 251, 70 N. W. 548.

[h] Threats in the statute connected by the conjunction "or" may be stated conjunctively. *State v. Lewis*, 96 Iowa 286, 65 N. W. 295. See *State v. Browning*, 153 Iowa 37, 133 N. W. 330. 12 STANDARD PROC. 507.

4. See *Schultz v. State*, 135 Wis. 644, 114 N. W. 505, 116 N. W. 259, 571, holding amendment as to date proper.

5. **Ia.**—*State v. Waite*, 101 Iowa 377, 70 N. W. 596. **Mich.**—*People v. Whittemore*, 102 Mich. 519, 61 N. W. 13. **Minn.**—*State v. Ullman*, 5 Minn. 13. **Tex.**—See *Tindale v. State* (Tex. Crim.), 51 S. W. 373.

6. *Glover v. People*, 204 Ill. 170, 68

the threat was made,<sup>7</sup> and against whom it was directed,<sup>8</sup> and the ownership of property sought to be gained or extorted.<sup>9</sup> If the threat was made by posting a notice, the place where the notice was posted should be alleged.<sup>10</sup> Where a threat is to inflict bodily injury with an instrument, it has been held the manner and force with which it was to be used must be stated.<sup>11</sup> But it is not necessary to state that a person threatened with prosecution is innocent of the crime of which he was to be accused.<sup>12</sup>

**Trial.** — The trial is held in accordance with the general rules regulating trials in criminal cases.<sup>13</sup>

**II. CIVIL REMEDIES.** — Threats of bodily injury or imprisonment resulting in damages through the fear occasioned thereby, are actionable.<sup>14</sup> Civil relief on the ground of duress occasioned by threats, is treated elsewhere in this work.<sup>15</sup>

N. E. 464; *State v. Strickland*, 21 N. M. 411, 21 Pac. 719.

7. *Glover v. People*, 204 Ill. 170, 68 N. E. 464; *Kessler v. State*, 50 Ind. 229. *Compare Toomer v. State*, 112 Md. 285, 76 Atl. 118, under statute as to sending letters.

[a] **An allegation of a threatening to kill one A. B. with intent then and there to extort money from him indicates the threat was within his hearing.** *Glover v. People*, 204 Ill. 170, 68 N. E. 464; *State v. Waite*, 101 Iowa 377, 70 N. W. 596.

8. *State v. Waite*, 101 Iowa 377, 70 N. W. 596.

[a] **Omission of Name Not Fatal.** *People v. Whittemore*, 102 Mich. 519, 61 N. W. 13.

9. *Green v. State*, 157 Ind. 101, 60 N. E. 941; *State v. Ullman*, 5 Minn.

13. See generally the title "**Extortion.**"

10. *Lowe v. Com.*, 11 Ky. L. Rep. 810.

11. *Tindale v. State* (Tex. Crim.), 51 S. W. 373.

12. *Kessler v. State*, 50 Ind. 229;

*State v. Debolt*, 104 Iowa 105, 73 N. W. 499. *Compare State v. Browning*, 153 Iowa 37, 133 N. W. 330. *Contra, Seales v. State*, 65 Tex. Crim. 355, 144 S. W. 263.

13. See the titles "**Juries and Jurors;**" "**Instructions;**" "**Trial;**" "**Verdict;**" and other titles dealing with particular aspects of trial practice.

[a] **Questions for the Jury.**—(1) The interpretation of language used in conveying a threat is a question of fact. *State v. Blackington*, 111 Me. 229, 88 Atl. 726. (2) And whether the letter contained the threat alleged is a question for the jury. *State v. Stewart*, 90 Mo. 507, 2 S. W. 790.

14. *Grimes v. Gates*, 47 Vt. 594, 19 Am. Rep. 129. See *Taft v. Taft*, 40 Vt. 229, 94 Am. Dec. 389; *Boggs v. Slack & Greenbrier Groc. Co.*, 53 W. Va. 536, 44 S. E. 777.

[a] **Words of threat need not be set out in the declaration.** *Grimes v. Gates*, 47 Vt. 594, 19 Am. Rep. 129.

15. See the titles "**Duress;**" "**Extortion;**" "**Rescission and Cancellation.**"

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**TIMBER.** — See **Logs and Logging; Public Lands; Waste.**

# TIME

By the Editorial Staff.

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## CROSS-REFERENCES:

## Time To Plead.

As to judicial notice respecting time, see *ENCYCLOPÆDIA OF EVIDENCE*, title "Judicial Notice."

Computing time for publication of process, see the title "Service of Process and Papers."

For further references and cross-references, see the index to this work and the references throughout this article.

**I. SCOPE OF ARTICLE.** — The following article is designed principally to cover the procedural aspect of computing time. A general statement of controlling principles of law is all that is intended in view of the particular applications of those principles in various articles throughout this work. Matters concerning time to plead are elsewhere discussed,<sup>1</sup> as are also those bearing on the pleading of time in civil<sup>2</sup> and criminal<sup>3</sup> proceedings and on variance and failure of proof as to time.<sup>4</sup>

**II. COMPUTATION OF TIME.** — **A. TERMS DEFINED AND EXPLAINED.** — **1. Day.** — A day, in legal contemplation is a period of twenty-four hours, the time between midnight and the midnight following.<sup>5</sup> It is a unit of time and not an aggregation of a certain number of hours, minutes and seconds.<sup>6</sup> Unless, therefore, justice<sup>7</sup> requires

1. See the title "Time To Plead."

2. See 6 *STANDARD PROC.* 676.

3. See 12 *STANDARD PROC.* 136, 296, 411.

4. See generally the article "Variance and Failure of Proof."

5. *Ala.*—*McKinnon v. City of Birmingham*, 196 *Ala.* 56, 71 *So.* 463. *Ia.* *Miner v. Goodyear India Rubber Glove Mfg. Co.*, 62 *Conn.* 410, 26 *Atl.* 643. *Ind.*—*Benson v. Adams*, 69 *Ind.* 353, 35 *Am. Rep.* 220; *Cheek v. Preston*, 34 *Ind. App.* 343, 72 *N. E.* 1048. *Pa.* *Kane v. Com.*, 89 *Pa.* 522, 33 *Am. Rep.* 787. *Tex.*—*Muckenfuss v. State*, 55 *Tex. Crim.* 229, 116 *S. W.* 51.

6. *Cal.*—*Cosgriff v. Board of Election Comrs.*, 151 *Cal.* 407, 91 *Pac.* 98. *Colo.*—*Stebbins v. Anthony*, 5 *Colo.* 348. *Ohio.*—*State v. Board of Deputy State Supervisors, etc.*, 93 *Ohio St.* 14, 112 *N. E.* 136.

[a] "A day is not capable of subdivision into hours, minutes, or seconds, but is to be taken as a whole. In such computations, the hours are not counted to ascertain whether a

period of twenty-four hours, or a given number of such periods, have elapsed between the act to be done and the day from which the time is to begin running. The fractions of the days are no more taken into consideration than are the fractions of the seconds. The consequence is that every day, and every part of that day, is, by this rule, one day before every part of the succeeding day. The last moment of any day is, in contemplation of law in such cases, one day before the first moment of the next day, although the elapsed time is infinitesimal." *Cosgriff v. Board of Election Comrs.*, 151 *Cal.* 407, 91 *Pac.* 98.

7. *Ala.*—*Lang v. Phillips*, 27 *Ala.* 311. *Cal.*—*People v. Beatty*, 14 *Cal.* 566. *Conn.*—*Brainard v. Bushnell*, 11 *Conn.* 16. *Ga.*—*Peebles v. Charleston & W. C. Ry. Co.*, 7 *Ga. App.* 279, 66 *S. E.* 953. *Mass.*—*Seward v. Hayden*, 150 *Mass.* 158, 22 *N. E.* 629, 15 *Am. St. Rep.* 183, 5 *L. R. A.* 844. *N. J.* *Gallagher v. True American Pub. Co.*, 75 *N. J. Eq.* 171, 71 *Atl.* 741, 138

otherwise, the fractions of a day will be disregarded,<sup>8</sup> and acts done on the same day will be considered as done at the same time.<sup>9</sup>

**2. Week.**—The term "week" is appropriately applied to any period of seven successive days,<sup>10</sup> though, in its most accurate sense,

Am. St. Rep. 514; *Johnson v. Pennington*, 15 N. J. L. 188. **Pa.**—*In re Small's Appeal*, 24 Pa. 398. **Va.**—*Neale v. Utz*, 75 Va. 480. **Wis.**—*Knowlton v. Culver*, 2 Pinn. 243, 1 Chand. 214, 52 Am. Dec. 156.

[a] **Where the precise hour when an act is done becomes material in ascertaining and determining the relative rights of persons, the legal fiction that a day is an indivisible point of time would not prevail as against the truth.** **Ga.**—*Peebles v. Charleston & W. C. Ry. Co.*, 7 Ga. App. 279, 66 S. E. 953. **Mo.**—*Kimm v. Osgood's Admr.*, 19 Mo. 60; *Williams v. Ettenson* (Mo. App.), 170 S. W. 370. **N. Y.**—*Marvin v. Marvin*, 75 N. Y. 240. **Pa.**—*Bordentown Banking Co. v. Restein*, 214 Pa. 30, 63 Atl. 451.

[b] **The hour of the day is sometimes made essential by the law stating the requirement to be performed. Thus where an ordinance requires notice of certain work be published for not less than one week before nine o'clock a. m. of December 27th, the whole of the day of the 27th cannot be allowed.** *Williams v. Ettenson* (Mo. App.), 170 S. W. 370.

**8. U. S.**—*Louisville v. Portsmouth Sav. Bank*, 104 U. S. 469, 26 L. ed. 775; *United States v. Edwin S. Hartwell Lumber Co.*, 142 Fed. 432, 73 C. C. A. 548. **Ala.**—*McKinnon v. City of Birmingham*, 196 Ala. 56, 71 So. 463. **Cal.**—*Cosgriff v. Board of Election Comrs.*, 151 Cal. 407, 91 Pac. 98; *Seo-ville v. Anderson*, 131 Cal. 590, 63 Pac. 1013. **Colo.**—*Denver v. Pearce*, 13 Colo. 383, 22 Pac. 774, 6 L. R. A. 541; *Smith v. Jefferson County*, 10 Colo. 17, 13 Pac. 917; *In re Senate Resolution*, 9 Colo. 620, 21 Pac. 470. **Conn.**—*Miner v. Goodyear I. R. G. Mfg. Co.*, 62 Conn. 410, 26 Atl. 643; *Sands v. Lyon*, 18 Conn. 18. **Del.**—*Alrichs v. Thompson*, 5 Harr. 432. **Ill.**—*Levy v. Chicago Nat. Bank*, 158 Ill. 88, 42 N. E. 129, 30 L. R. A. 380. **Ky.**—*Stuart v. Petrie*, 138 Ky. 514, 128 S. W. 592. **Mass.**—*Seward v. Hayden*, 150 Mass. 158, 22 N. E. 629, 15 Am. St. Rep. 183, 5 L. R. A. 844; *Portland Bank v. Maine Bank*, 11

**Mass.** 204. **Mo.**—*Shaffer v. Detie*, 191 Mo. 377, 90 S. W. 131; *St. Joseph v. Landis*, 54 Mo. App. 315; *Kimm v. Osgood's Admr.*, 19 Mo. 60. **N. J.**—*Thorne v. Mosher*, 20 N. J. Eq. 257. **N. Y.**—*Marvin v. Marvin*, 75 N. Y. 240; *Middlebrook v. Travis*, 68 Hun 155, 22 N. Y. Supp. 672, 52 N. Y. St. 231. **N. C.**—*Metts v. Bright*, 20 N. C. 311, 32 Am. Dec. 683. **Ohio.**—*State v. Board of Deputy State Supervisors, etc.*, 93 Ohio St. 14, 112 N. E. 136; *Follett v. Hall*, 16 Ohio 111, 47 Am. Dec. 365. **Pa.**—*Haines v. Elfman*, 235 Pa. 341, 84 Atl. 349; *In re Long's Appeal*, 23 Pa. 297; *Neff v. Barr*, 14 Serg. & R. 166. **S. C.**—*Williamson v. Farrow*, 1 Bailey 611, 21 Am. Dec. 492. **Tenn.**—*Rogers v. Etter*, 8 Baxt. 13; *Murfree's Heirs v. Carmack*, 4 Yerg. 270, 26 Am. Dec. 232. **Tex.**—*Dallas County v. Reynolds* (Tex. Civ. App.), 199 S. W. 702. **Utah.**—*Tilton v. Sterling Coal & C. Co.*, 28 Utah 173, 77 Pac. 758, 107 Am. St. Rep. 689. **Vt.**—*Giddings v. Ira*, 54 Vt. 346.

[a] **Rule One of Convenience.** "Any other method of computation would require an accurate account to be kept of the exact hour, minute, and second of the occurrence of the act to be timed, would produce endless confusion and strife, and would prove impolitic, if not wholly impracticable." *Cosgriff v. Board of Election Comrs.*, 151 Cal. 407, 91 Pac. 98.

[b] **Upon this subject, an English court uses the following language:** "Our law rejects fractions of a day more generally than the civil law does. . . . The effect is to render the day a sort of indivisible point; so that any act, done in the compass of it, is no more referable to any one, than to any other portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed until the day is passed." *Lester v. Garland*, 15 Ves. Jr. 248, 33 Eng. Reprint 748.

**9.** *Levy v. Chicago Nat. Bank*, 158 Ill. 88, 42 N. E. 129, 30 L. R. A. 380; *In re Boyer's Est.*, 51 Pa. 432, 91 Am. Dec. 129.

**10. U. S.**—*Leach v. Burr*, 126 U. S.

it means the time between midnight on Saturday and the same hour on the next succeeding Saturday.<sup>11</sup>

**3. Month.**—The early common-law rule adopted in England, and in some early decisions in the United States, was that in the absence of anything indicating a different intention, a month in law meant a lunar month or twenty-eight days.<sup>12</sup> At the present time, however, either because of statute or by force of judicial decision, a month in law means a calendar month,<sup>13</sup> or that period of time elapsing between a given date and the corresponding date of the next succeeding or preceding month by name.<sup>14</sup>

510, 23 Sup. Ct. 393, 47 L. ed. 567; *United States v. Southern Pac. Co.*, 209 Fed. 562, 126 C. C. A. 384. **Mo.** *Michel v. Taylor*, 143 Mo. App. 683, 127 S. W. 949. **Neb.**—*In re Johnson's Estate*, 99 Neb. 275, 155 N. W. 1100; *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866. **N. Y.**—*In re Wright's Will*, 224 N. Y. 293, 120 N. E. 725.

[a] **Act Defining Week Constitutional.**—The act (Neb. Laws, 1915, c. 222) defining the word week is not unconstitutional as an attempt to control judicial actions. It provides that when legal notices are required to be published "any number of weeks, or for any number of weeks the term 'week' shall be construed to mean either a period of time known as a calendar week beginning on Sunday and ending with Saturday, or any period of seven consecutive days beginning with the date of the first publication of notice." *In re Johnson's Estate*, 99 Neb. 275, 155 N. W. 1100.

**11. U. S.**—*Ronkendorff v. Taylor's Lessee*, 4 Pet. 349, 7 L. ed. 882. **Mo.** *Michel v. Taylor*, 143 Mo. App. 683, 127 S. W. 949. **N. Y.**—*In re Wright's Will*, 224 N. Y. 293, 120 N. E. 725.

**12.** See *Siegelschiffer v. Penn Mut. Life Ins. Co.*, 248 Fed. 226, 160 C. C. A. 304; *State ex rel. Slay v. White* (Fla.), 74 So. 486.

**13. U. S.**—*Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 Sup. Ct. 512, 35 L. ed. 116; *Siegelschiffer v. Penn Mut. Life Ins. Co.*, 248 Fed. 226, 160 C. C. A. 304. **Ala.**—*Bartol v. Calvert*, 21 Ala. 42. **Cal.**—*Scoville v. Anderson*, 131 Cal. 590, 63 Pac. 1013; *Savings & Loan Soc. v. Thompson*, 32 Cal. 347. **Colo.**—*Daly v. Concordia F. Ins. Co.*, 16 Colo. App. 349, 65 Pac. 416. **Conn.**—*Strong v. Birchard*, 5 Conn. 357; *Clark v. Ely*, 2 Root 380. **Fla.**

*State ex rel. Slay v. White*, 74 So. 486; *Myakka Co. v. Edwards*, 68 Fla. 382, 67 So. 217; *Guaranty Trust & Safe Deposit Co. v. Buddington*, 27 Fla. 215, 9 So. 246, 12 L. R. A. 770. **Kan.** *Holton v. Bimrod*, 8 Kan. App. 265, 55 Pac. 505. **Ky.**—*Rieg v. Blair*, 158 Ky. 680, 166 S. W. 180; *Pyle v. Maulding*, 7 J. J. Marsh. 202; *Payne v. Wallace*, 2 A. K. Marsh. 244. **Md.**—*Baltimore & D. P. R. Co. v. Pumphrey*, 74 Md. 86, 21 Atl. 559; *Glenn v. Smith*, 17 Md. 260. **Mass.**—*Churchill v. Merchants' Bank*, 19 Pick. 532; *Hunt v. Holden*, 2 Mass. 168. **Miss.**—*Mitchell v. Woodson*, 37 Miss. 567. **Neb.**—*Brown v. Williams*, 34 Neb. 376, 51 N. W. 851. **N. J.**—*Bohles v. Prudential Ins. Co.*, 83 N. J. L. 246, 83 Atl. 904. **N. Y.** *Ryer v. Prudential Ins. Co.*, 185 N. Y. 6, 77 N. E. 727; *Hosley v. Black*, 28 N. Y. 438, 26 How. Pr. 97. **N. C.** *Muse v. London Assur. Corp.*, 108 N. C. 240, 13 S. E. 94; *State v. Upchurch*, 72 N. C. 146. **Ohio.**—*White v. Lapp*, 4 Ohio Dec. 434. **Okla.**—*Bertwell v. Haines*, 10 Okla. 469, 63 Pac. 702. **Ore.** *In re Standard Cafeteria Co.*, 68 Ore. 550, 137 Pac. 774. **Pa.**—*In re Gregg's Estate*, 213 Pa. 260, 62 Atl. 856; *Moore v. Houston*, 3 Serg. & R. 169; *In re Parker's Estate*, 14 W. N. C. 566. **S. C.**—*Williamson v. Farrow*, 1 Bailey 611, 21 Am. Dec. 492. **Tenn.**—*Cook v. Shute*, Cooke 67. **Vt.**—*Kimball v. Lamson*, 2 Vt. 138. **Va.**—*Brewer v. Harris*, 5 Gratt. (46 Va.) 285. **W. Va.** *Bank of Union v. Baird*, 72 W. Va. 716, 79 S. E. 738. **Wyo.**—*Daley v. Anderson*, 7 Wyo. 1, 48 Pac. 839, 75 Am. St. Rep. 870.

**14. Fla.**—*State ex rel. Slay v. White*, 74 So. 486. **Ia.**—*Parkhill v. Brighton*, 61 Iowa 103, 15 N. W. 853. **Ky.** *Zeman v. Steinberg*, 21 Ky. L. Rep. 586, 52 S. W. 821; *Wagner v. Kenner*, 2 Rob. 120. **Neb.**—*McGinn v.*



4. **Year.**—Ordinarily when the word year is used in law to designate time, a calendar year is meant,<sup>15</sup> and in computing time thereby, days are not counted, but the calendar is examined and the day numerically corresponding to that day in the following year is ascertained, and the calendar year expires on that day, less one.<sup>16</sup> The circumstances of the particular case or the language used may, however, indicate that the legislature or the parties intended something else than a calendar year,<sup>17</sup> as for example a political year,<sup>18</sup> or a fiscal year,<sup>19</sup> or a school year.<sup>20</sup>

B. INCLUDING AND EXCLUDING FIRST AND LAST DAYS.—1. **Rules Stated.**—a. *In General.*—In computing time before or after a day,

State, 46 Neb. 427, 65 N. W. 46, 50 Am. St. Rep. 617, 30 L. R. A. 450; *Glore v. Hare*, 4 Neb. 131. **N. Y.** *People v. Ulrich*, 2 Abb. Pr. 28. **Pa.** *In re Gregg's Estate*, 213 Pa. 260, 62 Atl. 856; *Sock's Estate*, 9 Pa. Dist. 101. **S. C.**—*Williamson v. Farrow*, 1 Bailey 611, 21 Am. Dec. 492. **W. Va.** *Bank of Union v. Baird*, 72 W. Va. 716, 79 S. E. 738. **Wyo.**—*Daley v. Anderson*, 7 Wyo. 1, 48 Pac. 839, 75 Am. St. Rep. 870.

[a] "A number of months after or before a certain day shall be computed by counting such number of calendar months from such day, exclusive of the calendar month in which such day occurs, and shall include the day of the month in the last month so counted having the same numerical order in days of the month as the day from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of the month so counted." Sec. 30 of the statutory construction law of New York. See *Ryer v. Prudential Ins. Co.*, 185 N. Y. 6, 77 N. E. 727; *In re Babcock's Will*, 74 Misc. 31, 133 N. Y. Supp. 655.

15. **Ala.**—*Fretwell v. McLemore*, 52 Ala. 124. **Ga.**—*King v. Johnson*, 96 Ga. 497, 23 S. E. 500; *Atlanta & C. Air Line R. Co. v. Ray*, 70 Ga. 674. **Ia.**—*Sawyer v. Steinman*, 148 Iowa 610, 126 N. W. 1123. **Kan.**—*Garfield v. Hubbell*, 9 Kan. App. 785, 59 Pac. 600. **Ky.**—*Rice v. Blair*, 158 Ky. 680, 166 S. W. 180. **Okla.**—*City State Bank v. Stone*, 158 Pac 1168.

[a] An intervening leap year is not material where time in years is computed by the calendar year. *Rice v. Blair*, 158 Ky. 680, 166 S. W. 180.

[b] The terms "this year," "the

current year" or "the previous year" (1) usually refer to the calendar year. See *Clark v. Lancaster County*, 69 Neb. 717, 96 N. W. 593. (2) But "current year" in a code provision exempting crops from seizure on execution for the current year means the time from harvest to harvest and not a calendar year. *Hinton v. Roane*, 124 La. 927, 50 So. 793, 134 Am. St. Rep. 526.

[c] "Year of our Lord" means a year as indicated by the Christian calendar, commencing January 1st and ending December 31st. *Sawyer v. Steinman*, 148 Iowa 610, 126 N. W. 1123.

16. **Ind.**—*Vogel v. State*, 107 Ind. 374, 8 N. E. 164. **Me.**—*Marcoux v. Society of Beneficence*, 91 Me. 250, 39 Atl. 1027. **Neb.**—*McGinn v. State*, 46 Neb. 427, 65 N. W. 46, 50 Am. St. Rep. 617, 30 L. R. A. 450. **N. Y.** *Buchanan v. Whitman*, 151 N. Y. 253, 45 N. E. 556. **Pa.**—*Nesbit v. Godfrey*, 155 Pa. 251, 25 Atl. 621.

17. See *Sawyer v. Steinman*, 148 Iowa 610, 126 N. W. 1123; *Clark v. Lancaster County*, 69 Neb. 717, 96 N. W. 593.

[a] The words "preceding year" in a statute mean the preceding twelve months. *People ex rel. Francis v. Eschelman (Colo.)*, 165 Pac. 260.

18. *Battle Creek Brewing Co. v. Board of Suprs.*, 166 Mich. 52, 131 N. W. 160.

19. **Mo.**—*Glasgow v. Rowse*, 43 Mo. 479. **Okla.**—*City State Bank v. Stone*, 158 Pac. 1168. **S. C.**—*State v. State Treasurer*, 68 S. C. 411, 47 S. E. 683.

[a] A fiscal year is the year embraced in the annual term of the opening and closing of financial accounts. *Leavenworth Nat. Bank v. Reilly*, 97 Kan. 817, 156 Pac. 747.

20. *Williams v. Bagnelle*, 138 Cal. 699, 72 Pac. 408.

date, or event, both the first and last day are never included.<sup>21</sup> even though the act could be done on the first day.<sup>22</sup> Nor can both be excluded<sup>23</sup> unless the statute designates the time which must elapse as so many "entire days"<sup>24</sup> or "clear days,"<sup>25</sup> or otherwise indicates that a certain number of full days are to intervene.

b. *At Common Law.*—(1.) **Early Rule.**—Much uncertainty has existed at common law in respect to, including and excluding days in the computation of time.<sup>26</sup> To the rule of the earlier cases including the dies a quo when the computation was to be made from an act done

21. **Ga.**—*Charleston & W. C. Ry. Co. v. Cotton Seed Oil Co.*, 22 Ga. App. 337, 96 S. E. 586; *Marrietta Fertilizer Co. v. Benton*, 21 Ga. App. 466, 94 S. E. 657. **Ky.**—*Sanders' Heirs v. Norton*, 4 Mon. 464. **Miss.**—*Hattiesburg Grocery Co. v. Tompkins*, 111 Miss. 592, 71 So. 866. **N. Y.**—*Jackson ex dem. Hyer v. Van Valkenburgh*, 8 Cow. 260.

[a] "Nor does the statutory rule excluding the first day and including the last make any difference. That was the law long before the statute was enacted. Indeed, the statute was but enacting the decision of the supreme court." *Womack v. McAhren*, 9 Ind. 6, quoted in *Mathews Farmers' Mut. Live Stock Ins. Co. v. Moore*, 58 Ind. App. 240, 108 N. E. 155.

[b] **Only the First Day Excluded.** "The fact P. S., c. 2, sec. 34, provides that the day from which time is to be reckoned is to be excluded in computing the time within which an act must be done tends to the conclusion that that is the only day to be excluded in making the computation." *Clough v. Wilton* (N. H.), 104 Atl. 453.

22. **N. Y.**—*Jackson v. Van Valkenburgh*, 8 Cow. 260. **Pa.**—*Sims v. Hampton*, 1 Serg. & R. 411. **S. D.**—*Dobson v. Lindekugel*, 39 S. D. 374, 164 N. W. 269.

[a] Thus where notice of an election contest must be served a certain prescribed number of days after the canvass of the vote, the fact that the notice of the contest could be served, on the very day the canvass took place will not cause that day to be included in the count. *Dobson v. Lindekugel*, 39 S. D. 374, 164 N. W. 269.

23. **Ky.**—*Sanders' Heirs v. Norton*, 4 Mon. 464. **N. Y.**—*Jackson v. Van Valkenburgh*, 8 Cow. 260. **Pa.**—*Sims v. Hampton*, 1 Serg. & R. 411. **Tex.**

*McCormick v. Jester*, 53 Tex. Civ. App. 306, 115 S. W. 278.

[a] The court must conclude that only the first day is to be excluded where the statute provides that the day from which time is to be reckoned is to be excluded, and there is nothing to rebut the conclusion. *Clough v. Wilton* (N. H.), 104 Atl. 453.

[b] "But we take the law to be well settled, however, in matters of practice, where any particular number of days not expressed to be clear days is prescribed, the rule in regard to the computation of time, is, not to exclude both the day on which the notice is served, and the day on which the act is to be performed but to exclude the one and include the other. . . . The spirit if not the letter of our statute, sustains this computation. It provides that 'the time within which an act is to be done shall be computed by excluding the first day and including the last.'" *Dougherty v. Porter*, 13 Kan. 206.

24. See the following: *Richter v. State*, 156 Ala. 127, 47 So. 163; *Foster v. State*, 149 Ala. 632, 43 So. 179; *Owen v. Slatter*, 26 Ala. 547, 62 Am. Dec. 745; *Garner v. Johnson*, 22 Ala. 494.

[a] Where the statute requires "at least five days" to intervene, this does not mean five full days. *Prior v. People*, 107 Ill. 628.

25. See the following: **Ia.**—*Robinson v. Foster*, 12 Iowa 186. **Kan.**—*Garvin v. Jennerson*, 20 Kan. 371. **N. C.** *Branch v. Wilmington & W. R. Co.*, 88 N. C. 570; *Keeter v. Wilmington & W. R. Co.*, 86 N. C. 346. **Eng.**—*In re Railway Sleepers Supply Co.*, 29 Ch. Div. 204, 54 L. J. Ch. 720, 52 L. T. N. S. 731.

26. See the following: **U. S.**—*In re Babjak*, 211 Fed. 551. **Cal.**—*Price v. Whitman*, 8 Cal. 412. **Conn.**—*Weeks*

or from the time of an act,<sup>27</sup> exceptions were recognized,<sup>28</sup> which in time became so numerous as to obscure and render of doubtful authority the rule itself.<sup>29</sup> Some authorities made a distinction between computing time from an act or event, and time running from a day or date, including the first day in the former case and excluding it in the latter,<sup>30</sup> but the distinction does not rest on any substantial basis,<sup>31</sup> and has not been observed by more recent cases.<sup>32</sup>

*v. Hull*, 19 Conn. 376, 50 Am. Dec. 249. **Dak.**—*Taylor v. Brown*, 5 Dak. 335, 40 N. W. 525. **Minn.**—*Budds v. Frey*, 104 Minn. 481, 117 N. W. 158.

[a] "Many most refined distinctions have been raised, sustained, and then abandoned by the court; especially in England." *Price v. Whitman*, 8 Cal. 412.

[b] "Whether the 'terminus a quo' should be so included, it must be admitted, has been a vexed question for many centuries, both among learned doctors of the civil law and the courts of England and this country. It has been termed by a writer on civil law (Tiraqueau) the controversia controversissima." *Griffith v. Bogert*, 18 How. (U. S.) 158, 15 L. ed. 307.

[c] "While it is desirable that there should be a fixed and certain rule upon this subject, it must be conceded that the rule which excludes the terminus a quo is not absolute, but that it may be included where necessary to give effect to the obvious intention." *Taylor v. Brown*, 147 U. S. 640, 644, 13 Sup. Ct. 549, 37 L. ed. 313.

27. **U. S.**—*Griffith v. Bogert*, 18 How. 158, 15 L. ed. 307; *Arnold v. United States*, 9 Cranch 104, 3 L. ed. 671. **Conn.**—*Spencer v. Champion*, 13 Conn. 11. **Ind.**—*Swift v. Tousey*, 5 Ind. 196; *Jacobs v. Graham*, 1 Blackf. 392. **Kan.**—*Leavenworth Coal Co. v. Barber*, 47 Kan. 29, 27 Pac. 114. **Mass.**—*Butler v. Fessenden*, 12 Cush. 78. **N. H.**—*Priest v. Tarlton*, 3 N. H. 93. **Tex.**—*Lubbock v. Cook*, 49 Tex. 96. **Eng.**—*Glassington v. Rawlins*, 3 East 407, 102 Eng. Reprint 653; *Castle v. Burditt*, 3 T. R. 623, 100 Eng. Reprint 768; *Bellasis v. Hester*, 1 Ld. Raym. 280, 91 Eng. Reprint 1084.

28. See *Griffith v. Bogert*, 18 How. (U. S.) 158, 15 L. ed. 307.

[a] But the cases are conflicting and have established no fixed rule as to such exceptions. *Griffith v. Bogert*, 18 How. (U. S.) 158, 15 L. ed. 307.

29. See *infra*, this note.

[a] The cases for two hundred years had only served to "embarrass a point which a plain man of common sense and understanding would have no difficulty in construing." *Pugh v. Leeds*, 2 Cowp. 714, 98 Eng. Reprint 1323.

30. **Ind.**—*Jacobs v. Graham*, 1 Blackf. 392. **Kan.**—*Kansas v. Gibson*, 66 Kan. 501, 72 Pac. 222. **Ky.**—*Price v. Russell*, 154 Ky. 824, 159 S. W. 573; *Lowry v. Stotts*, 138 Ky. 251, 127 S. W. 789; *Newton v. Ogden*, 126 Ky. 101, 102 S. W. 365; *Frankfort v. Farmers' Bank*, 105 Ky. 811, 49 S. W. 811; *Chiles v. Smith*, 13 B. Mon. 460; *White v. Crutcher*, 1 Bush 472. **Me.**—*Flint v. Sawyer*, 30 Me. 226. **Mass.**—*Perry v. Provident L. Ins. & Inv. Co.*, 99 Mass. 162; *Atkins v. Sleeper*, 7 Allen 487. **Mich.**—*Gorham v. Wing*, 10 Mich. 486. **N. H.**—*In re Soldiers Voting Bill*, 45 N. H. 607; *Lefavour v. Bartlett*, 42 N. H. 555; *Blake v. Crowninshield*, 9 N. H. 304; *Priest v. Tarlton*, 3 N. H. 93; *Rand v. Rand*, 4 N. H. 267. **N. J.**—*McCulloch v. Hopper*, 47 N. J. L. 189, 54 Am. Rep. 146. **Ohio.**—*Cunningham v. Phillips*, Tapp. 184. **Pa.**—*Hampton v. Erenzeller*, 2 Browne 18; *Wayne v. Duffy*, 1 Phila. 367. **Tex.**—*Lubbock v. Cook*, 49 Tex. 96. **Eng.**—*Bellasis v. Hester*, 1 Ld. Raym. 280, 91 Eng. Reprint 1084; *Howard's Case*, 2 Salk. 625, 91 Eng. Reprint 528; *Clayton's Case*, 5 Coke 1a, 77 Eng. Reprint 48.

[a] "Where an act is to be done a certain number of days before a day stated, then that day is excluded in the computation; but where an act is to be done a certain number of days before another act, then the day on which the act is to be done is included." *Ehinger v. Graham*, 190 Mich. 132, 155 N. W. 747; *Chaddock v. Barry*, 93 Mich. 542, 53 N. W. 785.

31. *Seward v. Hayden*, 150 Mass. 153, 22 N. E. 629, 15 Am. St. Rep. 183, 5 L. R. A. 844.

32. See *infra*, II, B, 1, b, (II).



(II.) **Modern Common Law Rule.** — The tendency, if not the rule, of the more recent decisions upon the subject of computing time before or after a specified day, date, act, or event, is to exclude the first day and include the last.<sup>33</sup> However, the rule thus indicated is by no means

33. **U. S.**—*Smith v. Gale*, 137 U. S. 577, 11 Sup. Ct. 185, 34 L. ed. 792; *Credit Co. v. Arkansas C. R. Co.*, 128 U. S. 258, 9 Sup. Ct. 107, 32 L. ed. 448; *Best v. Doe*, 18 Wall. 112, 21 L. ed. 805; *Sheets v. Selden's Lessee*, 2 Wall. 177, 17 L. ed. 822; *Siegelschiffer v. Penn Mut. Life Ins. Co.*, 248 Fed. 226, 160 C. C. A. 304; *Supreme Council v. Gootee*, 89 Fed. 941, 32 C. C. A. 436; *Eliot Nat. Bank v. Gill*, 210 Fed. 933. **Ark.**—*Massachusetts Bonding & Ins. Co. v. Home Life & Acc. Co.*, 119 Ark. 102, 178 S. W. 314; *Peay v. Pulaski County*, 103 Ark. 601, 148 S. W. 491; *Connerly v. Dickinson*, 81 Ark. 258, 99 S. W. 82. **Cal.**—*Price v. Whitman*, 8 Cal. 412. **Colo.**—*Evans v. Bowers*, 13 Colo. 511, 22 Pac. 812. **Conn.**—*Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 249; *Sands v. Lyons*, 18 Conn. 18; *Avery v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240. **Fla.**—*Savage v. State*, 18 Fla. 970. **Ind.**—*Vogel v. State*, 107 Ind. 374, 8 N. E. 164. **Ia.**—*Des Moines Union Ry. Co. v. District Court*, 170 Iowa 568, 153 N. W. 217; *Teucher v. Hiatt*, 23 Iowa 527, 92 Am. Dec. 440. **Me.**—*Damon v. Webber*, 111 Me. 473, 89 Atl. 734. **Mass.**—*Seward v. Hayden*, 150 Mass. 158, 22 N. E. 629, 15 Am. St. Rep. 183, 5 L. R. A. 844; *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470; *Fuller v. Russell*, 6 Gray 128. **Mich.**—*Arnold v. Nye*, 23 Mich. 286; *Warren v. Slade*, 23 Mich. 1, 9 Am. Rep. 70; *Gorham v. Wing*, 10 Mich. 486. **N. H.**—*Blake v. Crowninshield*, 9 N. H. 304. **N. J.**—*McCulloch v. Hopper*, 47 N. J. L. 189, 54 Am. Rep. 146. **N. Y.**—*Vandenburgh v. Van Rensselaer*, 6 Paige 147; *Phelan v. Douglass*, 11 How. Pr. 193; *Judd v. Fulton*, 4 How. Pr. 298, 10 Barb. 117. **Ohio.**—*State v. Board of Deputy State Supervisors, etc.*, 93 Ohio St. 14, 112 N. E. 136; *Seaman v. Eager*, 16 Ohio St. 209. **Okla.**—*First Nat. Bank v. Drew*, 169 Pac. 1092; *Baker v. Hammett*, 23 Okla. 480, 100 Pac. 1114. **Pa.**—*Cromelien v. Brink*, 29 Pa. 522; *Boyer v. Northern C. R. Co.*, 1 Pearson 113. **Wash.**—*Peck v. Linney*, 97 Wash. 103, 165 Pac. 1080. **Eng.**—*Lester v. Garland*, 15 Ves. Jr. 248, 33 Eng. Re-

print 748; *Dowling v. Foxall*, 1 Ball & B. 193, 196.

[a] "The general rule for the interpretation of statutes where time is to be computed from a particular day, as when an act is to be performed within a specified period from or after a day named—is to exclude the day thus designated and to include the last day of the specified period." *Eliot Nat. Bank v. Gill*, 210 Fed. 933, citing *Sheets v. Selden*, 2 Wall. (U. S.) 177, 17 L. ed. 822; *Guaranty Tr. & S. D. Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 145, 11 Sup. Ct. 512, 35 L. ed. 116.

[b] "The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day of a particular event, as when an act is to be performed within a specified period from or after a day named, is to exclude the day thus designated, and to include the last day of the specified period." *Sheets v. Selden*, 2 Wall. (U. S.) 177, 190, 17 L. ed. 822, 826.

[c] "The reason for the rule that, in the computation of time the first day will be excluded, is that the law takes no notice of fractions of a day, except in certain cases, where the hour itself becomes material; and time is not, therefore, computed from the hour of the day on which the event happens to the corresponding hour of the day of performance, but the computation is from the day when the act was done. Such day is regarded as a point of time, and the computation begins from the expiration of such day, as, if counted, it would fail to give the party affected the whole of that day, but would give only a fractional part of it." *Massachusetts Bonding & Ins. Co. v. Home Life & Acc. Co.*, 119 Ark. 102, 178 S. W. 314, 317.

[d] Where time is to be computed from a testator's death the day of the death is excluded. *Lester v. Garland*, 15 Ves. Jr. 248, 33 Eng. Reprint 748.

[e] "Day of the date" and "date" are not substantially different in this

uniform,<sup>34</sup> and it is impracticable, perhaps, to lay down in advance a rule applicable to every case that might arise.<sup>35</sup> Much depends upon the facts of the particular case and the circumstances in which it arises<sup>36</sup> for courts will always adopt that construction which will uphold and enforce, rather than destroy, bona fide transactions and titles and whenever it is necessary to prevent a forfeiture or to effectuate the clear intention of the parties the dies a quo will be included.<sup>37</sup>

c. *Under Statutes.*—The matter of computing time has received legislative attention in many states. In general the statutes adopt the rule established by the more recent decisions<sup>38</sup> of excluding the first day and including the last,<sup>39</sup> or otherwise provide for the exclusion of one

connection. **Cal.**—Price v. Whitman, 8 Cal. 412. **Conn.**—Weeks v. Hull, 19 Conn. 376, 50 Am. Dec. 249. **Me.**—Oatman v. Walker, 33 Me. 67.

34. See Baker v. Hammett, 23 Okla. 480, 100 Pac. 1114.

35. **Ala.**—Oberhaus v. State *ex rel.* McNamara, 173 Ala. 483, 55 So. 898. **Cal.**—Price v. Whitman, 8 Cal. 412. **Mass.**—Seward v. Hayden, 150 Mass. 158, 22 N. E. 629, 15 Am. St. Rep. 183, 5 L. R. A. 844.

[a] "It would be tedious and unprofitable to attempt a review of the very numerous modern decisions, or to lay down any rules applicable to all cases. Every case must depend on its own circumstances. Where the construction of the language of a statute is doubtful, courts will always prefer that which will confirm rather than destroy any bona fide transaction or title. The intention and policy of the enactment should be sought for and carried out. Courts should never indulge in nice grammatical criticism of prepositions or conjunctions in order to destroy rights honestly acquired." Griffith v. Bogert, 18 How. (U. S.) 158, 15 L. ed. 307.

36. **U. S.**—Taylor v. Brown, 147 U. S. 640, 13 Sup. Ct. 549, 37 L. ed. 313; *In re Babjak*, 211 Fed. 551. **Ala.**—Oberhaus v. State *ex rel.* McNamara, 173 Ala. 483, 55 So. 898. **Cal.**—Price v. Whitman, 8 Cal. 412. **Okla.**—Baker v. Hammett, 23 Okla. 480, 100 Pac. 1114.

37. **U. S.**—Griffith v. Bogert, 18 How. 158, 15 L. ed. 307. **Cal.**—Price v. Whitman, 8 Cal. 412. **Conn.**—Weeks v. Hull, 19 Conn. 376, 50 Am. Dec. 249; Sands v. Lyon, 18 Conn. 18. **Dak.**—Taylor v. Brown, 5 Dak. 335, 40 N. W. 525. **Minn.**—Budds v. Frey, 104 Minn. 481, 117 N. W. 158. **S. C.**—State v.

Schnierle, 5 Rich. L. 299; Williamson v. Farrow, 1 Bailey 611, 21 Am. Dec. 492. **Tex.**—State v. Asbury, 26 Tex. 82.

[a] The rule laid down by Mansfield is that courts of justice ought to construe the words of parties so as to effectuate their deeds and not destroy them; and that "from" the date may, in vulgar use, and even in strict propriety of language, mean either inclusive or exclusive. Pugh v. Leeds, 2 Cowp. 714, 98 Eng. Reprint 1323.

[b] "While there is no fixed rule for the inclusion or exclusion of the terminus a quo in the computation of time, there does seem to be the view that the dies quo shall be either included or excluded, as the case may be, in order to preserve some right which otherwise would be destroyed." *In re Babjak*, 211 Fed. 551.

38. See *supra*, II, B, 1, b, (II).

39. **Ala.**—Rice v. J. H. Beavers & Co., 196 Ala. 355, 71 So. 659; Clark v. Watson, 195 Ala. 7, 71 So. 95; Oberhaus v. State *ex rel.* McNamara, 173 Ala. 483, 55 So. 898; Richter v. State, 156 Ala. 127, 47 So. 163. **Cal.**—Low v. Northern Assur. Co., 165 Cal. 394, 132 Pac. 590; Pacific Sash & Door Co. v. Bumiller, 162 Cal. 664, 124 Pac. 230, 41 L. R. A. (N. S.) 296; Cosgriff v. Board of Election Comrs., 151 Cal. 407, 91 Pac. 98; Hannah v. Green, 143 Cal. 19, 76 Pac. 708; Bellmer v. Blessington, 136 Cal. 3, 68 Pac. 111; Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Derby & Co. v. Modesto, 104 Cal. 515, 38 Pac. 900; Hagenmeyer v. Bd. of Equalization, 82 Cal. 214, 23 Pac. 14; Misch v. Mayhew, 51 Cal. 514. **Colo.**—Pelton v. Muntzing, 24 Colo. App. 1, 131 Pac. 281; Gibson v. Foster, 24 Colo. App. 252, 133 Pac. 144. **Dak.**—Taylor

day and the inclusion of the other.<sup>40</sup> When the last day is a Sunday or other non-judicial day, it also is excluded and the act may be done

*v. Brown*, 5 Dak. 335, 40 N. W. 525. **Idaho**.—*Seawell v. Gifford*, 22 Idaho 295, 125 Pac. 182, Ann. Cas. 1914A, 1132. **Ill.**—*People v. Coffin*, 279 Ill. 401, 117 N. E. 85; *People v. Snow*, 279 Ill. 289, 116 N. E. 670; *Prior v. People*, 187 Ill. 628; *Kahlo v. Kahlo*, 204 Ill. App. 409; *Dierssen v. Williamsburg City Fire Ins. Co.*, 204 Ill. App. 240. **Ind.**—*Wright v. Manns*, 111 Ind. 422, 12 N. E. 160; *Vogel v. State*, 107 Ind. 374, 8 N. E. 164. **Ia.**—*Robinson v. Foster*, 12 Iowa 186. **Kan.**—*Amis v. Board of Comrs.*, 98 Kan. 321, 158 Pac. 52; *Northrop v. Cooper*, 23 Kan. 432; *Dougherty v. Porter*, 18 Kan. 206. **Minn.**—*Budds v. Frey*, 104 Minn. 481, 117 N. W. 158; *Northwestern Guaranty Loan Co. v. Channell*, 53 Minn. 269, 55 N. W. 121; *Johnson v. Merritt*, 50 Minn. 303, 52 N. W. 863; *Spencer v. Haug*, 45 Minn. 231, 47 N. W. 794. **Mo.**—*Huhn v. Lang*, 122 Mo. 600, 27 S. W. 345; *Hahn v. Dierkes*, 37 Mo. 574; *State v. Fleetwood*, 143 Mo. App. 698, 127 S. W. 934; *St. Louis v. Bambrick*, 41 Mo. App. 648; *Hodgson v. Banking-House*, 9 Mo. App. 24. **Neb.**—*McGinn v. State*, 46 Neb. 427, 65 N. W. 46, 50 Am. St. Rep. 617, 30 L. R. A. 450. **N. H.**—*Clough v. Wilton*, 104 Atl. 453; *Lefavour v. Bartlett*, 42 N. H. 555. **N. Y.**—*Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565; *People v. Burgess*, 153 N. Y. 561, 47 N. E. 889; *Hudspeth v. Pierce-Arrow Motor Car Co.*, 180 App. Div. 147, 167 N. Y. Supp. 418; *Sugerman v. Jacobs*, 160 App. Div. 411, 145 N. Y. Supp. 429; *Benoit v. New York Central & H. R. R. Co.*, 94 App. Div. 24, 87 N. Y. Supp. 951, 15 N. Y. Ann. Cas. 90. **N. C.**—*Jenkins v. Griffin*, 175 N. C. 184, 95 S. E. 166. **Ohio**.—*Chicago Label & Box Co. v. Washburn*, 15 Ohio C. C. 510, 8 Ohio Cir. Dec. 113. **Okla.**—*First Nat. Bank v. Drew*, 169 Pac. 1092; *Campbell v. Ruble*, 40 Okla. 48, 135 Pac. 1050; *Baker v. Hammett*, 23 Okla. 480, 100 Pac. 1114. **Ore.**—*Watson v. Salem*, 84 Ore. 666, 164 Pac. 567, 1184; *State v. Macy*, 82 Ore. 81, 161 Pac. 111; *Vincent v. First Nat. Bank*, 76 Ore. 579, 143 Pac. 1100, 149 Pac. 938; *Walling v. La Follette*, 76 Ore. 497, 134 Pac. 1192; *Grant v. Pad-dock*, 30 Ore. 312, 47 Pac. 712. **S. D.**

*Dobson v. Lindekugel*, 39 S. D. 374, 164 N. W. 269. **Tenn.**—*Dickinson v. Lee*, 2 Coldw. 615. **Wash.**—*Allen v. Morris*, 87 Wash. 268, 151 Pac. 827. **Wis.**—*Fletcher v. La Crosse County*, 165 Wis. 446, 162 N. W. 484.

[a] **The regulations adopted by the English courts** (Hil J. 2 W. 4) exclude the first and includes the last day.

[b] **The federal courts** will in applying a state statute in respect to the computation of time, follow the construction put upon it by the courts of the state. *Hicks v. National L. Ins. Co.*, 60 Fed. 690, 9 C. C. A. 215; *Judd v. Fulton*, 4 How. Pr. (N. Y.) 298, 10 Barb. 117.

[c] **Where First or Last Day Expressed.**—The statute in respect to computing time is intended to apply only when it is necessary to have a rule for ascertaining the first day or the last day on which a thing may be done, when, in other words, a thing is to be done within a specified period as within a week, month, or year or a designated number of days, weeks, months or years. When the first or last day is expressed no rule is needed to ascertain what that day is. *Northwestern Guaranty Loan Co. v. Channell*, 53 Minn. 269, 55 N. W. 121.

40. *Board of Councilmen of Frankfort v. Bk. of Kentucky*, 105 Ky. 811, 49 S. W. 811.

[a] **Only the first or last day shall be counted.** *Curtis v. College Park Lumber Co.*, 145 Ga. 601, 89 S. E. 680; *Holt v. Richardson*, 134 Ga. 287, 67 S. E. 798; *Charleston & W. C. Ry. Co. v. Cotton Seed Oil Co.*, 22 Ga. App. 337, 96 S. E. 586; *Marietta Fertilizer Co. v. Benton*, 21 Ga. App. 466, 94 S. E. 657; *Hattiesburg Grocery Co. v. Tompkins*, 111 Miss. 592, 71 So. 866.

[b] **Where the computation is to be made from an act done as distinguished from the day of the act**, sec. 681, Ky. Code Pr. providing that, "If a certain number of days be required to intervene between two acts, the day of one only of the acts may be counted," does not apply. *Board of Councilmen of Frankfort v. Bk. of Kentucky*, 105 Ky. 811, 49 S. W. 811.



on the next following judicial day.<sup>41</sup>

d. *Construction of "From," "After" and Other Terms.*  
(L.) "**From.**" "**After.**" — The words "from" and "after" in their usual meaning and application are exclusive and not inclusive.<sup>42</sup> And it is well settled that in computing time "from" or "after" a particular day, the day thus designated is to be excluded,<sup>43</sup> unless by the plain meaning of the context or by necessary implication, intention to include the first day is shown.<sup>44</sup>

(II.) "**Before.**" — The rule excluding one day and including another applies where some act is required to be done a certain number of days "before" an event named,<sup>45</sup> as where notice<sup>46</sup> of some legal proceeding

41. See *infra*, II, B, 3.

42. *Mathews Farmers' Mut. Live Stock Ins. Co. v. Moore*, 58 Ind. App. 240, 108 N. E. 155.

[a] A provision that a statute should take effect "from and after its passage," should be construed so as to make the statute go into effect on the day after it was passed; that is, the day of the passage of the act should be excluded. *Parkinson v. Brandenburg*, 35 Minn. 294, 28 N. W. 919, 59 Am. Rep. 326.

43. **U. S.**—*Sheets v. Selden's Lessee*, 2 Wall. 177, 17 L. ed. 822. **Ala.**—*Rice v. J. H. Beavers & Co.*, 196 Ala. 355, 71 So. 659. **Cal.**—*Hannah v. Green*, 143 Cal. 19, 76 Pac. 708; *Price v. Whitman*, 8 Cal. 412. **Ga.**—*Charleston & W. C. Ry. Co. v. Cotton Seed Oil Co.*, 22 Ga. App. 337, 96 S. E. 586. **Ill.**—*People v. Coffin*, 279 Ill. 401, 117 N. E. 85; *Roan v. Rohrer*, 72 Ill. 582; *Waterman v. Jones*, 28 Ill. 54; *Ewing v. Bailey*, 5 Ill. 420; *Kahlo v. Kahlo*, 204 Ill. App. 409; *Dierssen v. Williamsburg City Fire Ins. Co.*, 204 Ill. App. 240. **Ind.**—*Vogel v. State*, 107 Ind. 374, 8 N. E. 164. **Ky.**—*Atkins v. Boylston F. & M. Ins. Co.*, 5 Mete. 439, 39 Am. Dec. 692. **La.**—*McWilliams v. Comeaux*, 135 La. 210, 65 So. 112. **Me.**—*Fenlason v. Shedd*, 109 Me. 326, 84 Atl. 409. **Mich.**—*Griffin v. Forrest*, 49 Mich. 309, 13 N. W. 603. **N. H.**—*Clough v. Wilton*, 104 Atl. 453. **N. C.**—*Jenkins v. Griffin*, 175 N. C. 184, 95 S. E. 166. **Ohio.**—*Seaman v. Eager*, 16 Ohio St. 209. **Okla.**—*First Trust & Sav. Bank v. Bloodworth*, 174 Pac. 545; *First Nat. Bank v. Drew*, 169 Pac. 1092; *St. Louis Commission Co. v. Calloway*, 5 Okla. 393, 47 Pac. 1088. **Pa.**—*In re Lutz's Appeal*, 124 Pa. 273, 16 Atl. 858; *Menges v. Frick*, 73 Pa. 137, 13 Am. Rep. 731; *Lysle v. Wil-*

*liams*, 15 Serg. & R. 135. **R. I.**—*Frey v. Rhode Island Co.*, 37 R. I. 96, 91 Atl. 1; *Millard v. Willard*, 3 R. I. 42. **S. D.**—*Dobson v. Lindekugel*, 39 S. D. 374, 164 N. W. 269. **Tex.**—*Hill v. Kerr*, 78 Tex. 213, 14 S. W. 566. **Eng.**—*Pugh v. Leeds*, 2 Cowp. 714, 98 Eng. Reprint 1323; *Hatter v. Ash*, 1 Lord Raym. 84, 91 Eng. Reprint 953.

44. **Dak.**—*Taylor v. Brown*, 5 Dak. 335, 40 N. W. 525. **Ind.**—*Mathews Farmers' Mut. Live Stock Ins. Co. v. Moore*, 58 Ind. App. 240, 108 N. E. 155. **Minn.**—*Budds v. Frey*, 104 Minn. 481, 117 N. W. 158. **Va.**—*Jennings v. Pocahontas Consolidated Collieries Co.*, 114 Va. 213, 76 S. E. 298. **Eng.**—*Pugh v. Leeds*, 2 Cowp. 714, 98 Eng. Reprint 1323.

45. **Ala.**—*Richter v. State*, 156 Ala. 127, 47 So. 163. **Cal.**—*In re Wright's Estate*, 177 Cal. 274, 170 Pac. 610; *Cosgriff v. Board of Election Comrs.*, 151 Cal. 407, 91 Pac. 98. **Kan.**—*Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116; *Northrop v. Cooper*, 23 Kan. 432. **Md.**—*Graham v. Wellington*, 121 Md. 656, 89 Atl. 232. **Mich.**—*Ehinger v. Graham*, 190 Mich. 132, 155 N. W. 747; *In re Miller's Est.*, 173 Mich. 467, 139 N. W. 17; *People v. Barry*, 93 Mich. 542, 53 N. W. 785, 18 L. R. A. 337. **Minn.**—*Coe v. Caledonia & M. Ry. Co.*, 27 Minn. 197, 6 N. W. 621. **Miss.**—*Hall v. Cassidy*, 25 Miss. 48. **Ohio.**—*State v. Board of Deputy State Supervisors, etc.*, 93 Ohio St. 14, 112 N. E. 136. **Wis.**—*Fletcher v. La Crosse County*, 165 Wis. 446, 162 N. W. 484.

But see *Dickinson v. Lee*, 2 Coldw. (Tenn.) 615.

[a] The words "before the first day of the term" include the first day of the term. *Ardery v. Dunn*, 181 Ind. 225, 104 N. E. 299.

46. See *infra*, II, B, 2, b.

is to be given.

(III.) "Within." — The word "within," as used as a limit of time, embraces the last day covered by the limit fixed.<sup>47</sup>

(IV.) "For." — The term "for" when used in connection with statutes or charters prescribing notice "for" a certain number of days, weeks etc., means through, throughout, during the continuance of that number of days, weeks, etc.<sup>48</sup>

(V.) "Not Less Than;" "At Least." — The phrases "not less than" and "at least" signify the smallest or lowest degree,<sup>49</sup> and legislation prescribing "not less than" or "at least" a specified number of days is usually construed to mean clear and full days for the specified period of time.<sup>50</sup>

(VI.) "Beginning With." — The rule excluding the first day and including the last has been held not to apply where the act is to be done within a particular period of time beginning with a specified day.<sup>51</sup>

(VII.) "Until;" "Till." — "Till" and "until" are synonymous,<sup>52</sup> and as marking the end of a period of time, have been construed both as exclusive<sup>53</sup> and as inclusive<sup>54</sup> of the terminus ad quem. Much depends on how the words were intended as ascertained from the subject

47. *Rice v. J. H. Beavers & Co.*, 196 Ala. 355, 71 So. 659; *Hamilton v. State*, 101 Tenn. 417, 47 S. W. 695.

48. *Kan.*—*Northrop v. Cooper*, 23 Kan. 432. *Mich.*—*Bacon v. Kennedy*, 56 Mich. 329, 22 N. W. 824; *Wilson v. Thompson*, 26 Minn. 299, 3 N. W. 699. *Neb.*—*State v. Cherry*, 58 Neb. 734, 79 N. W. 825. *N. D.*—*Dever v. Cornwell*, 10 N. D. 123, 86 N. W. 227. *Ore.*—*Watson v. Salem*, 84 Ore. 666, 164 Pac. 567, 1184.

49. *Watson v. Salem*, 84 Ore. 666, 164 Pac. 567, 1184.

50. *Ore.*—*Watson v. Salem*, 84 Ore. 666, 164 Pac. 567, 1184. *Pa.*—*In re Gregg's Estate*, 213 Pa. 260, 62 Atl. 856. *Wis.*—*Ward v. Walters*, 63 Wis. 39, 22 N. W. 844.

[a] "For Not Less Than."—"Emphatic as is the word 'for' it is, if possible, made still more emphatic by the accompanying language 'not less than;' and when combined these words unmistakably mean that the notice must be published for a period of time which cannot be less than five full successive days." *Watson v. Salem*, 84 Ore. 666, 164 Pac. 567, 1184.

51. *People v. Coffin*, 279 Ill. 401, 117 N. E. 85.

[a] "At or before the expiration of the period of probation," as used in civil service statutes, refers to the

duration of such period and does not include the whole or any part of the day following its expiration. *People v. Coffin*, 279 Ill. 401, 117 N. E. 85.

52. *Oberhaus v. State ex rel. McNamara*, 173 Ala. 483, 55 So. 898.

53. *Richardson v. State*, 142 Ala. 12, 39 So. 12; *Heal v. State*, 147 Ala. 686, 40 So. 571; *Oberhaus v. State ex rel. McNamara*, 173 Ala. 483, 55 So. 898. See *Ryan v. State Bank*, 10 Neb. 524, 7 N. W. 276.

54. *Ga.*—*Rogers v. Cherokee Iron & R. Co.*, 70 Ga. 717; *Glynn County Academy v. Dart*, 67 Ga. 765. *Ky.*—*Newport News & M. V. R. Co. v. Thomas*, 96 Ky. 613, 29 S. W. 437; *Louisville & N. R. Co. v. Turner*, 81 Ky. 489. *Md.*—*Gottlieb v. Fred W. Wolf Co.*, 75 Md. 126, 23 Atl. 198. *Mass.*—*Kendall v. Kingsley*, 120 Mass. 94. *Mo.*—*St. Louis & S. F. R. Co. v. Gracy*, 126 Mo. 472, 29 S. W. 579; *Hahn v. Dierkes*, 37 Mo. 574. *Mont.*—*Penn Placer Min. Co. v. Schreiner*, 14 Mont. 121, 35 Pac. 878. *N. J.*—*Houghwout v. Boisaubin*, 18 N. J. Eq. 315. *N. Y.*—*Sugerman v. Jacobs*, 160 App. Div. 411, 145 N. Y. Supp. 429; *Thomas v. Douglass*, 2 Johns. Cas. 226; *Bunce v. Reed*, 16 Barb. 347. *N. D.*—*State v. Jorgenson*, 25 N. D. 539, 142 N. W. 450, 49 L. R. A. (N. S.) 67. *Wyo.*—*Conway v. Smith Mercantile Co.*, 6 Wyo. 327, 44 Pac. 940, 49 L. R. A. 201.

matter and the context.<sup>55</sup> When by order of court time is given until a certain date within which to do an act in court practice, the period includes the date named and it is part of the time within which the act may be done.<sup>56</sup> The rule has been applied to orders extending time to file a case made,<sup>57</sup> or for filing a statement on motion for a new trial,<sup>58</sup> or to file petition in error.<sup>59</sup> Where one is prohibited from doing an act until after the expiration of a designated time, he cannot do it until the next day after the whole period or number of days have expired.<sup>60</sup>

(VIII.) "Between." — Time "between" two designated days is that which is intermediate without computing any part of either of those days to make the same,<sup>61</sup> and where the period of time<sup>62</sup> is specified as

55. **Ill.**—*Webster v. French*, 12 Ill. 302. **Md.**—*Gottlieb v. Fred W. Wolf Co.*, 75 Md. 126, 23 Atl. 198. **Mass.** *Kendall v. Kingsley*, 120 Mass. 94. **Neb.**—*Ryan v. State Bank*, 10 Neb. 524, 7 N. W. 276. **Wash.**—*State ex rel. Bickford v. Benson*, 21 Wash. 365, 58 Pac. 217. **Wyo.**—*Conway v. Smith Mercantile Co.*, 6 Wyo. 327, 44 Pac. 940, 49 L. R. A. 201.

56. **Ky.**—*Combs v. Frick Co.*, 162 Ky. 42, 171 S. W. 999; *Newport News & M. V. R. Co. v. Thomas*, 96 Ky. 613, 29 S. W. 437. **Mont.**—*Penn Placer Min. Co. v. Schreiner*, 14 Mont. 121, 35 Pac. 878. **Okla.**—*First Trust & Sav. Bank v. Bloodworth*, 174 Pac. 545; *St. Louis Commission Co. v. Calloway*, 5 Okla. 393, 47 Pac. 1088.

[a] **Statement on Motion for New Trial.**—Where the court, by order, extends time for filing a statement on motion for a new trial "to December 2d," the act may be done on December 2d. *Penn Placer Min. Co. v. Schreiner*, 14 Mont. 121, 35 Pac. 878.

[b] **Time To Plead.**—Where defendants were given until the 22nd day of the term to file an answer, their pleading was in time when tendered on that day. *Combs v. Frick Co.*, 162 Ky. 42, 171 S. W. 999.

[c] **A contrary rule exists in some states to the effect that when time is thus given the day named is not within the period and when the act is done on that day it is too late.** *Myers v. Winona Interurban Ry. Co.*, 50 Ind. App. 258, 98 N. E. 131; *Hartman v. Ringgenberg*, 119 Ind. 72, 21 N. E. 464; *Corbin v. Ketcham*, 87 Ind. 138; *Erb v. Moak*, 78 Ind. 569.

57. *First Trust & Sav. Bank v.*

*Bloodworth (Okla.)*, 174 Pac. 545; *St. Louis Commission Co. v. Calloway*, 5 Okla. 393, 47 Pac. 1088.

[a] **Where a number of days from a specified date are given in which to prepare and serve a case-made, the last day is included.** Thus where an extension of 90 days is allowed on May 30th and an additional extension of 60 days is subsequently allowed the time does not expire until midnight of Oct. 27th. *First Trust & Sav. Bank v. Bloodworth (Okla.)*, 174 Pac. 545.

[b] **Extension to Specified Date.** Where an order is made granting to the 6th day of May, 1895, to make and serve a case-made, the case-made may be served on that day. *St. Louis Com. Co. v. Calloway*, 5 Okla. 393, 47 Pac. 1088.

58. *Penn Placer Min. Co. v. Schreiner*, 14 Mont. 121, 35 Pac. 878.

[a] **An order extending "to December 2d" the time for filing a statement on motion for a new trial, gives the movant until the close of December 2d to file the statement.** *Penn Placer Min. Co. v. Schreiner*, 14 Mont. 121, 35 Pac. 878.

59. *First Trust & Sav. Bank v. Bloodworth (Okla.)*, 174 Pac. 545.

60. *Kahlo v. Kahlo*, 204 Ill. App. 409; *Judd v. Fulton*, 10 Barb. (N. Y.) 117, 4 How. Pr. 298.

61. *Robinson v. Foster*, 12 Iowa 186.

[a] **Where a pleading alleges that services were rendered between two specified days, items occurring on the two days mentioned are not within the allegations of the complaint.** *Todd v. Myres*, 40 Cal. 355.

62. **Cal.**—*Todd v. Myres*, 40 Cal. 355. **Ill.**—*Richardson v. Ford*, 14 Ill.



being between two given dates or days, both the first and last day are excluded.

e. *Periods of Months or Years.*—In some jurisdictions the rule excluding the first day and counting the last or vice versa does not apply where a period of months or years is prescribed.<sup>63</sup> But in general the rule is the same whether the time be reckoned by days, weeks, months or years.<sup>64</sup>

2. *Application of Rules.*—a. *Notice.*—Where notice is required to be given a specified number of days before a certain event the day of the giving or publishing of the notice is generally excluded and the day on which the event is to occur is included.<sup>65</sup> The rule thus stated

332. **Ia.**—*Robinson v. Foster*, 12 Iowa 186. **Mass.**—*Atkins v. Boylston*, F. & M. Ins. Co., 5 Mete. 439, 39 Am. Dec. 692. **Neb.**—*Weir v. Thomas*, 44 Neb. 507, 62 N. W. 871, 48 Am. St. Rep. 741. **N. J.**—*Delaware, L. & W. R. Co. v. Mehrhof Bros. Brick Mfg. Co.*, 53 N. J. L. 205, 23 Atl. 170. **N. Y.** *Bunce v. Reed*, 16 Barb. 347.

*Compare Jones v. State*, 42 Ark. 93; *Crawford v. Feder*, 27 Fla. 523, 8 So. 642.

[a] *Service of Process.*—Where the statute provides for the service of process in such time as to leave at least ten days between the day of service and the first day of the term both the day upon which the service is made and the first day of the appearance term of the court are excluded. *Robinson v. Foster*, 12 Iowa 186.

63. *Curtis v. College Park Lumber Co.*, 145 Ga. 601, 89 S. E. 680; *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479, 38 L. R. A. (N. S.) 77; *Charleston & W. C. Ry. Co. v. Cotton Seed Oil Co.*, 22 Ga. App. 337, 96 S. E. 586; *Brown v. Emerson Brick Co.*, 15 Ga. App. 332, 83 S. E. 160; *McLendon v. State*, 14 Ga. App. 270, 80 S. E. 692.

64. **Ill.**—*Kahlo v. Kahlo*, 204 Ill. App. 409. **Miss.**—*Hattiesburg Grocery Co. v. Tompkins*, 111 Miss. 592, 71 So. 866. **N. Y.**—*Hudspeth v. Pierce-Arrow Motor Car Co.*, 180 App. Div. 147, 167 N. Y. Supp. 418. **N. C.**—*Jenkins v. Griffin*, 175 N. C. 184, 95 S. E. 166. **Okla.**—*First Nat. Bank v. Drew*, 169 Pac. 1092.

[a] *Under the earlier New York rule* where time was reckoned in years the day from which the time was reckoned was included (*Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57

N. E. 168, 79 Am. St. Rep. 565; *Benoit v. New York Central & H. R. R. Co.*, 94 App. Div. 24, 87 N. Y. Supp. 951, 15 N. Y. Ann. Cas. 90), but acting on the suggestion of the court in the case of *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565, the legislature in 1910 amended section 20 of the general construction law so as to substitute for the sentence, "The day from which any specified number of days, weeks or months of time is reckoned shall be excluded in making the reckoning," the following sentence: "The day from which any specified period of time is reckoned shall be excluded in making the reckoning." The rule, therefore, is now the same whether time be reckoned by days, weeks, months or years.

65. **Ala.**—*Richter v. State*, 156 Ala. 127, 47 So. 163. **Cal.**—*Bellmer v. Blessington*, 136 Cal. 3, 68 Pac. 111, *Wilson v. His Creditors*, 55 Cal. 476; *Misch v. Mayhew*, 51 Cal. 514. **Ga.** *Marietta Fertilizer Co. v. Benton*, 21 Ga. App. 466, 94 S. E. 657. **Ill.**—*People v. Snow*, 279 Ill. 289, 116 N. E. 670, Ann. Cas. 1917E, 591; *Gordon v. People*, 154 Ill. 664, 39 N. E. 560; *Brown v. Chicago*, 117 Ill. 21, 7 N. E. 108; *Dierssen v. Williamsburg City Fire Ins. Co.*, 204 Ill. App. 240. **Ia.**—*Des Moines Union Ry. Co. v. District Court*, 170 Iowa 568, 153 N. W. 217. **Kan.** *Amis v. Board of Comrs.*, 98 Kan. 321, 158 Pac. 52; *Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116; *Schultz v. Hine*, 39 Kan. 334, 18 Pac. 221; *Northrop v. Cooper*, 23 Kan. 432. **Me.**—*Page v. Weymouth*, 47 Me. 238. **Md.**—*Walsh v. Boyle*, 30 Md. 262. **Mich.**—*Graham v. Board of Suprs.*, 190 Mich. 162, 156 N. W. 344; *Ehinger v. Graham*, 190 Mich. 132, 155 N. W. 747; *In re*

has been applied to notices to bind for attorney's fees,<sup>66</sup> to notices of trial or hearing,<sup>67</sup> of call of the docket,<sup>68</sup> of argument,<sup>69</sup> of eviction under dispossessionary warrants,<sup>70</sup> of foreclosure, execution and judicial

Miller's Est., 173 Mich. 467, 139 N. W. 17; *People v. Barry*, 93 Mich. 542, 53 N. W. 785, 18 L. R. A. 337; *Gantz v. Toles*, 40 Mich. 725. **Minn.**—*Coe v. Caledonia & M. Ry. Co.*, 27 Minn. 197, 6 N. W. 621. **Miss.**—*Mitchell v. Woodson*, 37 Miss. 567; *Hall v. Cassidy*, 25 Miss. 48. **Mo.**—*Hahn v. Dierkes*, 37 Mo. 574; *State v. Fleetwood*, 143 Mo. App. 698, 127 S. W. 934. **N. Y.**—*Taylor v. Corbiere*, 8 How. Prac. 385. **Ore.** *Watson v. Salem*, 84 Ore. 666, 164 Pac. 567, 1184. **S. D.**—*Dobson v. Lindenkugel*, 39 S. D. 374, 164 N. W. 269. **Tex.**—*Moore v. Miller* (Tex. Civ. App.), 155 S. W. 573. **Va.**—*Anderson v. Union Bank of Richmond*, 117 Va. 1, 83 S. E. 1080. **Wash.**—*Allen v. Morris*, 87 Wash. 268, 151 Pac. 827. **Wis.** *Fletcher v. La Crosse County*, 165 Wis. 446, 162 N. W. 484.

[a] By statute the rule excluding the first day and including the last is made applicable to the computation of time "for which any notice is to be given, whether required by law, order of court or contract." *Dierssen v. Williamsburg City Fire Ins. Co.*, 204 Ill. App. 240.

[b] "As a general rule, where notice is required to be posted or published a specified number of days before an event of which notice is to be given, the required number of days is computed by excluding the day of first posting or publishing, and including the day on which the event is to occur." *Ehinger v. Graham*, 190 Mich. 132, 155 N. W. 747.

[c] Where thirty days' notice of special terms of court by advertisement in a newspaper is required by statute, a notice of a special term published in a newspaper issued on Jan. 4, 1908, calling the court to meet on Feb. 3, 1908, is sufficient. *Richter v. State*, 156 Ala. 127, 47 So. 163.

66. *Marietta Fertilizer Co. v. Benton*, 21 Ga. App. 466, 94 S. E. 657.

[a] **Ten Days Before Suit.**—Where the return day for filing suits in a court is on the 15th of the month, and a petition is filed on that day, a notice to bind for attorney's fees, served on the 5th of the same month is served "ten days before suit is

brought." *Marietta Fertilizer Co. v. Benton*, 21 Ga. App. 466, 94 S. E. 657. 67. **Cal.**—*Bates v. Howard*, 105 Cal. 173, 38 Pac. 715. **Colo.**—*Stebbins v. Anthony*, 5 Colo. 348. **Ill.**—*Edward Hines Lumb. Co. v. Ream*, 64 Ill. App. 608. **Ind.**—*Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144. **Ia.**—*Wilson v. Knight*, 3 G. Gr. 126. **Kan.**—*Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116. **Mich.**—*Anderson v. Baughman*, 6 Mich. 298. **Minn.**—*State v. Weld*, 39 Minn. 426, 40 N. W. 561. **N. Y.**—*Dayton v. McIntyre*, 5 How. Pr. 117, 3 Code Rep. 164; *Easton v. Chamberlin*, 3 How. Pr. 412.

[a] **Application to Sell Ward's Property.**—The statute requires notice of the time at which an application shall be made to sell a ward's property to be served upon the minor at least ten days prior to the time fixed for such application. Where such notice was served on April 18th and the hearing was to be had on April 28th, the service was made a sufficient length of time prior to the hearing. *Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116.

68. *Des Moines Union Ry. Co. v. District Court*, 170 Iowa 568, 153 N. W. 217.

[a] **Ten Days' Notice of Call of Docket.**—Under a rule of court authorizing the court upon ten days' published notice to call the docket and upon such call dismiss a cause which has been upon the docket for three consecutive terms, the court may, where notice was published on June 10th of the calling of the docket for June 20th and 21st, dismiss plaintiff's cause on June 20th. *Des Moines Union Ry. Co. v. District Court*, 170 Iowa 568, 153 N. W. 217.

69. *Excelsior v. Minneapolis & S. P. Suburban R. Co.*, 108 Minn. 407, 120 N. W. 526, 122 N. W. 486, 133 Am. St. Rep. 455.

70. *Holt v. Richardson*, 134 Ga. 287, 67 S. E. 798.

[a] Where defendant in a dispossessionary warrant is given notice by the officer on November 7th (which falls on Thursday) that "after the expiration of three days (not counting Sundays or public holidays)" the officer

sales,<sup>71</sup> of sales of county bonds,<sup>72</sup> of election contest,<sup>73</sup> and of other matters.<sup>74</sup>

*n. Process.*<sup>75</sup> — In determining whether process was served in time, both the day of service and the return day are never included unless the statute contemplates clear or full days.<sup>76</sup> According to the practice of the particular jurisdiction, the day of service is excluded and the return or appearance day included,<sup>77</sup> or vice versa,<sup>78</sup> or either day included and the other excluded.<sup>79</sup>

*c. Trial.*<sup>80</sup> — The rule excluding the first day and including the last has been applied to the computation of the period of time within

will evict him unless he files the statutory counter affidavit, the officer cannot legally evict him before November 12th. *Holt v. Richardson*, 134 Ga. 287, 67 S. E. 798.

71. *Cal.*—*Bellmer v. Blessington*, 136 Cal. 3, 68 Pac. 111. *Kan.*—*Howbert v. Heyle*, 47 Kan. 58, 27 Pac. 116. *Wash.* *Allen v. Morris*, 87 Wash. 268, 151 Pac. 827.

[a] **Ten days' notice of sale upon foreclosure of chattel mortgage** is properly given where the day of sale is the 7th of October and the notice was given on the 27th of September. *Allen v. Morris*, 87 Wash. 268, 151 Pac. 827.

72. *Fletcher v. La Crosse County*, 165 Wis. 446, 162 N. W. 484.

[a] **Ten days' notice of sale of county bonds** is given as required where notice is published Feb. 24, 1917, setting the sale for March 6, 1917. *Fletcher v. La Crosse County*, 165 Wis. 446, 162 N. W. 484.

73. *Misch v. Mayhew*, 51 Cal. 514; *Dobson v. Lindekugel*, 39 S. D. 374, 164 N. W. 269.

[a] **Three Days' Notice of Illegal Votes.**—The statute requires a party contesting an election to give his opponent a written list of the illegal votes he would attempt to prove at least three days before the trial. A list served on the 7th of December is in time, where the trial is on the 10th of the same month. *Misch v. Mayhew*, 51 Cal. 514.

74. See *infra*, this note.

[a] **Notice of Defective Highway.** *Amis v. Board of Comrs.*, 98 Kan. 321, 158 Pac. 52.

[b] **Bids for Street Improvements.** Where a city charter requires notice for bids for street improvements to be published for not less than five

successive days, a notice first published on June 5th that bids would be open on June 10th is insufficient. *Watson v. Salem*, 84 Ore. 666, 164 Pac. 567.

[c] **Notice To Take Deposition.** *Littleton v. Christy's Admr.*, 11 Mo. 390.

75. See generally the title "**Service of Process and Papers.**"

76. *Del.*—*Warrington v. Tull*, 5 Harr. 107. *Ia.*—*Robinson v. Foster*, 12 Iowa 186. *Tex.*—*Fitzhugh v. Hall*, 28 Tex. 558.

77. *Ala.*—*Thrower v. Brandon*, 89 Ala. 406, 7 So. 442; *Garner v. Johnson*, 22 Ala. 494. *Ind.*—*Kerr v. Havestick*, 94 Ind. 178; *Reigelsberger v. Stapp*, 91 Ind. 311. *Kan.*—*Schultz v. Hine*, 39 Kan. 334, 18 Pac. 221. *Minn.* *Smith v. Force*, 31 Minn. 119, 16 N. W. 704. *Mo.*—*Sappington v. Lenz*, 53 Mo. App. 44. *N. Y.*—*Matter of Carhart*, 67 How. Pr. 216, 2 Dem. Sur. 627. *S. C.* *Buist v. Mitchell*, 3 Brev. 485. *Wis.* *Young v. Krueger*, 92 Wis. 361, 66 N. W. 355.

[a] **The first day of the court** is included in the twenty days required for the service of process. *Thrower v. Brandon*, 89 Ala. 406, 7 So. 442; *Garner v. Johnson*, 22 Ala. 494.

78. *Colo.*—*Stebbins v. Anthony*, 5 Colo. 348. *Ind.*—*Reigelsberger v. Stapp*, 91 Ind. 311. *Mass.*—*Butler v. Fessenden*, 12 Cush. 78. *Neb.*—*Messick v. Wigent*, 37 Neb. 692, 56 N. W. 493. *Ohio.*—*Barto v. Abbe*, 16 Ohio 408. *Pa.* *Black v. Johns*, 68 Pa. 83; *Ferris v. Zeidler*, 5 Phila. 529. *Tenn.*—*Dickinson v. Lee*, 2 Coldw. 615.

79. *Pollard v. Yoder*, 2 A. K. Marsh. (Ky.) 264.

80. **Notice of trial or hearing**, see *supra*, II, B, 2, a.



which a proceeding may be brought to trial or hearing.<sup>81</sup>

d. *Judgment and Proceedings Thereafter*.—In particular articles throughout this work will be found a discussion of the mode of reckoning time in connection with such subjects as applications for a new trial,<sup>82</sup> the taking of appeals,<sup>83</sup> suing out writs of error,<sup>84</sup> and presenting bills of exceptions.<sup>85</sup>

e. *Other Applications*.—The rule of excluding the first day and including the last, or vice versa, is applicable to provisions for the filing of papers within a certain period,<sup>86</sup> such as filing papers on review,<sup>87</sup> certificates of election,<sup>88</sup> depositions,<sup>89</sup> and delinquent tax lists.<sup>90</sup> It is also applicable to the computation of such periods of time as those prescribed in connection with the presentation of claims against decedent's estates,<sup>91</sup> the alienation of Indian lands,<sup>92</sup> the remarriage of divorced persons,<sup>93</sup> the limitation of actions and other<sup>94</sup> legal proceed-

81. *Hannah v. Green*, 143 Cal. 19, 76 Pac. 708.

[a] **Hearing of Election Contest**. The code permits the court to order a hearing of an election contest not less than ten nor more than twenty days from the date of such order. Under this provision a hearing fixed for the 11th of December under an order made and dated the 1st of December of the same year, is "not less than 10 days." *Hannah v. Green*, 143 Cal. 19, 76 Pac. 708.

82. See 20 STANDARD PROC. 588.

83. See 2 STANDARD PROC. 307.

84. See the title "Writ of Error."

85. See 4 STANDARD PROC. 338.

86. *Cosgriff v. Board of Election Comrs.*, 151 Cal. 407, 91 Pac. 98.

87. See *supra*, II, B, 2, d.

88. *Cosgriff v. Board of Election Comrs.*, 151 Cal. 407, 91 Pac. 98.

[a] **Twenty Days Before Election on November 6**.—Where the certificate of nomination is required to be filed 20 days before election and the election is on the 6th of November, a petition filed on October 17th is in time. *Cosgriff v. Board of Election Comrs.*, 151 Cal. 407, 91 Pac. 98.

89. *Garvin v. Jennerson*, 20 Kan. 371.

[a] **Depositions One Day Before Trial**.—Under a statute requiring depositions to be filed at least one day before trial, a deposition filed in court at 11 o'clock a. m. of the 11th of November, cannot be read on a trial commencing at 9 o'clock a. m. of November 12th of the same year. *Garvin v. Jennerson*, 20 Kan. 371.

90. *Prior v. People*, 107 Ill. 628.

[a] Where a delinquent tax list is filed on July 4 and the first day of the next term is July 9, the list is filed five days before the commencement of the term as required by statute. *Prior v. People*, 107 Ill. 628.

91. *Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 249.

[a] A claim exhibited on the 14th day of June was exhibited in season under an order passed of probate passed on the 14th of December of the previous year limiting six months from that time for the presentation of claims against the estate of a deceased person. *Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 249.

92. *Taylor v. Brown*, 147 U. S. 640, 13 Sup. Ct. 549, 37 L. ed. 313; *Baker v. Hammett*, 23 Okla. 480, 100 Pac. 1114.

[a] The day of the issue of the patent to Indian lands is included in computing the period within which, under the act of congress, they cannot be alienated or incumbered. *Taylor v. Brown*, 147 U. S. 640, 13 Sup. Ct. 549, 37 L. ed. 313; *Baker v. Hammett*, 23 Okla. 480, 100 Pac. 1114.

93. *Kahlo v. Kahlo*, 204 Ill. App. 409.

[a] One who marries on June 6, 1914, after being divorced on June 6, 1913, infringes the statutory prohibition against remarriage "within one year from the time" a decree of divorce from a prior marriage is granted. *Kahlo v. Kahlo*, 204 Ill. App. 409.

94. *Miss.*—*Hattiesburg Grocery Co. v. Tompkins*, 111 Miss. 592, 71 So. 866. *N. C.*—*Jenkins v. Griffin*, 175 N. C. 184, 95 S. E. 166. *Okla.*—*First Nat.*

ings and other matters set forth in the note below.<sup>95</sup>

**3. Last Day Sunday or Holiday.**—a. *In General.*—Sundays and certain holidays are recognized as non-judicial days,<sup>96</sup> and it is the general rule, made so by statute in many states that when the last day<sup>97</sup>

*Bank v. Drew*, 169 Pac. 1092.

[a] **The day on which the action accrued is excluded** in determining whether an action is barred under the statute of limitations. **Cal.**—First Nat. Bank of Long Beach *v.* Ziegler, 24 Cal. App. 503, 141 Pac. 938. **Conn.** Blackman *v.* Nearing, 43 Conn. 56, 21 Am. Rep. 634. **D. C.**—Ambrose *v.* Brown, 42 App. Cas. 25. **Minn.**—Haack *v.* Coughlan, 134 Minn. 78, 158 N. W. 908. **N. Y.**—Cornell *v.* Moulton, 3 Denio 12.

[b] **A sale under a mortgage** made April 14, 1916, was executed within ten years as required by statute, where the last payment on the mortgage was made April 14, 1906. *Jenkins v. Griffin*, 175 N. C. 184, 95 S. E. 166.

[c] **Action on Judgment.**—Though no statutory rule of computation exists on the subject, the first day will be excluded and the last included in computing the seven year period of limitations within which actions on judgments must be brought. *Hattiesburg Grocery Co. v. Tompkins*, 111 Miss. 592, 71 So. 866.

[d] **Within Two Years From the Usurious Transaction.**—An action commenced on the 2d day of March, 1916, to recover usurious interest paid on the 2d day of March, 1914, is commenced within the two year period prescribed by statute. *First Nat. Bank v. Drew (Okla.)*, 169 Pac. 1092.

95. See *infra*, this note.

[a] **Period for Naturalization.**—*In re Babjak*, 211 Fed. 551.

[b] **Sale of Decedent's Lands Upon Execution.**—Where the law allows the lands of a deceased debtor to be sold under execution after the expiration of a certain number of months from the date of letters of administration upon his estate, the day on which the letters of administration are taken out is included in computing the time so specified. *Griffith v. Bogert*, 18 How. (U. S.) 158, 15 L. ed. 307.

96. See the title "Sundays and Holidays."

**97. U. S.**—*Monroe Cattle Co. v. Becker*, 147 U. S. 47, 13 Sup. Ct. 217, 37 L. ed. 72; *Siegelschiffer v. Penn Mut. Life Ins. Co.*, 248 Fed. 226, 160 C. C. A. 304. **Ariz.**—*Pemberton v. Duryea*, 5 Ariz. 8, 43 Pac. 220. **Conn.** *Sands v. Lyon*, 18 Conn. 18; *Pickett v. Allen*, 10 Conn. 146. **Fla.**—*Bacon v. State*, 22 Fla. 46. **Ga.**—*Morgan v. Perkins*, 94 Ga. 353, 21 S. E. 574; *Charleston & W. C. Ry. Co. v. Cotton Seed Oil Co.*, 22 Ga. App. 337, 96 S. E. 586. **Ill.**—*Prior v. People*, 107 Ill. 628; *Dierssen v. Williamsburg City Fire Ins. Co.*, 204 Ill. App. 240. **Ind.**—*Close v. Twibell*, 47 Ind. App. 290, 92 N. E. 377. **Ia.**—*Romayne v. Hawkeye Commercial Men's Assn.*, 135 N. W. 735; *Conklin v. Marshalltown*, 66 Iowa 122, 23 N. W. 294; *Robinson v. Foster*, 12 Iowa 186. **Kan.**—*Lightner v. Prudential Ins. Co.*, 97 Kan. 97, 154 Pac. 227. **Me.**—*Cressey v. Parks*, 75 Me. 387, 46 Am. Rep. 406. **Minn.**—*Budds v. Frey*, 104 Minn. 481, 117 N. W. 158; *Northwestern Guaranty Loan Co. v. Channell*, 53 Minn. 269, 55 N. W. 121; *Spencer v. Haug*, 45 Minn. 231, 47 N. W. 794. **Mo.**—*Keys v. Keys' Est.*, 217 Mo. 48, 116 S. W. 537. **Mont.**—*Kelly v. Independent Pub. Co.*, 45 Mont. 127, 122 Pac. 735, 38 L. R. A. (N. S.) 1160; *Schnepel v. Mellen*, 3 Mont. 118. **Neb.** *Deere, Wells & Co. v. Hodges*, 59 Neb. 288, 80 N. W. 897. **N. J.**—*Bohles v. Prudential Ins. Co.*, 83 N. J. L. 246, 83 Atl. 904. **N. Y.**—*Ryer v. Prudential Ins. Co.*, 185 N. Y. 6, 77 N. E. 727; *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565; *Gilbert v. Johnson*, 169 App. Div. 840, 155 N. Y. Supp. 687; *Anonymous*, 2 Hill 375; *Cock v. Bunn*, 6 Johns. 326; *Borst v. Griffin*, 5 Wend. 84. **N. D.**—*Styles v. Dickey*, 22 N. D. 515, 134 N. W. 702. **Okla.**—*Grant v. Creed*, 35 Okla. 190, 128 Pac. 511. **Ore.**—*Cauldwell v. Bingham & S. Co.*, 84 Ore. 257, 155 Pac. 190, 163 Pac. 827. **Pa.**—*Edmundson v. Wragg*, 104 Pa. 500, 49 Am. Rep. 590. **R. I.**—*Barnes v. Eddy*, 12 R. I. 25. **S. D.**—*Dobson v. Lindekugel*, 39 S. D. 374, 164 N. W. 269.

for doing an act falls on Sunday, or a non-judicial holiday,<sup>98</sup> that day is excluded and the act may be lawfully done on the following day and if that day is also a non-judicial day then on the next business day thereafter.<sup>99</sup> In some jurisdictions, the rule is not applicable to the computation of time fixed by statute unless the statute itself so provides.<sup>1</sup> Sunday is thus excluded only where it is the last day of a prescribed period and not where it is one of the intermediate days,<sup>2</sup> unless the time limited is less than a week.<sup>3</sup> It has been held, moreover, that the rule of exclusion does not apply where the last day is expressed,<sup>4</sup> or where the period designated is more than seven days,<sup>5</sup>

[a] At common law, when Sunday is the last day of the time within which an act is to be performed under a contract it is excluded and performance on Monday is allowed. *Mass.* Hammond v. American Mutual Life Ins. Co., 10 Gray 306. *N. Y.*—Salter v. Burt, 20 Wend. 205, 32 Am. Dec. 530. *Eng.*—Harbord v. Perigal, 5 T. R. 210, 101 Eng. Reprint 118; Solomons v. Freeman, 4 T. R. 557, 100 Eng. Reprint 1174; Lee v. Carlton, 3 T. R. 642, 100 Eng. Reprint 779.

[b] Congress (1) has made such provision only as to certain proceedings and this is indicative of its intention to limit the rule to proceedings thus specified (*Meyer v. Hot Springs Imp. Co.*, 169 Fed. 628, 95 C. C. A. 156; *Johnson v. Meyers*, 54 Fed. 417, 4 C. C. A. 399), thus (2) the law regulating bankruptcy proceedings, congress has provided that in the computation of time limited by such laws, or by orders of court thereunder the last day shall be excluded when such day falls on Sunday, Christmas, etc. Rev. St. U. S., sec. 5013, but this act has no application to the computation of time in proceedings generally. *Johnson v. Meyers*, 54 Fed. 417, 4 C. C. A. 399; *Shefer v. Magone*, 47 Fed. 872.

[c] "A power that may be exercised up to and including a given day of the month may generally, when that day happens to be Sunday, be exercised on the succeeding day." *Street v. United States*, 133 U. S. 299, 10 Sup. Ct. 309, 33 L. ed. 631.

98. *Cal.*—*In re Rose's Est.*, 63 Cal. 346. *Idaho.*—*Seawell v. Gifford*, 22 Idaho 295, 125 Pac. 182, Ann. Cas. 1914A, 1132. *Mont.*—*Kelly v. Independent Pub. Co.*, 45 Mont. 127, 122 Pac. 735, 38 L. R. A. (N. S.) 1160. *Neb.*—*Ostertag v. Galbraith*, 23 Neb. 730, 37 N. W. 637. *N. J.*—*Feuchtwanger v. McCool*, 29 N. J. Eq. 151.

*W. Va.*—*Bennett v. Farmers' Mut. Ins. Assn.*, 78 W. Va. 654, 90 S. E. 169.

99. *Budds v. Frey*, 104 Minn. 481, 117 N. W. 158.

1. *Meyer v. Hot Springs Imp. Co.*, 169 Fed. 628, 95 C. C. A. 156; *Johnson v. Meyers*, 54 Fed. 417, 4 C. C. A. 399; *Shefer v. Magone*, 47 Fed. 872; *Pearpoint v. Graham*, 4 Wash. C. C. 232, 19 Fed. Cas. No. 10,877. *Mass.* *Haley v. Young*, 134 Mass. 364. *Mich.* *Drake v. Andrews*, 2 Mich. 203. *N. Y.* *Ex parte Dodge*, 7 Cow. 147. *Tex.* *Burr v. Lewis*, 6 Tex. 76.

2. *Prior v. People*, 107 Ill. 623; *Robinson v. Foster*, 12 Iowa 186.

3. *Mass.*—*Alderman v. Phelps*, 15 Mass. 225; *Thayer v. Felt*, 4 Pick. 354. *N. Y.*—Anonymous, 2 Hill 375. *Eng.* *Wathen v. Beaumont*, 11 East 271, 103 Eng. Reprint 1008; *Asmole v. Goodwin*, 2 Salk. 624, 91 Eng. Reprint 528.

4. *Northwestern Guaranty Loan Co. v. Channell*, 53 Minn. 269, 55 N. W. 121.

[a] Thus where arbitrators were to report their award before the 10th day of July, 1892, that day was not to be excluded because it is Sunday; consequently an award filed July 11th was too late. *Northwestern Guaranty Loan Co. v. Channell*, 53 Minn. 269, 55 N. W. 121.

5. *Siegelschiffer v. Penn Mut. Life Ins. Co.*, 248 Fed. 226, 160 C. C. A. 304; *Meyer v. Hot Springs Imp. Co.*, 169 Fed. 628, 95 C. C. A. 156; *Johnson v. Meyers*, 54 Fed. 417, 4 C. C. A. 399; *Shefer v. Magone*, 47 Fed. 872; Anonymous, 2 Hill (N. Y.) 375.

[a] "The theory is (1) that, when the period within which an act is to be done is less than seven days, there is reason to think that judicial days are intended, and that Sunday following within such time should be ex-



as for example a period of months<sup>6</sup> or years.<sup>7</sup>

b. *Applications of Rule.*—The rule excluding Sunday or other non-judicial day, where it is the last day has been applied to the giving of notice,<sup>8</sup> service of process,<sup>9</sup> filing of pleadings,<sup>10</sup> taking steps to perfect a review,<sup>11</sup> and other matters of procedure.<sup>12</sup>

cluded, but that, where the time limited is such that one or more Sundays must fall within it, the court should not extend the time fixed by excluding the last, the first, or any intermediate Sunday. There are Sundays in every month, and they are as much a part of the month as Saturdays, and there is no more reason for excluding the last Sunday than the intervening Sundays, and if the intervening Sundays were to be excluded we should extend thereby the time limited another month." *Siegelschiffer v. Penn Mut. Life Ins. Co.*, 248 Fed. 226, 160 C. C. A. 304. (2) Unless the time is fixed by rule of court. *Anonymous*, 2 Hill (N. Y.) 375.

6. *Siegelschiffer v. Penn Mut. Life Ins. Co.*, 248 Fed. 226, 160 C. C. A. 304; *Meyer v. Hot Springs Imp. Co.*, 169 Fed. 628, 95 C. C. A. 156; *Johnson v. Meyers*, 54 Fed. 417, 4 C. C. A. 399; *Shefer v. Magone*, 47 Fed. 872; *Ryer v. Prudential Ins. Co.*, 185 N. Y. 6, 77 N. E. 727.

[a] *Time for Appeal.*—When the last day of the six months within which an appeal may be taken or writ of error sued out falls on Sunday, the appeal cannot be taken or the writ sued out on the Monday following. *Siegelschiffer v. Penn Mut. Life Ins. Co.*, 248 Fed. 226, 160 C. C. A. 304; *Meyer v. Hot Springs Imp. Co.*, 169 Fed. 628, 95 C. C. A. 156; *Johnson v. Meyers*, 54 Fed. 417, 4 C. C. A. 399.

[b] *Redemption From Sheriff's Sale.* When the last day of the fifteen months within which a creditor may redeem from a sheriff's sale falls on Sunday, redemption cannot be made on Monday. *Porter v. Pierce*, 120 N. Y. 217, 24 N. E. 281, 7 L. R. A. 847.

7. *Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565.

8. *Cal.*—*Alameda Macadamizing Co. v. Huff*, 57 Cal. 331. *Ill.*—*Dierssen v. Williamsburg City Fire Ins. Co.*, 204 Ill. App. 240. *Ia.*—*Holbrook v. Mill*

*Owners' Mut. Ins. Co.*, 86 Iowa 255, 53 N. W. 229. *Mo.*—*Webb v. Strobach*, 143 Mo. App. 459, 127 S. W. 680.

[a] *Notice of an Election Contest.* *Dobson v. Lindekugel*, 39 S. D. 374, 164 N. W. 269.

[b] *Notice of a Retainer.*—*Gilbert v. Johnson*, 169 App. Div. 840, 155 N. Y. Supp. 687.

[c] *Not to notice of trial by jury.* *Central Bank v. Alden*, 41 How. Pr. (N. Y.) 102.

9. See the title "*Service of Process and Papers*," and see 18 STANDARD PROC. 595.

10. *Cal.*—*Crane v. Crane*, 121 Cal. 99, 53 Pac. 433; *Muir v. Galloway*, 61 Cal. 498. *Colo.*—*Brown v. Vailes*, 14 L. R. A. 120. *Ia.*—*Romayne v. Hawkeye Commercial Men's Assn.*, 135 N. W. 735. *La.*—*Catherwood & Co. v. Shepard*, 30 La. Ann. 677. *Mont.*—*Kelly v. Independent Pub. Co.*, 45 Mont. 127, 122 Pac. 735, Ann. Cas. 1913D, 1063, 38 L. R. A. (N. S.) 1160. *N. Y.*—*Borst v. Griffin*, 5 Wend. 84.

See the title "*Time To Plead.*"

11. *Taking and perfecting appeal*, see 2 STANDARD PROC. 308.

*Settling bills of exceptions*, see 4 STANDARD PROC. 338.

*Filing bonds or undertakings on review*, see the title "*Undertakings.*"

12. See *infra*, this note.

*Issuance of execution*, 15 STANDARD PROC. 756.

*Entry of judgment in justice's court*, see 18 STANDARD PROC. 98, note 81 [c].

[a] *Putting in Special Bail.*—*Clink v. Muskegon Cir. Judge*, 58 Mich. 242, 25 N. W. 175.

[b] *Reviving Judgment.*—*In re Lutz's Appeal*, 124 Pa. 273, 16 Atl. 858.

[c] *Redemption From Judicial Sale.* *Ind.*—*Backer v. Pyne*, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231. *Kan.*—*English v. Williamson*, 34 Kan. 212, 8 Pac. 214. *N. Y.*—*Porter v. Pierce*, 120 N. Y. 217, 24 N. E. 281, 7 L. R. A. 847. *N. D.*—*Styles v. Dickey*, 22 N. D. 515, 134 N. W. 702.

# TIME TO PLEAD

By the Editorial Staff.

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## CROSS-REFERENCES:

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Amendment as of course before expiration of time for answering, see 1 STANDARD PROC. 858.

As to right to plead over after demurrer overruled, see 6 STANDARD PROC. 1001.

What is a pleading within the statutes limiting time to plead, see 14 STANDARD PROC. 872 and 877, and 2 STANDARD PROC. 13.

When want of jurisdiction may be pleaded, see 17 STANDARD PROC. 910.

Pleading of statute of limitations after expiration of time to plead, see 18 STANDARD PROC. 1042.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. GENERALLY.**—The time in which to plead is generally governed by statute,<sup>1</sup> or rule of court.<sup>2</sup> Where the statute is silent, the matter rests in the court's discretion.<sup>3</sup> On failure to plead in time, the plaintiff may be nonprossed, or nonsuited,<sup>4</sup> and a default judgment may be rendered against the defendant,<sup>5</sup> provided, in some jurisdictions, that he has not actually pleaded before the default proceedings.<sup>6</sup> Where an action is begun by process the plaintiff has a limited

1. See the statutes and following cases: *Mich.*—Hake *v.* Grove, 99 Mich. 216, 58 N. W. 62. *Miss.*—Pool *v.* Hill, 44 Miss. 306. *Mo.*—Berglar *v.* University City (Mo. App.), 190 S. W. 620. *W. Va.* Snider *v.* Cochran, 80 W. Va. 252, 92 S. E. 347.

Answer, see 2 STANDARD PROC. 12.

Plea in abatement, see 1 STANDARD PROC. 52; 3 STANDARD PROC. 798.

Cross-bill, see 6 STANDARD PROC. 280.

Demurrer, see 6 STANDARD PROC. 860; to indictment, see 12 STANDARD PROC. 653.

In election contests, see 8 STANDARD PROC. 76.

In the justice's court, see 18 STANDARD PROC. 36.

Pleading statute of limitations after expiration of, see 18 STANDARD PROC. 1043.

[a] Under statute authorizing a replication at any time before trial, a replication may be filed after one trial at which the jury disagreed and before another trial. *Burke v. Miller*, 4 Gray (Mass.) 114.

2. See the rules of court.

Plea in abatement, see 1 STANDARD PROC. 58.

3. *Van Allen v. Atchison*, Colorado & P. R. Co., 1 McCrary (U. S.) 598, 3 Fed. 545; *Schultz v. McLean*, 109 Cal. 437, 42 Pac. 557.

4. See 7 STANDARD PROC. 44. And see *infra*, III.

5. See the title "Default," and 14 STANDARD PROC. 854.

In admiralty, see 1 STANDARD PROC. 463.

6. See *infra*, II.



time thereafter in which to file his pleading.<sup>7</sup> But where suit is commenced by filing of a complaint, it must be filed before process can issue.<sup>8</sup> An answer before the filing of a complaint is irregular.<sup>9</sup> Upon the opening of a default the court should fix a reasonable time to plead.<sup>10</sup>

**II. PLEADING OUT OF TIME AND WAIVER.**—A failure to plead within the time prescribed, is not an absolute forfeiture of the right to plead further, as the pleading may still be filed by leave of court.<sup>11</sup> Some courts hold that a party has no right to plead after expiration of the time therefor, without leave, and that a pleading so filed is a nullity and may be disregarded.<sup>12</sup> In a number of jurisdictions, however, the defendant has a right to plead at any time before

7. **Ill.**—*English v. Wilkins*, 163 Ill. 542, 45 N. E. 287. The declaration must be filed before the next term of court, after the term to which the process which becomes effective by service is returnable. **Ia.**—*Clark v. Stevens*, 55 Iowa 361, 7 N. W. 591, if the petition be not filed by the date fixed in the notice and ten days before the term, the action is deemed discontinued. An order of court is not required. See *Anderson v. Kerr*, 10 Iowa 236. **Mich.**—*Reid, Murdock & Co. v. Benzie Circ. Judge*, 115 Mich. 418, 73 N. W. 391, he may file the declaration at any time before end of next term after the return of the writ.

[a] **Before return day of writ**, declaration cannot be served. *Brown v. Daws*, 23 N. J. L. 483.

[b] **Until personal service or appearance**, the plaintiff need not declare. *Hiles v. McFarland*, 3 Pinn. (Wis.) 365, 4 Chand. 89.

[c] **At common law**, the declaration must be filed within one year after the return of the writ; but the plaintiff may be nonprossed if he does not deliver it within two terms. *Wolf v. Watson Stillman Co.*, 79 N. J. L. 284, 75 Atl. 436. See *infra*, III.

[d] **Demand of Complaint.**—(1) In some states, the complaint, if not served with the summons, must be served within twenty days after a written demand therefor made within twenty days of summons served. *Martin v. McCurdy*, 120 App. Div. 665, 105 N. Y. Supp. 474; *Pritchard v. Huntington*, 16 Wis. 569. (2) A copy included with the attachment papers is not a compliance. *Crouse v. Reichert*, 61 Hun 46, 15 N. Y. Supp. 369, 21 Civ. Proc. 39, 39 N. Y. St. 832.

[e] **Court cannot compel plaintiff**

to file pleading. *Rodesch v. Estey*, 71 Ill. App. 482.

8. See 8 STANDARD PROC. 978; 21 STANDARD PROC. 698.

9. **Ill.**—*Rodesch v. Estey*, 71 Ill. App. 482. **Md.**—*Newcomer v. Keedy*, 9 Gill 263. **N. Y.**—*Philips v. Prescott*, 9 How. Pr. 430. **Wis.**—*Pritchard v. Huntington*, 16 Wis. 569.

[a] **But failure to return the copy** cures the defect. *Pritchard v. Huntington*, 16 Wis. 569.

10. See 15 STANDARD PROC. 247.

**Irregular default as extension of time to plead**, see *infra*, VIII.

11. **Ala.**—*United States Rolling Stock Co. v. Weir*, 96 Ala. 396, 11 So. 436. **Ill.**—*Flanders v. Whittaker*, 13 Ill. 707. **Ky.**—*Williams v. Pidgeon*, 5 Ky. L. Rep. 517. **Miss.**—*Wright v. Alexander*, 11 Smed. & M. 411.

See *infra*, VI.

[a] **Statute Is Directory.**—*Lynde v. Verity*, 3 How. Pr. (N. Y.) 350, 1 Code Rep. 97.

[b] **After motion for default**, it is too late to plead except by leave of court. *Chicago Stamp Co. v. Mechanical Rubber Co.*, 83 Ill. App. 230.

12. **N. J.**—*State v. Vanderveer*, 7 N. J. L. 38, 39. **N. Y.**—*Mandeville v. Winne*, 5 How. Pr. 461, 1 Code Rep. (N. S.) 161, holding the answer to be filed out of time, but as the defendant swears to the merits, the default judgment will be set aside and leave to answer granted. **Okla.**—*State Nat. Bank v. Lowenstein*, 155 Pac. 1127.

[a] **Complaint served while plaintiff is in default is without effect.** *McKay v. Foster*, 179 App. Div. 303, 166 N. Y. Supp. 331.

[b] **Demurrer to complaint filed out of time may be disregarded.** **Ala.**—*Sparks v. Reeves & Co.*, 165 Ala. 352,

the entry of default, although the time to plead has expired, at least the filing is not a nullity and the pleading cannot be disregarded,<sup>13</sup> although it has been held it may be stricken out.<sup>14</sup> But when the state of the pleadings is such that no default is necessary, a pleading filed out of time may be disregarded.<sup>15</sup>

**Filing a pleading after default entered** does not affect the default,<sup>16</sup> though the default may be waived.<sup>17</sup>

**Waiver.** — By failing to object to a pleading filed out of time, the party waives his objections thereto.<sup>18</sup> And even after default entered, the plaintiff by his conduct, as by an acceptance of service of a pleading, may waive the default.<sup>19</sup>

**III. RULE TO PLEAD.** — At common law and in some jurisdictions either party may obtain a rule on the other party to declare, plead, reply, rejoin, etc., by a specified time. And on noncompliance with the rule,<sup>20</sup> a judgment of non prosecutur or default may be en-

51 So. 574. **Ill.**—*Flanders v. Whitaker*, 13 Ill. 707. **Md.**—*Betz v. Welty & Co.*, 116 Md. 190, 81 Atl. 382.

[c] **Additional pleas filed out of time** without leave of court may be disregarded, although they may recite that leave had been permitted. *Wright v. Alexander*, 11 Smed. & M. (Miss.) 411.

13. **Ala.**—*Craig & Co. v. Pierson Lumb. Co.*, 179 Ala. 535, 60 So. 838. **Cal.**—*Acock v. Halsey*, 90 Cal. 215, 27 Pac. 193; *Bowers v. Dickerson*, 18 Cal. 420; *Lunnun v. Morris*, 7 Cal. App. 710, 95 Pac. 907. **Colo.**—See *Sieber v. Frink*, 7 Colo. 148, 2 Pac. 901. **D. C.** *Banville v. Sullivan*, 11 App. Cas. 23, 31. **Ga.**—*Hall v. Tiedeman*, 141 Ga. 602, 81 S. E. 868; *Albany P. P. Co. v. Hercules Mfg. Co.*, 123 Ga. 270, 51 S. E. 297. **Ia.**—*Redfield v. Miller*, 59 Iowa 393, 13 N. W. 334. **P. R.**—*Juncos Central Co. v. Rodriguez*, 16 Porto Rico 286. **Tex.**—*Jefferson v. Jones*, 74 Tex. 635, 12 S. W. 749. **Wis.**—*Maxwell v. Jarvis*, 14 Wis. 506; *Pett v. Clark*, 5 Wis. 198.

[a] **At common law**, this was the rule. See *Banville v. Sullivan*, 11 App. Cas. (D. C.) 23, 31.

**Default judgment** cannot be entered. See 14 STANDARD PROC. 875.

14. See the title "**Striking Out and Withdrawal**," and 8 STANDARD PROC. 979.

15. *Rhoads v. Gatlin*, 2 Colo. App. 96, 29 Pac. 1019.

[a] **A demurrer to an answer** after expiration of time to plead does not prevent judgment on the pleadings.

*Rhoads v. Gatlin*, 2 Colo. App. 96, 29 Pac. 1019.

16. See 14 STANDARD PROC. 876, note 87.

17. See *infra*, this section.

18. *Sawtelle v. Muncy*, 116 Cal. 435, 48 Pac. 387; *Luke v. Johnncake*, 9 Kan. 511; *Osgood v. Haverty*, McCahon (Kan.) 182.

19. **Cal.**—*Madison v. Octave Oil Co.*, 154 Cal. 768, 99 Pac. 176; *Sawtelle v. Muncy*, 116 Cal. 435, 48 Pac. 387; *Hestres v. Clements*, 21 Cal. 425. **Ia.** *Jones v. Jones*, 13 Iowa 276. **Mich.** *Gillett v. Arnt*, 1 Mich. N. P. 22.

[a] **By failing to raise objections** to pleadings filed subsequent to entry of default, and by going to trial on the merits, the default is waived. *Sawtelle v. Muncy*, 116 Cal. 435, 48 Pac. 387.

20. **Ill.**—*Moody v. Thomas*, 79 Ill. 274; *Pratt v. Grimes*, 35 Ill. 164. **Ind.** *Buchanan v. Berkshire L. Ins. Co.*, 96 Ind. 510; *Jelley v. Gaff*, 56 Ind. 331. **Ky.**—*Campbell v. Adams*, Ky. Dec. 16. But see *Wallace v. Henderson*, Ky. Dec. 34. **Md.**—*Wilkin Mfg. Co. v. Melvin*, 116 Md. 97, 81 Atl. 879; *Marsh v. Johns*, 49 Md. 569; *Newcomer v. Keedy*, 9 Gill 263. **N. H.**—*Colby v. Knapp*, 13 N. H. 175. **W. Va.**—*United States O. & Gas W. Sup. Co. v. Gartlan*, 58 W. Va. 267, 52 S. E. 524 (the defendant may appear and give a rule to declare); *Moore v. Smith*, 26 W. Va. 379; *Manufacturers' & F. Bank v. Mathews*, 3 W. Va. 26.

See 1 Tidd Pr. 452, 456, 483, 675.

tered, unless the court, for good cause shown, shall enlarge the rule.<sup>21</sup> But this practice does not obtain in many states.<sup>22</sup> In some states, actions may be commenced by filing a declaration to which is attached or on which is endorsed a rule to plead within a limited time.<sup>23</sup>

Unless otherwise provided by statute or rule of court,<sup>24</sup> orders or rules to plead are procured upon the motion of the party desiring pleadings from the adverse party,<sup>25</sup> and are sometimes required to be served on the adverse party or his attorney.<sup>26</sup> If not served before the ensuing term, they must be renewed from term to term until served.<sup>27</sup>

**Before default judgment,** see 14 STANDARD PROC. 881, note 10.

**Special appearance does not dispense with rule to plead,** 2 STANDARD PROC. 521.

[a] **A party can never be in default of a pleading, until the rule to plead is laid or at least supposed to be laid.** *Newcomer v. Keedy*, 9 Gill (Md.) 263.

[b] **If the plaintiff do not declare in due time,** the defendant may enter a rule to declare and demand a declaration. The plaintiff is not allowed any longer time to declare, without leave, than the time allowed by the defendant's rule. And if he do not declare before the rule is out, the defendant may, at any time before the essoinday of the next term, sign a nonpros, but not afterwards. The demand of declaration must be in writing. 1 Tidd. Pr. 458.

[c] **Rule for Reply.**—When the defendant has put in an affirmative answer containing matter of avoidance, he is entitled to his rule for a reply, and on failure to comply therewith, he may take judgment. *Buchanan v. Berkshire L. Ins. Co.*, 96 Ind. 510; *Preston v. Sandford's Admr.*, 21 Ind. 156.

[d] **In New York,** (1) where the answer sets up a defense by way of avoidance, the court may, on defendant's application, direct the plaintiff to reply. *Barkenthien v. People*, 212 N. Y. 36, 46, 105 N. E. 808; *Freeland v. Marvin*, 1 How. Pr. (N. Y.) 131. (2) This matter rests in the court's discretion. *Columbus Hocking Valley & T. R. Co. v. Ellis*, 11 N. Y. Supp. 768, 25 Abb. N. C. 150, 19 Civ. Proc. 66; *Scotfield v. Demorest*, 55 Hun 254, 7 N. Y. Supp. 832, 27 N. Y. St. 898.

[e] **A scire facias** is a declaration for the purpose of pleas, and rules to plead thereto may be entered. *Wilkin*

*Mfg. Co. v. Melvin*, 116 Md. 97, 81 Atl. 879. See the title "**Scire Facias**."

21. *Wilkin Mfg. Co. v. Melvin*, 116 Md. 97, 81 Atl. 879; *Marsh v. Johns*, 49 Md. 569.

22. *King v. Gardner*, 25 Colo. 395, 55 Pac. 727, under the codes. See *Hower v. Bennett*, 15 Pa. Co. Ct. 530.

[a] **An Order To Plead Will Be Disregarded.**—*King v. Gardner*, 25 Colo. 395, 55 Pac. 727.

23. See the statutes and *Campbell v. Wayne Circ. Judge*, 111 Mich. 247, 69 N. W. 514.

[a] **Rule should be entitled in the names of all the defendants.** *Campbell v. Wayne Circ. Judge*, 111 Mich. 247, 69 N. W. 514; *Ralston v. Chapin*, 49 Mich. 274, 13 N. W. 588.

24. See the statutes and rules of court.

[a] **In Maryland,** the clerk enters the rules to declare or plead as of course, when the defendant has been returned "summoned" and when a declaration is filed before the return day in the summons or notice. See *Wilkin Mfg. Co. v. Melvin*, 116 Md. 97, 81 Atl. 879; *Acklen v. Fink*, 95 Md. 655, 53 Atl. 423.

25. *Buchanan v. Berkshire L. Ins. Co.*, 96 Ind. 510, 517. See *Wilkin Mfg. Co. v. Melvin*, 116 Md. 97, 81 Atl. 879, and 1 Tidd Pr. 458, 483.

**Form of notices to declare, to plead, reply, rejoin and surrejoin,** see 9 STANDARD PROC. 1204.

26. — *v. Dill*, 6 N. J. L. 168. Compare 1 Tidd Pr. 483, otherwise at common law.

[a] **Even though he is in court when the rule is taken.** — *v. Dill*, 6 N. J. L. 168.

27. *Halsey v. Miller*, 16 N. J. L. 63; *Sassenburgh v. Shaver*, 7 N. J. L. 170. See *Koon v. Moore*, 19 Wend. (N. Y.) 95.

[a] **Service of expired rule is nuga-**



**IV. ABRIDGMENT OF TIME TO PLEAD.**<sup>28</sup> — The court cannot shorten the time to plead allowed by statute.<sup>29</sup> But as the time to plead is for the benefit of the pleader, he may waive that benefit and consent to judgment before expiration of the time.<sup>30</sup> The entry of an appearance does not limit the time to plead.<sup>31</sup>

**V. IMPARLANCE.** — An imparlance is time given to plead, under the common law practice.<sup>32</sup> But in modern practice time for pleading is in most cases allowed according to rules of practice without the formality of an imparlance.<sup>33</sup>

**VI. EXTENSION OF TIME TO PLEAD.** — A. **GENERALLY.**<sup>34</sup> Time to plead may be extended by order of court or judge<sup>35</sup> by virtue

tory. *Sassenburgh v. Shaver*, 7 N. J. L. 170.

28. As to validity of process requiring defendant to plead in less than the statutory time, see 21 STANDARD PROC. 728.

29. *White v. Reagan*, 25 Ark. 622.

As to answer, see 2 STANDARD PROC. 13 and 15.

Interstate commerce commission shortening time for answer, see 14 STANDARD PROC. 258.

"Short" summons, see 21 STANDARD PROC. 730.

Time to plead to amended pleading, see *infra*, VII.

30. See 14 STANDARD PROC. 882 (note 12), 920.

31. *Colby v. Knapp*, 13 N. H. 175.

32. *Colby v. Knapp*, 13 N. H. 175.

[a] It is an allowance to either party of time to answer his adversary, but usually it is time allowed to the defendant. *Will's Gould Pl.* 73.

[b] A general imparlance (1) is a prayer for time to plead without reserving special exceptions. *Colby v. Knapp*, 13 N. H. 175; *Mack v. Lewis*, 67 Vt. 383, 31 Atl. 888. Compare *Otis v. Ellis*, 78 Me. 75, 2 Atl. 851. (2) This is always to another term. 1 Tidd Pr. 462.

[c] A special imparlance is a prayer for time to plead reserving special exceptions. *Colby v. Knapp*, 13 N. H. 175.

[d] A general special imparlance is one with a saving of all exceptions whatsoever. 1 Tidd Pr. 462.

No plea in abatement after general imparlance, see 1 STANDARD PROC. 60.

[e] Proceedings are continued by imparlance after declaration and before issue joined. 1 Tidd Pr. 678.

Forms of Imparlance.—See 9 STANDARD PROC. 1204.

33. *Deane v. Echols*, 2 App. Cas. (D. C.) 522; *Will's Gould Pl.* 74.

[a] The general rules fixing periods for the filing of pleas have taken the place of special leaves to plead. *Mack v. Lewis*, 67 Vt. 383, 31 Atl. 888.

[b] In District of Columbia, the practice is not now in force. *Deane v. Echols*, 2 App. Cas. (D. C.) 522, 530.

[c] In England, the practice of imparlance is abolished. See *Deane v. Echols*, 2 App. Cas. (D. C.) 522, 530.

34. As to imparlance, see *supra*, V.

Enlarging time to plead does not stay proceedings, see the title "Supersedeas and Stay of Proceedings."

35. U. S.—*In re Cooper Bros.*, 159 Fed. 956, 20 Am. Bankr. Rep. 392.

Ark.—*White v. Reagan*, 25 Ark. 622.

Ala.—*Hudson v. Wood*, 102 Ala. 631, 15 So. 356.

Ga.—*Chambless v. Livingston*, 123 Ga. 257, 51 S. E. 314.

Ill. *Bemis v. Homer*, 145 Ill. 567, 33 N. E. 869.

Ia.—*Newton v. White*, 42 Iowa 608.

Neb.—*Lichtenberger v. Worm*, 41 Neb. 856, 60 N. W. 93.

N. Y.—*Allen v. Ackley*, 4 How. Pr. 5, 2 Code Rep. 21; *Lynde v. Verity*, 3 How. Pr. 350, 1 Code Rep. 97.

Extending time for filing generally, see 8 STANDARD PROC. 979.

By interstate commerce commission, see 14 STANDARD PROC. 258.

May be granted at chambers, see 16 STANDARD PROC. 612.

[a] The recorder being vested with same power as a judge, may grant an extension of time. *Dutchess Cotton Mfg. Co. v. Davis*, 14 Johns. (N. Y.) 343.

[b] Whether a general rule extending the time to plead in all cases is within the power of the court is doubtful. *Fidelity Trust & S. V. Co. v. New-*

*port News & M. V. Co.*, 70 Fed. 403.

of its inherent powers,<sup>36</sup> or by stipulation of the parties,<sup>37</sup> or by certain proceedings in the action.<sup>38</sup> After receiving a bill of particulars<sup>39</sup> or giving oyer,<sup>40</sup> the defendant has the same time for pleading that he had at the time of demanding it. But an order staying proceedings,<sup>41</sup> or granting a continuance,<sup>42</sup> or an order requiring security for costs, or a motion therefor,<sup>43</sup> does not enlarge the time to plead. And the continuance of publication of summons beyond the required time does not extend the time to answer.<sup>44</sup>

B. AS AFFECTED BY CHARACTER OF PLEADING TO BE FILED.—The court may extend the time for filing any pleading, or allow it to be filed out of time, whether or not it is to the merits of the action.<sup>45</sup>

36. *Woodcock v. Merriman*, 122 N. C. 731, 30 S. E. 321; *Gilchrist v. Kitchen*, 86 N. C. 20.

[a] The power, as a part of the common law jurisdiction of the court, has been possessed and exercised from time immemorial. *Allen v. Ackley*, 4 How. Pr. (N. Y.) 5, 2 Code Rep. 21.

37. U. S.—*Hinman v. Barrett*, 244 Fed. 621; *Groton Bridge & M. Co. v. American Bridge Co.*, 137 Fed. 284, 297. Cal.—*Voorman v. Superior Court*, 149 Cal. 266, 86 Pac. 694. Conn.—*Goodrich v. Alfred*, 72 Conn. 257, 43 Atl. 1041. Mo.—*Owens v. Tinsley*, 21 Mo. 423. N. Y.—*Pattison v. O'Connor*, 23 Hun 307, 60 How. Pr. 141. Pa.—*Muir v. Preferred Acc. Ins. Co.*, 203 Pa. 338, 53 Atl. 158. Tex.—*Travelers' Ins. Co. v. Arant* (Tex. Civ. App.), 40 S. W. 853.

See generally the title "Stipulations."

[a] Stipulation (1) should be filed. *Blackwood v. Cutting Pack. Co.*, 71 Cal. 461, 12 Pac. 493. (2) Although not filed, the stipulation rebuts the imputation of negligence. *Crane v. Crane*, 121 Cal. 99, 53 Pac. 433.

Vacation of judgment taken in violation of, see 15 STANDARD PROC. 182.

38. See *infra*, this section.

Pendency of motions as extending the time to plead, see 14 STANDARD PROC. 877.

39. N. J.—Anonymous, 16 N. J. L. 346. Wash.—*Plummer v. Weil*, 15 Wash. 427, 46 Pac. 648. Eng.—*Mowbray v. Schuberth*, 13 East 508, 104 Eng. Reprint 468.

40. *Warren v. Camack*, 12 N. J. L. 178 (that is, if he had fifteen days to plead at the time he demanded oyer, he has fifteen days after oyer given. The time elapsing between the demand and the giving of oyer is not counted);

*Webber v. Austin*, 8 Durn. & East (Eng.) 356, this means as many pleading days.

*Compare McCormick v. Fullerton*, 2 How. Pr. (N. Y.) 159, holding that where a stipulation extending time is entered into, the craving of oyer does not extend the time.

41. See the title "Supersedeas and Stay of Proceedings."

[a] Whether a stay of proceedings prevents obtaining an extension of time, query. *Marks v. King*, 66 How. Pr. (N. Y.) 453, 13 Abb. N. C. 374.

42. *Beacham v. Kea*, 118 Ga. 406, 45 S. E. 398.

43. Idaho.—*Domer v. Stone*, 27 Idaho 279, 149 Pac. 505. Md.—*Wilkin Mfg. Co. v. Melvin*, 116 Md. 97, 81 Atl. 879. Mo.—*Fears v. Riley*, 148 Mo. 49, 49 S. W. 836. N. Y.—*Schwehm v. Hinberg*, 63 Misc. 525, 117 N. Y. Supp. 321. N. M.—*Pilant v. S. Hirsch & Co.*, 14 N. M. 11, 88 Pac. 1129. N. D.—*Naderhoff v. Benz & Sons*, 25 N. D. 165, 141 N. W. 501, 47 L. R. A. (N. S.) 853.

44. *Anderson v. Goff*, 72 Cal. 65, 13 Pac. 73, 1 Am. St. Rep. 34.

45. See *infra*, this note.

Pleas in abatement, see 1 STANDARD PROC. 59.

Demurrer, see 6 STANDARD PROC. 861.

[a] Answer setting up pleas of payment as well as statute of limitation. *Freeman v. Hill*, 45 Kan. 435, 25 Pac. 870. See *Dulle v. Lally*, 167 Ill. 485, 47 N. E. 753, denying application where excuse for delay was not shown.

[b] Replication.—*Geffinger v. Klewer*, 227 Ill. 598, 81 N. E. 712.

[c] Filing additional pleas (1) may be allowed. Ala.—*Steele v. Tutwiler*, 57 Ala. 113. See *Hightower v. Ogle-tree*, 114 Ala. 94, 21 So. 934. Ill. *Bemis v. Homer*, 145 Ill. 567, 33 N. E.

C. BY WHOM GRANTED. — Any judge of the court in which the action is pending may extend the time to plead.<sup>46</sup> Under some statutes, ex parte applications for extensions of time may be granted by other judges than that before whom the action is pending.<sup>47</sup>

D. WHEN APPLICATION MADE. — The time for making an application for leave to file a pleading out of time is sometimes limited by rule of court.<sup>48</sup> If the time to plead has not expired it may be extended, and if it has expired, leave to file the pleading out of time may be granted.<sup>49</sup>

E. PROCEEDINGS TO OBTAIN. — 1. **Generally.** — A compliance with any reasonable rule of court regulating the granting of extensions of time to plead is required.<sup>50</sup> If a default has been taken, it must be first set aside.<sup>51</sup> Statutes sometimes require the consent of the adverse party to an extension of time to plead beyond a certain time.<sup>52</sup>

2. **Motion and Affidavit.** — An extension of time to plead may be obtained by motion therefor,<sup>53</sup> supported by affidavit showing good cause,<sup>54</sup> and sometimes by an affidavit of merits.<sup>55</sup> When leave to file a certain pleading is asked, the pleading should accompany the notice of motion.<sup>56</sup> But when the parties are in court on the hearing of a motion for default, leave to answer may be given without a filing of a

869. **R. I.**—*Jodoin v. Archambault*, 35 R. I. 316, 86 Atl. 907. (2) Leave to file additional pleas tending to confusion and delay will be denied. *Hallberg v. Brosseau*, 64 Ill. App. 520.

[d] **Filing of an insufficient plea** will not be allowed. *Pennington v. Ware*, 16 Ark. 120.

46. *Lucke v. Kiernan*, 68 N. J. L. 281, 53 Atl. 566.

47. *Edwards v. Shreve*, 83 App. Div. 165, 82 N. Y. Supp. 514; *Crandall & Godley Co. v. Eddy Confectionery Co.*, 37 Misc. 745, 76 N. Y. Supp. 476, when notice is necessary, the rule is otherwise.

[a] **Unnecessary giving of notice** does not limit power of another judge to grant ex parte motion. *Crandall & Godley Co. v. Eddy Confectionery Co.*, 37 Misc. 745, 76 N. Y. Supp. 476.

48. *Rigdon v. Ferguson*, 172 Mo. 49, 72 S. W. 504, must be made before expiration of time for pleading.

49. *Price v. Hamilton*, 146 Ga. 705, 92 S. E. 62; *Mandeville v. Winne*, 5 How. Pr. (N. Y.) 461, 1 Code Rep. (N. S.) 161.

50. **Mo.**—*Rigdon v. Ferguson*, 172 Mo. 49, 72 S. W. 504. **N. Y.**—*Kinley v. American Hdw. Co.*, 49 Misc. 334, 99 N. Y. Supp. 199, 18 N. Y. Ann. Cas. 142. **S. C.**—*Gales v. Poe*, 107 S. C. 482, 93 S. E. 189.

51. See 2 STANDARD PROC. 16, and see generally 14 STANDARD PROC. 151.

52. Cal. Code Civ. Proc., §1054; *Kennedy v. Mulligan*, 136 Cal. 556, 69 Pac. 291.

53. *Trenton Mut. L. & F. Ins. Co. v. Hodges*, 24 N. J. L. 673.

54. **Ill.**—*Fisher v. Greene*, 95 Ill. 94. **N. J.**—*Trenton Mut. L. & F. Ins. Co. v. Hodges*, 24 N. J. L. 673. **N. Y.** *Condon v. Church of St. Augustine*, 14 Misc. 181, 35 N. Y. Supp. 382, 69 N. Y. St. 811. **S. C.**—*Fishburne v. Minott*, 72 S. C. 567, 52 S. E. 648. **Wis.**—*Wallace v. Wallace*, 13 Wis. 224.

**Form of affidavit**, see 9 STANDARD PROC. 1205.

[a] **Excuse for delay** to be shown. *Dulle v. Lally*, 167 Ill. 485, 47 N. E. 753.

55. See 1 STANDARD PROC. 654; 2 STANDARD PROC. 15.

[a] **May be dispensed with** in furtherance of justice. *Strauss v. Edelstein*, 48 App. Div. 553, 62 N. Y. Supp. 935.

56. **Ill.**—*Bemis v. Homer*, 145 Ill. 567, 572, 33 N. E. 869. **N. Y.**—*Stout v. White*, 154 App. Div. 921, 139 N. Y. Supp. 77; *Lynde v. Verity*, 3 How. Pr. 350, 1 Code Rep. 97. **S. D.**—*Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34, he must serve with his notice of motion an affidavit of merits with a copy of his proposed pleading.



motion and service of notice.<sup>57</sup>

**3. Notice.**<sup>58</sup>—A motion for an extension of time to plead may be made ex parte,<sup>59</sup> unless the statute or rule of court requires notice.<sup>60</sup> Under some codes, an order enlarging the time to plead when applied for before the expiration of the time may be had ex parte,<sup>61</sup> but is required to be on notice if applied for afterwards.<sup>62</sup>

**F. DETERMINATION AND ORDER.**—The granting or denial of the application for an extension of time or leave to plead out of time is within the discretion of the court or judge.<sup>63</sup> Reasonable terms may

57. *McDermett v. Rosenbaum*, 13 Colo. App. 444, 58 Pac. 880.

58. **Form of notice of motion**, see 9 STANDARD PROC. 1205.

59. *Bemis v. Homer*, 145 Ill. 567, 33 N. E. 869; *State v. Coughran*, 19 S. D. 271, 278, 103 N. W. 31.

[a] **But in vacation**, notice should be given of application to file additional pleas. *Norfolk & W. R. Co. v. Coffey*, 104 Va. 665, 51 S. E. 729, 52 S. E. 367.

[b] **The defendant may come in afterwards and show that the order should not have been made**, when it is granted ex parte. *Bemis v. Homer*, 145 Ill. 567, 33 N. E. 869.

[c] **Statutes relating to stay of proceedings and amendment of proceedings do not apply.** *Condon v. Church of St. Augustine*, 14 Misc. 181, 35 N. Y. Supp. 382, 69 N. Y. St. 811.

60. **U. S.**—*Groton Bridge & M. Co. v. American Bridge Co.*, 137 Fed. 284, 296, under the New York rule. **N. J.** *Trenton Mut. L. & F. Ins. Co. v. Hodges*, 24 N. J. L. 673, it is a special motion requiring two days' notice. **N. Y.**—*Tuska v. Heller, Hirsch & Co.*, 140 App. Div. 323, 125 N. Y. Supp. 182, two days' notice must be given where an extension has already been had.

61. *Wileox & Gibbs G. Co. v. Phoenix Ins. Co.*, 60 Fed. 929; *Condon v. Church of St. Augustine*, 14 Misc. 181, 35 N. Y. Supp. 382, 69 N. Y. St. 811; *Travis v. Travis*, 48 Hun 343, 1 N. Y. Supp. 357, 14 Civ. Proc. 307, 15 N. Y. St. 874.

62. *Landmesser v. Hayward*, 157 App. Div. 74, 141 N. Y. Supp. 730; *Travis v. Travis*, 48 Hun 343, 1 N. Y. St. 357, 14 Civ. Proc. 307, 15 N. Y. St. 874; *Petrie v. Fitzgerald*, 2 Abb. Pr. N. S. (N. Y.) 354; *Searles v. Lawrence*, 8 S. D. 11, 65 N. W. 34. But see *Fishburne v. Minott*, 72 S. C. 567,

52 S. E. 648, notice is not required under S. C. code.

[a] **Order without notice is a nullity and may be disregarded.** *Fries v. Coar*, 19 Abb. N. C. (N. Y.) 267, 13 Civ. Proc. 152.

63. **Ala.**—*Colley v. Atlanta Brew. & Ice Co.*, 196 Ala. 374, 72 So. 45. **Ark.**—*McCall v. North Pine Bluff Realty Co.*, 125 Ark. 553, 188 S. W. 1178; *White v. Reagan*, 25 Ark. 622. **Ga.** *Fisher v. Savannah Guano Co.*, 97 Ga. 473, 25 S. E. 477. **Ia.**—*Davis & Shangle v. Boyer*, 122 Iowa 132, 97 N. W. 1002. **Kan.**—*Freeman v. Hill*, 45 Kan. 435, 25 Pac. 870; *Merten v. Newforth*, 44 Kan. 705, 25 Pac. 204; *Neitzel v. Hunter*, 19 Kan. 221. **Ky.**—*Hardesty v. Mt. Eden*, 27 Ky. L. Rep. 745, 86 S. W. 687; *Schwertman v. Voss*, 50 S. W. 832. **Mass.**—*Haynes v. Saunders*, 11 Cush. 537. **Mo.**—*Peak v. Laughlin*, 49 Mo. 162, demurrer. **Neb.**—*Hartford F. Ins. Co. v. Corey*, 53 Neb. 209, 73 N. W. 674, reply. **N. C.**—*Woodcock v. Merrimon*, 122 N. C. 731, 30 S. E. 321; *Bailey v. Board of Comrs.*, 120 N. C. 388, 27 S. E. 28. **Ohio.**—*Newsom's Admr. v. Ran*, 18 Ohio 240. **Okla.** *McCoy v. Mayo*, 174 Pac. 491; *Lawton v. Kelley*, 162 Pac. 1081. **P. R.**—*Porto Rican Leaf Tobacco Co. v. Ereno*, 16 Porto Rico 96. **S. C.**—*Pike v. Spartanburg Ry. G. & E. Co.*, 65 S. C. 409, 43 S. E. 869; *McDaniel v. Addison*, 53 S. C. 222, 31 S. E. 226; *Hane v. Goodwyn*, 1 Brev. 461, 2 Bay 521. **Va.** *Thacker v. Hubbard*, 122 Va. 379, 94 S. E. 929.

**As to Answers.**—See 2 STANDARD PROC. 13.

[a] **A Judicial Discretion.**—**Mo.** *Rigdon v. Ferguson*, 172 Mo. 49, 72 S. W. 504. **Okla.**—*Checotah Hdw. Co. v. Hensley*, 42 Okla. 260, 141 Pac. 422. **Ore.**—*Macfarlane v. McFarlane*, 45 Ore. 360, 77 Pac. 837.

[b] **No set rule for the exercise of**

be imposed.<sup>64</sup> But any statutory limitations as to the time to be allowed to plead must be observed.<sup>65</sup>

The order should conform to the general rules with respect to orders,<sup>66</sup> and should be filed,<sup>67</sup> and served on the adverse party.<sup>68</sup> A filing nunc pro tunc may be ordered.<sup>69</sup>

G. REVIEW AND VACATION. — An order denying or granting an extension of time to plead is reviewable only subject to the limitations elsewhere treated.<sup>70</sup> To justify a reversal, an abuse of the court's discretion must affirmatively appear.<sup>71</sup> An order in excess of jurisdiction may be reviewed on certiorari.<sup>72</sup>

discretion can be stated. *Bishop v. Jacobs*, 108 S. C. 49, 93 S. E. 243.

[c] The practice of refusing to permit defendants to file answers out of time is discouraged. *McCoy v. Mayo* (Okla.), 174 Pac. 491.

[d] If no sufficient reason is shown, the application may be denied. *Ind. Main v. Ginthert*, 92 Ind. 180. **N. C.** *Wilmington v. McDonald*, 133 N. C. 548, 45 S. E. 864. **Va.** — *Thacker v. Hubbard*, 122 Va. 379, 94 S. E. 929.

[e] In the absence of any showing of a defense, the application may be denied. *Neitzel v. Hunter*, 19 Kan. 221.

64. **Kan.** — *Brown v. Holmes*, 19 Kan. 567. **Ky.** — *Chicago Bond. & Sur. Co. v. P. P. Johnson & Son*, 180 Ky. 589, 203 S. W. 317. **N. Y.** — *Lynde v. Verity*, 3 How. Pr. 350, 1 Code Rep. 97. **N. C.** — *Byrd v. Byrd*, 117 N. C. 523, 23 S. E. 324. **S. C.** — *Crane v. Lipscomb*, 24 S. C. 430.

[a] Discrimination as to defenses to be made will not be made in imposing terms. *Grant v. McCaughin*, 4 How. Pr. (N. Y.) 216.

65. *Gibson v. Superior Court*, 83 Cal. 643, 24 Pac. 152; *Baker v. Superior Court*, 71 Cal. 583, 12 Pac. 685; *Staley v. O'Day*, 22 Cal. App. 149, 133 Pac. 620.

[a] Where no time is fixed in the order, the time to plead does not reach the trial term. *Boddie v. Woodard*, 83 N. C. 2.

66. See the title "Orders."

Form of order for further time, see 9 STANDARD PROC. 1205.

Construction of order, see 2 STANDARD PROC. 17.

[a] Should Not Exceed the Application. — *Landmesser v. Hayward*, 141 App. Div. 74, 141 N. Y. Supp. 730.

67. *Swift v. Canovan*, 47 Cal. 86. although no statute specifically requires it, filing and service of the order is more correct practice.

68. *Swift v. Canovan*, 47 Cal. 86.

[a] Mere notice of the order is insufficient. *Cheetham v. Lewis*, 2 Johns. (N. Y.) 104.

[b] A copy of the order should be served. *Cheetham v. Lewis*, 2 Johns. (N. Y.) 104.

[c] A copy of the affidavit on which motion is based is required to be served with the order. *Fishburne v. Minott*, 72 S. C. 567, 52 S. E. 648.

69. *Turner v. Butler*, 126 Mo. 131, 28 S. W. 77; *Dempsey v. Rhodes*, 93 N. C. 120.

70. See 2 STANDARD PROC. 159, 451.

[a] Not the Subject of an Independent Appeal. — *Woodcock v. Merrimon*, 122 N. C. 731, 30 S. E. 321; *Gilchrist v. Kitchen*, 86 N. C. 20.

71. **Cal.** — *Schultz v. McLean*, 109 Cal. 437, 443, 42 Pac. 557; *Blackwood v. Cutting Pack. Co.*, 71 Cal. 461, 12 Pac. 493. **Ill.** — *Anderson Transfer Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251. **Mo.** — *Rigdon v. Ferguson*, 172 Mo. 49, 72 S. W. 504. **Neb.** — *Grand Island & W. C. R. Co. v. Swinbank*, 51 Neb. 521, 71 N. W. 48.

[a] Exception to action of court must be made. *Reynolds v. Mandel*, 175 Ill. 615, 51 N. E. 649; *Osgood v. Haverty*, *McCahon* (Kan.) 182, 1 Kan. 587.

[b] Presumption as to proper exercise of discretion, see *Thompson v. Shewalter*, 17 Ind. App. 290, 46 N. E. 601.

72. *Gibson v. Superior Court*, 83 Cal. 643, 24 Pac. 152; *Baker v. Superior Court*, 71 Cal. 583, 12 Pac. 685, where

**Vacation of Order.**—The court may vacate the order extending time to plead.<sup>73</sup>

When an order extending time to plead is vacated, the defendant, it has been held, must plead within the time originally allowed him,<sup>74</sup> although he has the rest of the day on which the order is vacated, in which to plead.<sup>75</sup>

H. **SUCCESSIVE EXTENSIONS.**—Successive extension of time may be granted in the court's discretion,<sup>76</sup> subject, of course, to statutory limitations.<sup>77</sup>

**VII. AFTER AMENDMENT.**—After an amendment to a pleading the adverse party may plead to it within the time allowed for pleading to the original.<sup>78</sup> The court may, however, in the absence of a contrary statute prescribe a different time.<sup>79</sup>

**VIII. COMPUTATION OF TIME TO PLEAD.**<sup>80</sup>—Where the time to plead is a specified time after service, it runs from the time service

order extended time more than thirty days.

73. *Lucke v. Kiernan*, 68 N. J. L. 281, 53 Atl. 566; *Landmesser v. Hayward*, 157 App. Div. 74, 141 N. Y. Supp. 730; *Marks v. King*, 66 How. Pr. (N. Y.) 453, 13 Abb. N. C. 374; *Kingman v. Rathbone's Admsrs.*, 12 Wend. (N. Y.) 240. See generally 20 STANDARD PROC. 827.

[a] **Ex Parte.**—(1) *Marks v. King*, 66 How. Pr. (N. Y.) 453, 13 Abb. N. C. 374; *Kingman v. Rathbone's Admsrs.*, 12 Wend. (N. Y.) 240. (2) Ex parte order may be vacated ex parte. *Landmesser v. Hayward*, 157 App. Div. 74, 141 N. Y. Supp. 730; *Edwards v. Shreve*, 83 App. Div. 165, 82 N. Y. Supp. 514. See 20 STANDARD PROC. 830. But see *Lucke v. Kiernan*, 68 N. J. L. 281, 53 Atl. 566, holding that notice is required except where the exigency of the case will not admit of it.

[b] **Order of Recorder May Be Revoked by the Judge.**—*Brown v. St. John*, 19 Wend. (N. Y.) 617.

74. *Brown v. St. John*, 19 Wend. (N. Y.) 617.

[a] **Service of pleading before actual signing and entry of the order** vacating the extension of time is in time. *De Pallandt v. Flynn*, 104 App. Div. 501, 93 N. Y. Supp. 678.

[b] **Service of a pleading after vacation of an irregular order** extending time and before service thereof can be made does not avail the party. *W. M. Ritter Lumb. Co. v. Bacon*, 36 Misc. 862, 74 N. Y. Supp. 923.

75. *Lucke v. Kiernan*, 68 N. J. L. 281, 53 Atl. 566.

76. *Ind.*—*Van Allen v. Spadone*, 16 Ind. 319. *Kan.*—*Merten v. Newforth*, 44 Kan. 705, 25 Pac. 204. *N. Y.*—*Crandall & Godley Co. v. Eddy Confectionery Co.*, 37 Misc. 745, 76 N. Y. Supp. 476; *Condon v. Church of St. Augustine*, 14 Misc. 181, 35 N. Y. Supp. 382, 69 N. Y. St. 811.

77. See the statutes.

78. *Ia.*—*Wright v. Howell*, 24 Iowa 150. *Mich.*—See *Marvin v. Bowlby*, 135 Mich. 640, 98 N. W. 399. *Mont.*—*Barber v. Briscoe*, 8 Mont. 214, 19 Pac. 589. *N. Y.*—*Hayes v. Kerr*, 39 App. Div. 529, 57 N. Y. Supp. 323. *Ohio.*—*Mather v. Gallia Furnace Co.*, 2 Ohio Dec. (Reprint) 94. *S. D.*—*Bell v. Thomas*, 7 S. D. 202, 63 N. W. 907.

[a] **Where a material amendment to the petition is made when defendant is in default of an answer**, he has the usual time to plead thereafter. But if the amendment is not material and the original petition would sustain the judgment the rule does not apply. *Mather v. Gallia Furnace Co.*, 2 Ohio Dec. (Reprint) 94. See 14 STANDARD PROC. 861.

79. *Cal.*—*Schultz v. McLean*, 109 Cal. 437, 42 Pac. 557. *Ia.*—*Wright v. Howell*, 24 Iowa 150. *S. D.*—*Bell v. Thomas*, 7 S. D. 202, 63 N. W. 907.

[a] **Time for pleading to amended pleadings** is in the discretion as the statute applies to original pleadings only. *Schultz v. McLean*, 109 Cal. 437, 443, 42 Pac. 557.

[b] **A reasonable time** should be allowed. *Davis v. Davis*, 62 Miss. 818.

80. **After overruling demurrer**, time to plead runs from service of notice



is complete.<sup>81</sup> When service is deemed complete,<sup>82</sup> and the time to plead, therefore, begins to run,<sup>83</sup> depends somewhat upon the manner in which service is made.

In computing the time the rule is either to exclude the first and include the last day, or vice versa,<sup>84</sup> generally, the day of service or notice being excluded, and the last day included.<sup>85</sup> If the last day for pleading falls on a non-judicial day the time is extended to the next judicial day.<sup>86</sup> However, according to most authorities, non-judicial

of the decision. See 6 STANDARD PROC. 1005.

81. See following notes.

[a] **From the time of personal service** the time for answering begins to run; and not from the time proof thereof made and filed. *Sayles v. Davis*, 22 Wis. 225.

[b] **Inadvertent antedating of admission of service** does not entitle plaintiff to default judgment until lapse of statutory period after actual service. *Tolhurst v. Howard*, 94 App. Div. 439, 88 N. Y. Supp. 235.

82. See the title "**Service of Process and Papers.**"

83. See *Conley v. Morris*, 6 Colo. 212.

[a] **Where service is by mail**, the time to plead runs from the date of mailing, not from the date of receipt. *Yates v. Guthrie*, 119 N. Y. 420, 23 N. E. 741; *People ex rel. Werner v. West Side Brotherly Love C. & B. Soc.*, 51 Misc. 82, 99 N. Y. Supp. 206. See also *Elliot v. Kennedy*, 26 How. Pr. (N. Y.) 422; *Van Horne v. Montgomery*, 5 How. Pr. (N. Y.) 238.

[b] **When a defendant served by publication appears and demands a copy of the complaint before the completion of service**, his time to answer runs from the time of the service of the complaint in compliance with such demand. *Kinley v. American Hdw. Co.*, 49 Misc. 334, 99 N. Y. Supp. 199, 18 N. Y. Ann. Cas. 142; *Sanders v. People's Co-op. Ice. Co.*, 44 Misc. 171, 89 N. Y. Supp. 785.

[c] **When personal service outside the state is made**, (1) the time commences to run from the day of such service. *Dykers, Alstyn & Co. v. Woodward*, 7 How. Pr. (N. Y.) 313. (2) But where seizure of the res, either actual or constructive is essential to jurisdiction, the time to plead does not begin to run until such seizure has been made though process has

been previously personally served on the non-resident defendant. *Haase v. Michigan Steel Boat Co.*, 148 App. Div. 298, 132 N. Y. Supp. 1046 (levy of attachment). As to necessity for and what constitutes seizure, actual or constructive, see 17 STANDARD PROC. 683, 685, 688; as to whether service precedes or follows seizure, see the title "**Service of Process and Papers.**"

84. See the title "**Time.**"

[a] **In the common pleas the time to plead is reckoned inclusive of the day of the order and exclusive of the day when it expires.** *Buist v. Mitchell*, 3 Brev. (S. C.) 485 (this is the court we are directed to follow); 1 Tidd Pr. 470.

85. **Kan.**—*Neitzel v. Hunter*, 19 Kan. 221. **N. Y.**—*Sugerman v. Jacobs*, 160 App. Div. 411, 145 N. Y. Supp. 429. **Pa.**—*Marks' Exrs. v. Russell*, 40 Pa. 372. **Tex.**—See *Hollis v. Francois*, 1 Tex. 118.

[a] **Where defendant has twenty days to answer after the day summons is returnable**, the day it is returnable is excluded. *Neitzel v. Hunter*, 19 Kan. 221. See also *Sugerman v. Jacobs*, 160 App. Div. 411, 145 N. Y. Supp. 429.

[b] **"Seven days' time for pleading"** gives the whole of the seventh day to plead in, after excluding the day on which the order is made. *Pepperell v. Burrell*, 2 Dowl. P. C. (Eng.) 674.

86. **Cal.**—*Crane v. Crane*, 121 Cal. 99, 53 Pac. 433; *Blackwood v. Cutting Packing Co.*, 71 Cal. 461, 12 Pac. 493. **N. J.**—*Feuchtwanger v. McCool*, 29 N. J. Eq. 151. **Pa.**—*Marks' Exrs. v. Russell*, 40 Pa. 372.

See the titles "**Sunday and Holidays;**" "**Time.**"

[a] **But Saturday half holidays must be counted.** *Fries v. Coar*, 19 Abb. N. C. (N. Y.) 267, 13 Civ. Proc. 152.

days intervening between the first and the last day, are counted.<sup>87</sup> Fractions of days are not regarded,<sup>88</sup> and the party has the whole of the last day in which to plead.<sup>89</sup>

Where a party is allowed "till," or "until" or "to" a specified day to plead, he may plead at any time during that day,<sup>90</sup> although some courts hold otherwise.<sup>91</sup>

Under a rule to plead *instanter* or *forthwith*, the party has twenty-four hours within which to plead, according to some courts,<sup>92</sup> but according to others, has only until the closing of the court on that day.<sup>93</sup>

While an irregular default stands, it has been held that the time to plead does not run.<sup>94</sup>

## IX. COMPLIANCE WITH RULE, ORDER OR STIPULATION.

The party should comply with a rule to plead or an order or stipulation extending time to plead, or allowing pleading out of time.<sup>95</sup>

87. See the title "Time." But see *Wash v. Randolph*, 9 Mo. 142.

[a] **The Sundays intervening** between the date of filing and the commencement of the term are to be counted. *Heard v. Phillips*, 101 Ga. 691, 31 S. E. 216, 44 L. R. A. 369. See the title "Time."

[b] **Where the court in vacation illegally adjourns a term**, a pleading filed at the following term is in time. *Frank & Co. v. Horkan*, 122 Ga. 38, 49 S. E. 800.

88. *Columbia Tp. Road Co. v. Haywood*, 10 Wend. (N. Y.) 422.

89. *Sugerman v. Jacobs*, 160 App. Div. 411, 145 N. Y. Supp. 429; *Peperell v. Burrell*, 2 Dowl. P. C. (Eng.) 674. See *Rowe v. Spencer*, 70 Tex. 78, 8 S. W. 60; *East Line & R. R. Co. v. Scott*, 66 Tex. 565, 1 S. W. 663.

[a] **The Whole of Appearance Day.** *Hoyt v. Macon*, 2 Colo. 113; *Hoehne v. Rupear*, 1 Colo. 405.

[b] **Where defendant "shall not be compelled to plead before the next succeeding term,"** he has all of the first day of the second term in which to plead. *Hoyt v. Macon*, 2 Colo. 113.

[c] **On the call of the appearance docket on the fifth day**, if the defendant is present and asks the remainder of the day to answer, it shall be allowed him. Otherwise a default judgment is rendered. *Rowe v. Spencer*, 70 Tex. 78, 8 S. W. 60; *East Line & R. R. Co. v. Scott*, 66 Tex. 565, 1 S. W. 663. Compare admiralty practice, 1 STANDARD PROC. 500.

90. *Sugerman v. Jacobs*, 160 App. Div. 411, 145 N. Y. Supp. 429; *Thomas v. Douglass*, 2 Johns. Cas. (N. Y.) 226; *Bunce v. Reed*, 16 Barb. (N. Y.) 347, 352.

91. *Clark v. Ewing*, 87 Ill. 344, he has until the meeting of the court on that day in which to plead.

92. *Moffat v. Dickson*, 3 Colo. 313.

93. *Northrop v. McGee*, 20 Ill. App. 108, he must plead "before the rising of the court."

94. *Gillett v. Arnt*, 1 Mich. N. P. 22.

**Time to plead after default set aside**, see 15 STANDARD PROC. 247.

95. See *infra*, this note.

**Where the extension is without limitation as to kind of plea**, a plea in abatement may be filed. See 1 STANDARD PROC. 61.

[a] **A rule to plead to the action** is not complied with by filing a dilatory plea. *Archer v. Claffin*, 31 Ill. 306.

[b] **Rule To Answer.**—Filing an answer, plea, or demurrer is a compliance with a rule to answer, although it may be otherwise where an order extending time is made. *Bracken v. Kennedy*, 4 Ill. 558.

[c] **After an order extending time to answer**, a demurrer cannot be legally filed. Ill.—*Bracken v. Kennedy*, 4 Ill. 558, query. Ind.—*Van Allen v. Spadone*, 16 Ind. 319. Ia.—*Newton v. White*, 42 Iowa 608. N. Y.—*Davenport v. Sniffen*, 1 Barb. 223.

[d] **A stipulation "to plead" is**

Should any other pleading than that authorized be filed, it may be stricken and judgment entered for want of pleading.<sup>96</sup>

not complied with by filing a special demurrer. *Welsh v. Blackwell*, 14 N. J. L. 344.

96. *Newton v. White*, 42 Iowa 608. See generally the titles "Judgments;" "Striking Out and Withdrawal."

Vol. XXIV



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By the Editorial Staff.

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#### CROSS-REFERENCES:

Adverse Possession;	Replevin;
Covenant, Action of;	Sales;
Denials;	Specific Performance;
Departure;	Taxation;
Detinue;	Tenants in Common;
Ejectment;	Trespass;
Joint Tenants;	Trespass To Try Title;
Lands and Land Transfers;	Trover and Conversion;
Mines and Minerals;	Vendor and Purchaser;
Quieting Title;	Writ of Entry.
Real and Mixed Actions;	

Actions concerning tax titles, see the title "Taxation."

Slander of title, see 18 STANDARD PROC. 959, et seq.

For forms, see 9 STANDARD PROC. 1205, et seq.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. PLEADING TITLE OR OTHER INTEREST. — A. NECESSITY OF PLEADING. — 1. In General.** — It is a rule of the common law,<sup>1</sup> of equity,<sup>2</sup> and under the code practice,<sup>3</sup> that title, or other interest, in real or personal property must be pleaded where relied upon as a ground for relief.<sup>4</sup>

**2. Character of Title or Interest Relied Upon. — a. In General. (I.) Title or Ownership.** — The estate alleged must be sufficient to support the claim for relief based upon it.<sup>5</sup> If the right to be enforced depends upon ownership in fee, such ownership must be alleged;<sup>6</sup> and similarly, it is necessary to plead any estate less than the fee upon

1. Clay v. St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883.
2. U. S.—Gage v. Kaufman, 133 U. S. 471, 10 Sup. Ct. 406, 33 L. ed. 725.
- Ala.—Adler v. Sullivan, 115 Ala. 582, 22 So. 87.
- Ark.—Blakeney v. Ferguson, 8 Ark. 272.
- Cal.—Adams v. Crawford, 116 Cal. 495, 48 Pac. 488.
- Colo.—Wall v. Magnes, 17 Colo. 476, 30 Pac. 56.
- Conn.—Bull v. Meloney, 27 Conn. 560.
- Fla.—Keil v. West, 21 Fla. 508.
- Ga. Arline v. Miller, 22 Ga. 330.
- Ill. Snow v. Counselman, 136 Ill. 191, 26 N. E. 590.
- Ind.—Cargar v. Fee, 140 Ind. 572, 39 N. E. 93.
- Ia.—Brinton v. SeEVERS, 12 Iowa 389.
- Kan.—Entreken v. Howard, 16 Kan. 551.
- Ky.—Weaver v. Bates, 17 Ky. L. Rep. 1218, 33 S. W. 1118.
- Mass.—Tudor v. Cambridge Water Wks., 1 Allen 164.
- Mich.—Hanscom v. Hinman, 30 Mich. 419.
- Minn. Wakefield v. Day, 41 Minn. 344, 43 N. W. 71.
- Miss.—Ricks v. Baskett, 68 Miss. 250, 8 So. 514.
- Neb.—Smith v. Neufeld, 57 Neb. 660, 78 N. W. 278.
- N. H.—Winnipiseogee Lake Co. v. Young, 40 N. H. 420.
- N. J.—Monighoff v. Sayre, 41 N. J. Eq. 113, 3 Atl. 397.
- N. Y.—Pearce v. Moore, 114 N. Y. 256, 21 N. E. 419.
- N. C.—McGill v. Buie, 106 N. C. 242, 11 S. E. 284.
- Ohio. Lamb v. Boyd, 4 Ohio C. C. 499, 2 Ohio Cir. Dec. 672.
- S. C.—Garrett v. Weinberg, 50 S. C. 310, 27 S. E. 770.
- Tex. Buffalo B. S. C. Co. v. Bruly, 45 Tex. 6.
- Va.—Martin v. Martin, 95 Va. 26, 27 S. E. 810.
- Wash.—Rogers v. Miller, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20.
- W. Va.—Harr v. Shaffer, 45 W. Va. 709, 31 S. E. 905.
- Wis.—Keyes v. Seanlan, 63 Wis. 345, 23 N. W. 570.
3. Ark.—St. Louis I. M. & S. R. Co. v. Hecht, 38 Ark. 357.
- Cal.—Souter v. Maguire, 78 Cal. 543, 21 Pac. 183.
- Colo.—Baker v. Cordwell, 6 Colo. 199.
- Ind.—Phoenix Ins. Co. v. Rowe, 117 Ind. 202, 20 N. E. 122.
- Ia.—Knott v. Tincher, 39 Iowa 628.
- Kan.—Leonard v. Ross, 23 Kan. 292.
- Ky.—Louisville & P. Canal Co. v. Murphy, 9 Bush 522.
- Minn.—Frasier v. Williams, 15 Minn. 288.
- Mo.—Chouteau v. Allen, 70 Mo. 290.
- Mont.—Vantilburgh v. Hamilton, 2 Mont. 413.
- N. Y.—Malcom v. O'Reilly, 89 N. Y. 156.
- S. C.—Flen-niken v. Buchanan, 21 S. C. 432.
- Tex. Ballard v. Perry's Admr., 28 Tex. 347.
- Wis.—Iowa v. Mineral Point R. Co., 24 Wis. 93.

[a] Under the New York code proceeding to determine conflicting claims to real estate. See King v. Townshend, 78 Hun 380, 29 N. Y. Supp. 181, 60 N. Y. St. 739.

4. Proof by defendant under general issue or denial, see *infra*, I, D, 1. Allegation of ownership of bill or note sued on, see 4 STANDARD PROC. 262.

5. See the cases cited *infra*, this section.

6. Cal.—Ham v. Henderson, 50 Cal. 367.
- Ind.—Otis v. De Boer, 116 Ind. 531, 19 N. E. 317.
- Ia.—Knott v. Tincher, 39 Iowa 628.
- Kan.—Leonard v. Ross, 23 Kan. 292.
- Me.—Hutchins v. Burrill, 72 Me. 311.
- Minn.—Dana v. Porter, 14 Minn. 478.
- Mo.—Chouteau v. Allen, 70 Mo. 290.
- N. Y.—Malcom v. O'Reilly, 89 N. Y. 156.
- S. C.—Flen-niken v. Buchanan, 21 S. C. 432.
- Wis. Iowa v. Mineral Pt. R. Co., 24 Wis. 93.

See Erwin v. Central U. Tel. Co., 148 Ind. 365, 46 N. E. 667, 47 N. E. 663.

[a] Thus, while *prima facie* the fee to a public street is in the abutting property owners, this fact is not presumed in pleading title to abutting property, and when ownership in fee to the street is an essential fact it must be alleged. Erwin v. Central U. Tel. Co., 148 Ind. 365, 46 N. E. 667, 47 N. E. 663.



which the party relies,<sup>7</sup> such as a joint tenancy,<sup>8</sup> an interest in remainder or reversion,<sup>9</sup> or a mere possessory interest.<sup>10</sup>

(II.) **Possession.**—When possession either actual or constructive is essential, it must be alleged,<sup>11</sup> and such an allegation may be sufficient where a present or possessory interest is involved.<sup>12</sup>

b. *Title in Adverse Party.*—When it is necessary to allege title, ownership or possession in the adverse party, no greater title need be averred than is sufficient to sustain the liability alleged, usually possession; how possession was acquired, as well as other particular statements of fact showing the source of the adverse party's title, being immaterial.<sup>13</sup>

B. **MANNER OF PLEADING.**—1. **Generally.**—Like other material facts, title or possession must be pleaded directly, or shown by necessary inference from the facts set forth.<sup>14</sup> It is not sufficient to plead

7. *Ala.*—*Blackburn v. Baker*, 7 Port 284. *Cal.*—*People v. Jackson*, 24 Cal. 630. *Ill.*—*Bowman v. People*, 114 Ill. 474, 2 N. E. 484. *Ia.*—*Gillis v. Black*, 6 Iowa 439. *Mo.*—*Cagle v. Chillicothe etc. Ins. Co.*, 78 Mo. App. 431. *N. Y.*—*In re Anderson*, 79 Hun 170, 29 N. Y. Supp. 476.

[a] “In pleading an estate in lands less than a fee simple, it must be particularly described, or it would not appear what part of the fee simple it was, either in quantity of estate, time of its duration, or whether in severalty, coparcenary, or in common, or what one of the numerous parts into which the fee simple may be divided.” *McManus v. Smith*, 53 Ind. 211.

8. *Conn.*—*Vandenheuvel v. Storrs*, 3 Conn. 203. *Mass.*—*Melvin v. Proprietors of Locks, etc. on Merrimack River*, 16 Pick. 161. *Wis.*—*Stroebe v. Fehl*, 22 Wis. 337.

9. *Conn.*—*Peck v. Peck*, 35 Conn. 390. *Ill.*—*Chicago & E. I. R. Co. v. Loeb*, 8 Ill. App. 627. *Mass.*—*Geer v. Fleming*, 110 Mass. 39. *Mo.*—*Proffitt v. Henderson*, 29 Mo. 325; *Bobb v. Syenite Granite Co.*, 41 Mo. App. 642. *N. J.*—*Beavers v. Trimmer*, 25 N. J. L. 97; *Potts v. Clarke*, 20 N. J. L. 536. *N. Y.*—*Tobias v. Cohn*, 36 N. Y. 363. *S. D.*—*Arneson v. Spawn*, 2 S. D. 269, 49 N. W. 1066, 39 Am. St. Rep. 783. *W. Va.*—*Clay v. St. Albans*, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883. *Eng.*—*Jackson v. Pesked*, 1 Maule & S. 234, 105 Eng. Reprint 88.

10. See *infra*, I, A, 2, a, (II).

11. *Cal.*—*Bane v. Peerman*, 125 Cal. 220, 57 Pac. 885 (claim and delivery); *Fredericks v. Tracy*, 98 Cal. 658, 33

Pac. 750. *Conn.*—*Phelps v. Baldwin*, 17 Conn. 209. *Ky.*—*Daniel v. Holland*, 4 J. J. Marsh. 18. *Mo.*—*Garner v. McCullough*, 48 Mo. 318; *Jamison v. Smith*, 4 Mo. 202 (pleading a legal right to the thing is not sufficient); *Deland v. Vanstone*, 26 Mo. App. 297. *Wis.*—*Wals v. Grosvenor*, 31 Wis. 681.

12. See *Ia.*—*Sturman v. Stone*, 31 Iowa 115. *N. Y.*—*Simmons v. Lyons*, 55 N. Y. 671. *W. Va.*—*Clay v. St. Albans*, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883.

But see the titles “Detinue;” “Personal Property;” “Replevin;” “Trespass;” “Trover and Conversion.”

13. See the following: *Ill.*—*Thomson v. Morris*, 57 Ill. 333; *Morgan v. Smith*, 11 Ill. 194. *Ind.*—*Otis v. De Boer*, 116 Ind. 531, 19 N. E. 317. *N. J.*—*Wheeler & Wilson Mfg. Co. v. Filer*, 52 N. J. Eq. 164, 28 Atl. 13. *N. Y.*—*Austin v. Goodrich*, 49 N. Y. 266; *King v. Townshend*, 78 Hun 380, 29 N. Y. Supp. 181, 60 N. Y. St. 739. *Tex.*—*Oliver v. Chapman*, 15 Tex. 400. *Eng.*—*Blake v. Foster*, 8 T. R. 487, 101 Eng. Reprint 1505; *Wotton v. Hele*, 2 Saund. 175, 177, 85 Eng. Reprint 935, 937.

14. *Ala.*—*Taylor v. Perry*, 48 Ala. 240. *Conn.*—*Peck v. Peck*, 35 Conn. 390. *Ind.*—*Tennison v. Tennison*, 114 Ind. 424, 16 N. E. 818; *Pittsburgh, C. C. & St. L. Ry. Co. v. Harper*, 11 Ind. App. 481, 37 N. E. 41. *Mich.*—*Necker v. Harvey*, 49 Mich. 517, 14 N. W. 503. *Mo.*—*Eans' Admr. v. Exchange Bank*, 79 Mo. 182; *Rubelman v. McNichol*, 13 Mo. App. 584. *Ohio.*—*Sargent v. Steubenville & I. R. Co.*, 32 Ohio St. 449. *S. C.*—*Archer v. Long*, 38 S. C. 272, 16 S. E. 995; *Suber v. Chandler*, 28 S. C.

mere legal conclusions,<sup>15</sup> nor should the mere evidence of title be alleged.<sup>16</sup> As in other cases, the pleader should set forth with definiteness and certainty<sup>17</sup> the ultimate facts of the particular title or interest.<sup>18</sup>

**2. Sufficiency of General Allegations.**—a. *Title or Ownership.* General averments of ownership are generally regarded as averments of ultimate facts and are sufficient both as to personal<sup>19</sup> property and

382, 6 S. E. 155; *Dial v. Tappan*, 20 S. C. 167. **Wis.**—*Gage v. Wayland*, 67 Wis. 566, 31 N. W. 108; *Howard v. Boorman*, 17 Wis. 459.

**Allegation of ownership of bill or note**, see 4 STANDARD PROC. 263.

15. See *infra*, this section, and 5 STANDARD PROC. 225.

[a] **That one holds by virtue of a deed** is an averment of a conclusion of law. *Miller v. Stalker*, 158 Ill. 514, 42 N. E. 79.

[b] **That one is entitled to the exclusive possession of certain premises** is insufficient, being a conclusion of law. *Garner v. McCullough*, 48 Mo. 318.

[c] **Nature of Possession.**—That a party's possession was permissive and subordinate is the statement of a conclusion by the pleader. *Graham v. Graham* (Ala.), 79 So. 450.

[d] **That a way existed as appurtenant to an owner's land** is an averment of a fact. *Cincinnati, R. & M. R. R. v. Miller*, 36 Ind. App. 26, 72 N. E. 827, 73 N. E. 1001.

16. **Cal.**—*McCaughy v. Schuette*, 117 Cal. 223, 46 Pac. 666, 48 Pac. 1088, 59 Am. St. Rep. 176. **Fla.**—*Bucki v. Cone*, 25 Fla. 1, 6 So. 160. **Mo.**—*Planet P. & F. Co. v. St. Louis etc. R. Co.*, 115 Mo. 613, 22 S. W. 616. **N. Y.**—*Loeb v. Chur*, 53 Hun 637, 6 N. Y. Supp. 296, 25 N. Y. St. 996.

**As to pleading the source of title**, see *infra*, I, B, 2, a.

[a] **Thus in ejectment** it is not proper to set out such matters of evidence as the mesne conveyances through which the plaintiffs deraign title. *Coryell v. Cain*, 16 Cal. 567. See 7 STANDARD PROC. 1040.

17. **Ark.**—*Keith v. Pratt*, 5 Ark. 661. **Cal.**—*Rutan v. Wolters*, 116 Cal. 403, 48 Pac. 385. **Ill.**—*May v. First Nat. Bank*, 19 Ill. App. 604; *Simons v. People*, 18 Ill. App. 588. **Ind.**—*Phoenix Ins. Co. v. Rowe*, 117 Ind. 202, 20 N. E. 122. **Mo.**—*Prendergast v. Dwelling House Ins. Co.*, 67 Mo. App. 426. **N. Y.**

*Gruen v. Peabody Edu. Fund*, 51 App. Div. 605, 64 N. Y. Supp. 238; *De Nobele v. Lee*, 61 How. Pr. 272. **Tex.**—*Willis & Bro. v. Hudson*, 63 Tex. 678. **Va.**—*Kimball v. Borden*, 95 Va. 203, 28 S. E. 207. **Wis.**—*Leihy v. Ashland Lumb. Co.*, 49 Wis. 165, 5 N. W. 471; *Connecticut Mut. L. Ins. Co. v. Cross*, 18 Wis. 109.

See generally the title "Certainty in Pleading."

[a] **Certainty to a common intent** sufficient. *Van Riper v. Morton*, 61 Mo. App. 440; *Leihy v. Ashland Lumb. Co.*, 49 Wis. 165, 5 N. W. 471.

[b] **Where the time of ownership is material** there must be no ambiguity in the allegation of such time. **Cal.**—*Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750. **Mo.**—*Harness v. Nat. F. Ins. Co.*, 62 Mo. App. 245. **N. Y.**—*Clapp v. Bromagham*, 9 Cow. 530.

18. **U. S.**—*McCloskey v. Barr*, 38 Fed. 165. **Cal.**—*Jones v. Sanders*, 138 Cal. 405, 71 Pac. 506; *Turner v. White*, 73 Cal. 299, 14 Pac. 794. **Ill.**—*May v. First Nat. Bank*, 122 Ill. 551, 13 N. E. 806. **Ind.**—*Nicholson v. Caress*, 76 Ind. 24. **Ia.**—*Jordan v. Walker*, 56 Iowa 686, 10 N. W. 232. **Ky.**—*La Rue v. Hays*, 7 Bush 50. **Mo.**—*Garner v. McCullough*, 48 Mo. 318. **N. J.**—*Beavers v. Trimmer*, 25 N. J. L. 97. **N. Y.**—*Sheridan v. Jackson*, 72 N. Y. 170. **Wis.**—*Page v. Kennan*, 38 Wis. 320.

See *supra*, this section.

19. **Ia.**—*Whitaker v. Sigler*, 44 Iowa 419; *Sturman v. Stone*, 31 Iowa 115. **N. Y.**—*Prindle v. Caruthers*, 15 N. Y. 425. **Wis.**—*Reeve v. Fraker*, 32 Wis. 243; *Sanford v. McCreedy*, 28 Wis. 103.

But see 5 STANDARD PROC. 225.

**As to bill or note**, see 4 STANDARD PROC. 263.

**As to easement**, see 7 STANDARD PROC. 968.

**In replevin**, see 22 STANDARD PROC. 920.

[a] **That one is in possession as a lessee** is not objectionable as a con-

realty.<sup>20</sup> But where the party proceeds to set forth the facts of his estate, an additional general averment of ownership,<sup>21</sup> or of specified special interest or estate<sup>22</sup> is deemed to be a mere legal conclusion from the facts stated. And where a party bases his right upon a special ownership, it has been held that an allegation in terms that he has a special ownership is a mere legal conclusion; the facts must be stated.<sup>23</sup>

b. *Possession*.—Possession of real estate is usually averred by a direct allegation to the effect that the land is the close of the plaintiff

clusion. *Payne v. Moore*, 31 Ind. App. 360, 66 N. E. 483, 67 N. E. 1005.

[b] *In possession as common carrier* of goods for hire is sufficient. *Russell Grain Co. v. Wabash R. Co.*, 114 Mo. App. 488, 89 S. W. 908.

20. **U. S.**—*Gage v. Kaufman*, 133 U. S. 471, 10 Sup. Ct. 406, 33 L. ed. 725; *Ely v. New Mexico & A. R. Co.*, 129 U. S. 291, 9 Sup. Ct. 293, 32 L. ed. 688; *Christy v. Scott*, 14 How. 282, 14 L. ed. 422; *Geo. Adams & Frederick Co. v. South Omaha Nat. Bank*, 123 Fed. 641, 60 C. C. A. 579. **Ala.**—*Burns v. George*, 119 Ala. 504, 24 So. 718. **Ark.**—*Pace v. Crandall*, 74 Ark. 417, 86 S. W. 812.

**Cal.**—*Gartlan v. C. A. Hooper & Co.*, 177 Cal. 414, 170 Pac. 1115; *Fuller v. Fuller*, 176 Cal. 637, 169 Pac. 369; *McArthur v. Goodwin*, 173 Cal. 499, 160 Pac. 679; *Souter v. Maguire*, 78 Cal. 543, 21 Pac. 183; *Payne v. Treadwell*, 16 Cal. 220; *Crittenden v. St. Hill*, 34 Cal. App. 107, 166 Pac. 1016. **Fla.**

*Bucki v. Cone*, 25 Fla. 1, 6 So. 160.

**Ill.**—*Bragg v. Chicago*, 73 Ill. 152. **Ind.**

*McMannus v. Smith*, 53 Ind. 211. **Ia.**

*Gillis v. Black*, 6 Iowa 439. **Kan.**

*Saline v. Young*, 18 Kan. 440; *Leavenworth, L. & G. R. Co. v. Leahy*, 12 Kan. 124. **Ky.**—*Louisville & N. R. Co. v. Scamp*, 124 Ky. 330, 98 S. W. 1024.

**La.**—*Hart v. Connolly*, 49 La. Ann. 1587, 22 So. 809. **Me.**—*Baker v.*

*Bessey*, 73 Me. 472, 40 Am. Rep. 377; *Jordan v. Record*, 70 Me. 529. **Mass.**

See *Coolidge v. Learned*, 8 Pick. 504.

**Mich.**—See *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797. **Minn.**—*Buckholz v. Grant*, 15 Minn. 406. **Mo.**—*Tupperry v. Hertung*, 46 Mo. 135. **Mont.**—*McCauley v. Gilmer*, 2 Mont. 202. **Nev.**—*Hershiser v.*

*Ward*, 29 Nev. 228, 87 Pac. 171. **N. Y.**

*Levin v. Russell*, 42 N. Y. 251; *Ensign v. Sherman*, 14 How. Pr. 439; See also

*King v. Townshend*, 78 Hun 380, 29 N. Y. Supp. 181, 60 N. Y. St. 739. **N. C.**

See *Thames v. Jones*, 97 N. C. 121, 1

S. E. 692. **N. D.**—*Donovan v. St. Anthony etc. Elev. Co.*, 7 N. D. 513, 75 N. W. 809, 66 Am. St. Rep. 674. **Pa.** *Meyer v. Horst*, 106 Pa. 552. See *Wisler v. Hershey*, 23 Pa. 333. **S. C.** *Wilmington C. & A. R. Co. v. Garner*, 27 S. C. 50, 2 S. E. 634; *Flenniken v. Buchanan*, 21 S. C. 432. **S. D.**—*Grace v. Ballou*, 4 S. D. 333, 56 N. W. 1075. **Wash.**—*Ingram v. Wishkah Boom Co.*, 35 Wash. 191, 77 Pac. 34. **Wis.**—*Ehrmantrout v. McMahon*, 78 Wis. 138, 47 N. W. 305; *Iowa v. Mineral Pt. R. Co.*, 24 Wis. 93; *Gillett v. Robbins*, 12 Wis. 319.

But see 5 STANDARD PROC. 225.

**Title by Adverse Possession.**—See 1 STANDARD PROC. 621, et seq.

[a] **A form of expression in general use** in pleading title to real estate is that the party is the owner in fee. *Gartlan v. C. A. Hooper & Co.*, 177 Cal. 414, 170 Pac. 1115.

21. **U. S.**—See *McCloskey v. Barr*, 38 Fed. 165. **Cal.**—*Heeser v. Miller*, 77 Cal. 192, 19 Pac. 375. **N. Y.**—*Burdick v. Chesebrough*, 94 App. Div. 532, 88 N. Y. Supp. 13; *Gruen v. Peabody Edu. Fund*, 51 App. Div. 605, 64 N. Y. Supp. 238; *Adams v. Holley*, 12 How. Pr. 326. **Tex.**—*Blaisdell Jr. Co. v. Citizens' Nat. Bank*, 96 Tex. 626, 75 S. W. 292, 97 Am. St. Rep. 944, 62 L. R. A. 968; *Branch v. De Blanc* (Tex. Civ. App.), 62 S. W. 134.

22. **Cal.**—*Schoonover v. Birnbaum*, 148 Cal. 548, 83 Pac. 999, tenancy in common. **Ill.**—*Mason v. Mason*, 219 Ill. 609, 76 N. E. 692, tenancy in common. **N. Y.**—*Callanan v. Keeseville*, A. C. & L. C. R. Co., 48 Misc. 476, 95 N. Y. Supp. 513, an allegation that an estate owns an undivided half interest in certain bonds, held a legal conclusion.

23. *Griffing v. Curtis*, 50 Neb. 334, 69 N. W. 968. See 22 STANDARD PROC. 922.



and that he was lawfully possessed of same,<sup>24</sup> but it has been held that the averment of possession is included in or presumed from an allegation of ownership,<sup>25</sup> or seisin in fee.<sup>26</sup> The forms of expression in general use in averring possession of personalty are that such property "belonged to the plaintiff" or "was the goods and chattels of" or that plaintiff "was lawfully possessed of certain goods and chattels."<sup>27</sup>

c. *Conflict Between General and Specific Allegations.*—When general and specific allegations of title are made the latter control,<sup>28</sup> providing such specific averments are issuable facts and not merely matters of evidence.<sup>29</sup>

C. HOW DEFECTIVE AVERMENT OF TITLE AIDED OR CURED. — 1. **By Pleading.**—When a plea of title is omitted, or is defective, the fault may be cured either by implication from other averments in a party's own pleading,<sup>30</sup> or by an admission, express or implied, in a pleading by the adverse party.<sup>31</sup>

2. **By Amendment.**—Whenever a material plea or title is not shown by a party's pleading, such pleading, in order to avoid a fatal variance,<sup>32</sup> providing the defendant is not prejudiced or surprised,<sup>33</sup> and a new cause of action is not introduced,<sup>34</sup> may be remedied<sup>35</sup> by

24. Ala.—O'Neal v. Simonton, 109 Ala. 167, 19 So. 412. Cal.—Godwin v. Stebbins, 2 Cal. 103. Kan.—Larkin v. Taylor, 5 Kan. 433. Mo.—Renshaw v. Lloyd, 50 Mo. 368. W. Va.—Clay v. St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883. Wis.—Leihy v. Ashland Lumb. Co., 49 Wis. 165, 5 N. W. 471.

25. Bell v. Clark, 30 Mo. App. 224.

26. Cushing v. Adams, 18 Pick. (Mass.) 110.

27. See the following: Ky.—Smith v. Hancock, 4 Bibb 222. Mo.—Cochran v. Whitesides, 34 Mo. 417; Warnick v. Baker, 42 Mo. App. 439. W. Va.—Clay v. St. Albans, 43 W. Va. 539, 27 S. E. 368, 64 Am. St. Rep. 883.

28. Cal.—Haven v. Seeley, 59 Cal. 494. Ind.—Morgan v. Lake Shore, etc. R. Co., 130 Ind. 101, 28 N. E. 548. Ia.—Jordan v. Walker, 56 Iowa 686, 10 N. W. 232. Minn.—Pinney v. Fridley, 9 Minn. 34.

[a] Thus where the defendant, in an action of forcible entry and detainer, pleads ownership generally and also sets out the facts under which he claims, showing the legal title in the plaintiff but a right of possession in himself under a contract binding the plaintiff to convey, the statement of facts is controlling and the plea of ownership insufficient. Jordan v. Walker, 56 Iowa 686, 10 N. W. 232, 52

Iowa 647, 3 N. W. 679.

29. See Patterson v. Keystone Min. Co., 30 Cal. 360.

30. Sargent v. Steubenville & I. R. Co., 32 Ohio St. 449; Gage v. Wayland, 67 Wis. 566, 31 N. W. 108.

31. Ark.—Warner v. Capps, 37 Ark.

32. Ky.—Grigsby v. Barr, 14 Bush 330.

Mass.—Spear v. Bicknell, 5 Mass. 125.

Mo.—Dillard v. McClure, 64 Mo. App.

488. N. Y.—Bruce v. Kelly, 7 Jones &

S. 27. Tex.—Fowler v. Stonum, 6 Tex. 60.

32. Ind.—Keck v. State, 12 Ind.

App. 119, 39 N. E. 899. Ia.—Burns v.

Iowa Homestead Co., 48 Iowa 279.

N. Y.—Avery v. New York Cent. etc.

R. Co., 106 N. Y. 142, 12 N. E. 619.

Pa.—Miller v. Pollock, 99 Pa. 202. Tex.

Eversberg v. Miller (Tex. Civ. App.), 56 S. W. 223.

33. Tiffany v. Henderson, 57 Iowa 490, 10 N. W. 884.

34. Robbins v. Harris, 96 N. C. 557,

2 S. E. 70; Morales v. Fisk, 66 Tex.

189, 18 S. W. 495. See the title "New

Cause of Action or Defense."

35. Ala.—Lister v. Vowell, 122 Ala.

264, 25 So. 564. Cal.—Crittenden v. St.

Hill, 34 Cal. App. 107, 166 Pac. 1016.

Colo.—Messenger v. Northcutt, 26 Colo.

527, 58 Pac. 1090. Conn.—Mechanics'

Bank v. Woodward, 74 Conn. 689, 51

Atl. 1084. Ga.—McCandless v. Inland

Acid Co., 115 Ga. 968, 42 S. E. 449.

amendment, either before<sup>36</sup> or, under proper circumstances, after verdict.<sup>37</sup>

**3. By Verdict.**—Pursuant to the general principles elsewhere discussed,<sup>38</sup> a defective allegation of title is cured or aided by verdict,<sup>39</sup> but where the defect is a failure to show any title whatever, when such a showing is material, the omission is fatal.<sup>40</sup>

**D. ISSUES, PROOF AND VARIANCE.**<sup>41</sup> — **1. General Issue or Denial.**<sup>42</sup> Under the general issue at common law the defendant may introduce any competent evidence to defeat the plaintiff's claim of title and show ownership in himself or another, under whose authority he acts,

**Ia.**—*Tiffany v. Henderson*, 57 Iowa 490, 10 N. W. 884. **Mass.**—*Williams v. Hingham & Q. B. & T. Corp.*, 4 Pick. 341. **Mich.**—*Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797. **Mo.**—*Cagle v. Chillicothe T. Mut. F. Ins. Co.*, 78 Mo. App. 431. **N. C.**—*Godwin v. Early*, 114 N. C. 11, 18 S. E. 973. **Ohio.**—*Baltimore & O. & C. R. Co. v. Gibson*, 41 Ohio St. 145. **S. C.**—*Tumbleston v. Rumph*, 43 S. C. 275, 21 S. E. 84. **Tex.**—*Becton v. Alexander*, 27 Tex. 659. **Va.**—*Kimball v. Borden*, 95 Va. 203, 28 S. E. 207. **Wis.**—*Stroebe v. Fehl*, 22 Wis. 337.

**36.** *Tiffany v. Henderson*, 57 Iowa 490, 10 N. W. 884; *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797.

**37.** **Mass.**—*Williams v. Hingham & Q. B. & T. Corp.*, 4 Pick. 341. **Mich.**—*Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797. **Mo.**—*Cagle v. Chillicothe T. Mut. F. Ins. Co.*, 78 Mo. App. 431.

[a] **After Reversal and Remand.** *Kimball v. Borden*, 95 Va. 203, 28 S. E. 207. See 19 STANDARD PROC. 324.

**38.** See 21 STANDARD PROC. 415, et seq.

**39.** **Ark.**—*Keith v. Pratt*, 5 Ark. 661. **Cal.**—*Pralus v. Jefferson etc. Min. Co.*, 34 Cal. 558. **Ill.**—*Western Screw Co. v. Johnson*, 86 Ill. App. 89; *Libby v. Scherman*, 50 Ill. App. 123. **Ind.**—*Knight v. McDonald*, 37 Ind. 463. **Ind. Ter.**—*German-Am. Ins. Co. v. Paul*, 2 Ind. Ter. 625, 53 S. W. 442. **Ky.**—*Todd v. McClenahan*, Sneed 304; *Burbage v. Bullitt*, Sneed 23; *Hall v. Roberts*, 24 Ky. L. Rep. 2362, 74 S. W. 199. **Mo.**—*Gustin v. Concordia F. Ins. Co.*, 164 Mo. 172, 64 S. W. 178; *Clinton v. Williams*, 53 Mo. 141; *Jones v. Tuller*, 38 Mo. 363; *Deland v. Vanstone*, 26 Mo. App. 297. **N. J.**—*Lippencott v. Smith*, 4 N.

**J. L.** 106. **R. I.**—*Dunn v. Sullivan*, 23 R. I. 605, 51 Atl. 203.

[a] **A default judgment will not cure a defective statement of title.** *Dunn v. Sullivan*, 23 R. I. 605, 51 Atl. 203.

**40.** **U. S.**—*Lincoln v. Cambria Iron Co.*, 103 U. S. 412, 26 L. ed. 518. **Ala.**—*Payne v. Martin*, 1 Stew. 407. **Cal.**—*Bane v. Peerman*, 125 Cal. 220, 57 Pac. 885. **Conn.**—*Phelps v. Baldwin*, 17 Conn. 209. **Ill.**—*Bowman v. People*, 114 Ill. 474, 2 N. E. 484. **Ind.**—*Pittsburgh, C. & St. L. Ry. Co. v. Hunt*, 71 Ind. 229. **Ky.**—*Owensboro & H. G. Road Co. v. Coons*, 20 Ky. L. Rep. 1678, 49 S. W. 966. **Me.**—*Lane v. Maine Mut. F. Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150. **Md.**—*Neale v. Clautice*, 7 Har. & J. 372. **Mass.**—*Cushing v. Adams*, 18 Pick. 110. **Miss.**—*Cole v. Harman*, 8 Smed. & M. 562. **Mo.**—*Boulware v. Farmers' etc. Ins. Co.*, 77 Mo. App. 639. **N. H.**—*Low v. Tilton*, 19 N. H. 271. **N. J.**—*Halsey v. Salmon*, 3 N. J. L. 916. **Pa.**—*Miltnerberger v. Schlegel*, 7 Pa. 241. **S. C.**—*Craven v. Rose*, 3 S. C. 72. **Tex.**—*Loungeway v. Hale*, 73 Tex. 495, 11 S. W. 537. **Vt.**—*Curtis v. Burdick*, 48 Vt. 166. **Va.**—*Dejarnatte v. Allen*, 5 Gratt. (46 Va.) 499. **Wis.**—*Brickley v. Walker*, 68 Wis. 563, 32 N. W. 773. **Eng.**—*Stennel v. Hogg*, 1 Saund. 220, 226, 85 Eng. Reprint 240, 244.

[a] **When the averment of possession is essential, its omission is a defect which cannot be cured by verdict.** *Deland v. Vanstone*, 26 Mo. App. 297.

**41.** See generally the title "Variance and Failure of Proof."

**As to evidence of title or ownership, see ENCY. OF EV. titles "Ownership," "Title."**

**42.** See the title "Denials."

whether the property involved be real<sup>43</sup> or personal,<sup>44</sup> but under some statutes lack of title in the plaintiff, cannot over objection, be shown under the general issue.<sup>45</sup> When the strict legal title to land is not involved, the defendant may prove under the general issue an abandonment by the plaintiff of his rights therein;<sup>46</sup> and in action by a tenant against his landlord, an allegation of the latter's ownership of the premises is admitted by the general issue.<sup>47</sup>

Under a general denial, when title to or possession of land is pleaded in general terms, the defendant may prove the plaintiff's want of title<sup>48</sup> or possession,<sup>49</sup> and show ownership in himself,<sup>50</sup> or another party;<sup>51</sup> but under circumstances making necessary the pleading of facts showing title it has been held that such facts must be specially denied.<sup>52</sup> Likewise, in cases involving personal property, a sufficient averment in general terms of possession, right of possession, or ownership may be disproved under a general denial,<sup>53</sup> but when necessary to be pleaded specially, or a showing of a particular right must be made, such as a right to immediate possession, a special denial is called for.<sup>54</sup>

**2. Variance and Failure of Proof.**<sup>55</sup> — Under a sufficient allegation

43. **Fla.**—Neal v. Spooner, 20 Fla. 38 (ejectment); Wade v. Doyle, 17 Fla. 522. **Mich.**—Miller v. Beck, 68 Mich. 726, 35 N. W. 899. **N. H.**—Murray v. Webster, 5 N. H. 391, trespass. **N. J.** Hetfield v. Central R. Co., 29 N. J. L. 571, trespass. **Va.**—Callison v. Hedrick, 15 Gratt. (56 Va.) 244. **Eng.**—Johnson v. Howson, 2 M. & R. 226, 17 E. C. L. 710.

But in quiet title suits, see 21 STANDARD PROC. 1017.

44. **McLean County Coal Co. v. Long**, 91 Ill. 617; Outcalt v. Durling, 25 N. J. L. 443.

45. **Fla.**—Robinson v. Hartridge, 13 Fla. 501. **N. J.**—Outcalt v. Durling, 25 N. J. L. 443. **Eng.**—Barton v. Brown, 5 Mees. & W. 298.

See 1 Chit. Pl. (16th Am. ed.) 535. 46. **Perry v. Carey** (Ind. App.), 119 N. E. 1010.

47. **Sprengel v. Schroeder**, 203 Ill. App. 213.

48. **Cal.**—Colman v. Clements, 23 Cal. 245. **Kan.**—Wicks v. Smith, 18 Kan. 508. **Mo.**—Westbay v. Milligan, 74 Mo. App. 179. **Neb.**—Staley v. Housel, 35 Neb. 160, 52 N. W. 888. **N. Y.**—Raynor v. Timerson, 46 Barb. 518. **Wis.**—Hutchinson v. Chicago & N. W. R. Co., 41 Wis. 541.

[a] The insufficient character of the instrument under which title is claimed may be shown under a general denial. **Wenzel v. Schultz**, 100 Cal. 250, 34 Pac. 696.

49. **Cal.**—Uttendorffer v. Saegers, 50 Cal. 496. **Ind.**—Steeple v. Downing, 60 Ind. 478; Woodruff v. Garnor, 20 Ind. 174. **Wis.**—Hutchinson v. Chicago & N. W. R. Co., 41 Wis. 541.

50. **Dieckman v. Young**, 87 Mo. App. 530; **Hill v. Bailey**, 8 Mo. App. 85; **Branch v. De Blanc** (Tex. Civ. App.), 62 S. W. 134.

51. **Beard v. First Nat. Bank**, 41 Minn. 153, 43 N. W. 78.

52. **Ballard v. Kansas City & M. Farms Co.**, 131 Ark. 83, 198 S. W. 527.

53. **U. S.**—Schulenberg v. Harri-man, 21 Wall. 44, 22 L. ed. 551. **Cal.**—Wetmore v. San Francisco, 44 Cal. 294. **Ia.**—Gaskell v. Patton, 58 Iowa 163, 12 N. W. 140. **Minn.**—McClelland v. Nichols, 24 Minn. 176. **Mo.**—Westbay v. Milligan, 74 Mo. App. 179; **Pugh v. Williamson**, 61 Mo. App. 165. **Neb.**—Jenkins v. Mitchell, 40 Neb. 664, 59 N. W. 90. **N. Y.**—Field v. Knapp, 108 N. Y. 87, 14 N. E. 829; **Beaty v. Swarthout**, 32 Barb. 293.

54. **Ariz.**—Hall v. Southern Pac. Co., 6 Ariz. 378, 57 Pac. 617. **Ark.**—Shirk v. Williamson, 50 Ark. 562, 9 S. W. 307; **St. Louis, I. M. & S. R. Co. v. Hecht**, 38 Ark. 357. **Ia.**—Dyson v. Ream, 9 Iowa 51. **La.**—Citizens' Bank v. Maureau, 37 La. Ann. 857.

55. See the title "Variance and Failure of Proof."



of title in general terms, evidence of the source of title is admissible.<sup>56</sup>

As a general rule, the title proved must be that which is alleged,<sup>57</sup> or one sufficient to support the action.<sup>58</sup> So if the right to recover depends upon the existence of the title as alleged it must be proved,<sup>59</sup> whether such allegation be of an absolute title,<sup>60</sup> or particular estate.<sup>61</sup> Moreover in like case, an averment of a legal title is not sustained by

56. **Conn.**—Bennett *v.* Lathrop, 71 Conn. 613, 42 Pac. 634, 71 Am. St. Rep. 222. **La.**—Boatner *v.* Walker, 4 La. 313. **Minn.**—McArthur *v.* Clark, 86 Minn. 165, 90 N. W. 369, 91 Am. St. Rep. 333. **Mo.**—First Nat. Bank *v.* Ragsdale, 158 Mo. 668, 59 S. W. 987, 81 Am. St. Rep. 332. **Ore.**—Carter *v.* Wakeman, 42 Ore. 147, 70 Pac. 393. **Utah.**—Hague *v.* Nephi Irr. Co., 16 Utah 421, 52 Pac. 765, 67 Am. St. Rep. 634, 41 L. R. A. 311. **Wash.**—Osborne & Co. *v.* Stevens, 15 Wash. 478, 46 Pac. 1027.

But see Cilley *v.* Van Patten, 58 Mich. 404, 25 N. W. 326.

[a] But when possession is the gist of the action and is not presumed from a general averment of ownership, evidence of possession is not permissible under such general averment. McGrew *v.* Lamb, 31 Wash. 485, 72 Pac. 100.

57. **La.**—Drew *v.* Attakapas M. T. Co., 26 La. Ann. 306; Shaw *v.* Noble, 15 La. Ann. 305. **Minn.**—Caldwell *v.* Bruggerman, 4 Minn. 270. **Ohio.**—Satchell *v.* Doram, 4 Ohio St. 542.

[a] **Source of Title.**—When the source of title is pleaded, the evidence should correspond to the pleading or the latter should be amended. **Ia.**—Burns *v.* Iowa Homestead Co., 48 Iowa 279. **Mo.**—Utassy *v.* Giedinghagen, 132 Mo. 53, 33 S. W. 444. **Neb.**—Randall *v.* Persons, 42 Neb. 607, 60 N. W. 898. **Tex.**—Walker *v.* Houston (Tex. Civ. App.), 29 S. W. 1139.

[b] **Otherwise When Source Not Material.**—In ejectment it is not essential to allege source of title, and so if the plaintiff avers ownership by inheritance it may be shown that title was acquired by prescription. Davis *v.* Leeper, 22 Ky. L. Rep. 116, 56 S. W. 712.

58. **Meanev v. Kehoe**, 181 Mass. 424, 63 N. E. 925.

[a] **Where an absolute title is pleaded to personal property**, it is not a variance to prove an interest under a conditional sale. Keck *v.* State, 12 Ind. App. 119, 39 N. E. 899.

59. **Ala.**—Wharton *v.* King, 69 Ala. 365. **Ga.**—Northwestern Fert. Co. *v.* Atlanta Nat. Bank, 80 Ga. 629, 5 S. E. 793. **Ind.**—Indianapolis D. & W. R. Co. *v.* Center, 143 Ind. 63, 40 N. E. 134. **Ia.**—Burns *v.* Iowa Homestead Co., 48 Iowa 279. **Mich.**—Hubbard *v.* Long, 105 Mich. 442, 63 N. W. 644. **Minn.**—Derby *v.* Gallup, 5 Minn. 119. **N. H.**—Great Falls Co. *v.* Worster, 15 N. H. 412. **N. J.**—Outcalt *v.* Durling, 25 N. J. L. 443. **N. Y.**—Graney *v.* Berrie, 31 App. Div. 285, 52 N. Y. Supp. 775. **Ohio.**—Robinson *v.* Fitch, 26 Ohio St. 659. **Pa.**—Darlington *v.* Painter, 7 Pa. 473. **S. C.**—Hobbs *v.* Beard, 43 S. C. 370, 21 S. E. 305. **Tex.**—Willis & Bro. *v.* Hudson, 63 Tex. 678. **Eng.**—Beadsworth *v.* Torkington, 1 Q. B. 782, 41 E. C. L. 775, 1 G. & D. 482, 10 L. J. Q. B. 254, 113 Eng. Reprint 1330.

**Avoiding variance by amendment**, see *supra*, I, C, 2.

60. **Ala.**—Winter *v.* Merrick, 69 Ala. 86. **Ill.**—Lyon *v.* Kain, 36 Ill. 362. **Mich.**—Emerson *v.* Atwater, 7 Mich. 12. **N. Y.**—Wilbur *v.* Brown, 3 Denio 356. **Ohio.**—Satchell *v.* Doram, 4 Ohio St. 542. **Pa.**—Darlington *v.* Painter, 7 Pa. 473; Campbell *v.* Wasserman & Bros., 9 Pa. Co. Ct. 381. **Tex.**—Texas & N. O. R. R. Co. *v.* Oates, 2 Wills. Civ. Cas., §618.

[a] **A less estate**, such as a common or joint tenancy, cannot be shown under a necessary averment of absolute ownership. Galveston, H. & S. A. R. Co. *v.* Becht (Tex. Civ. App.), 21 S. W. 971; Missouri Pac. Ry. Co. *v.* Teague, 2 Wills. Civ. Cas. (Tex.), §780; Gulf, C. & S. F. R. Co. *v.* Witt, 2 Wills. Civ. Cas. (Tex.), §774.

61. **American Bank v. Campbell**, 34 Mo. App. 45; **Williams v. Holmes**, 2 Wis. 129. See also Smith *v.* Runnels, 97 Iowa 55, 65 N. W. 1002; **Moulton v. Moore**, 56 Vt. 700.

[a] **But a larger estate**, such as general ownership, may be shown under a plea of a special interest. Robinson *v.* Fitch, 26 Ohio St. 659.

proof of an equitable title,<sup>62</sup> but proof of an equitable title is admissible when such title is sufficient to support the action.<sup>63</sup> Ordinarily it is a variance to allege title in one party and prove that it resides in several,<sup>64</sup> or vice versa.<sup>65</sup>

**II. ACTIONS AGAINST ABSTRACTORS OR INSURERS OF TITLE.**—A. **IN GENERAL.**—An action against an abstractor or title insurance company for damages flowing from an imperfect or incorrect abstract or certificate of title arises ex contractu, not ex delicto,<sup>66</sup> and accrues at the time of delivery of such abstract or certificate of title,<sup>67</sup> although in some jurisdictions the action is held to accrue at the time of the discovery of the breach.<sup>68</sup>

B. **PARTIES.**—Under some statutes the action is maintainable by any person who relies upon the abstract and is injured thereby,<sup>69</sup> and it has been held that where it is known to the abstractor that the ab-

62. **Ala.**—Alabama Coal Min. Co. v. Brainard, 35 Ala. 476. **Ind.**—Stout v. McPheeters, 84 Ind. 585; Stehman v. Crull, 26 Ind. 436. **Ia.**—Knowlton v. Lendrum, 54 Iowa 756, 7 N. W. 97. **Mich.**—Emerson v. Atwater, 7 Mich. 12. **Minn.**—Stuart v. Lowry, 49 Minn. 91, 51 N. W. 662. **N. C.**—Geer v. Geer, 109 N. C. 679, 14 S. E. 297. **Utah.**—Tarpey v. Deseret Salt Co., 5 Utah 205, 14 Pac. 338.

63. Curtis v. Mohr, 18 Wis. 615.

[a] Where personal property is involved, proof of an equitable title is sufficient to show that one is rightfully in possession. Loeb v. Chur, 53 Hun 637, 6 N. Y. Supp. 296, 25 N. Y. St. 996.

[b] As against a mere trespasser proof of an equitable title is sufficient under an allegation of a legal title. Arrington v. Arrington, 114 N. C. 116, 19 S. E. 278.

[c] Where the right to sue is given by statute to an equitable owner, proof of an equitable interest is sufficient under an allegation of a legal title. Oliver v. Dougherty, 8 Ariz. 65, 68 Pac. 553.

64. Chicago, R. I. & P. R. Co. v. Todd, 91 Ill. 70.

65. Chicago & W. I. R. Co. v. Rolvink, 31 Ill. App. 596.

66. **Ia.**—Russell & Co. v. Polk County Ab. Co., 87 Iowa 233, 54 N. W. 212, 43 Am. St. Rep. 381. **Ohio.**—Thomas v. Guarantee Title, etc. Co., 81 Ohio St. 432, 91 N. E. 183, 26 L. R. A. (N. S.) 1210. **Tenn.**—Equitable B. & L. Assn. v. Bank of Commerce & Tr. Co., 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. (N. S.) 449. **Wash.**—Doug-

las v. Title Trust Co., 80 Wash. 71, 141 Pac. 177; Bremerton Dev. Co. v. Title Trust Co., 67 Wash. 268, 121 Pac. 69. **Eng.**—Knights v. Quarles, 2 B. & B. 102, 6 E. C. L. 55, 129 Eng. Reprint 896.

67. **Cal.**—Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115. **Ia.**—Russell & Co. v. Polk County Ab. Co., 87 Iowa 233, 54 N. W. 212, 43 Am. St. Rep. 381. **Kan.**—E. T. Arnold & Co. v. Barner, 91 Kan. 768, 139 Pac. 404, Ann. Cas. 1915D, 446; Provident Loan Trust Co. v. Walcott, 5 Kan. App. 473, 47 Pac. 8. **Mo.**—Schade v. Gehner, 133 Mo. 252, 34 S. W. 576; Rankin v. Schaeffer, 4 Mo. App. 108. **Okla.**—Walker v. Bowman, 27 Okla. 172, 111 Pac. 319, Ann. Cas. 1912B, 839, 30 L. R. A. (N. S.) 642. **Pa.**—Owen v. Western Sav. Fund, 97 Pa. 47, 39 Am. Rep. 794; Bodine v. Wayne T. & T. Co., 33 Pa. Super. 68.

68. Hillock v. Idaho Title & Tr. Co., 22 Idaho 440, 126 Pac. 612, 42 L. R. A. (N. S.) 178.

69. **Kan.**—E. T. Arnold & Co. v. Barner, 91 Kan. 768, 139 Pac. 404, Ann. Cas. 1915D, 446. **Neb.**—Crook v. Chilvers, 99 Neb. 684, 157 N. W. 617, Ann. Cas. 1918E, 90. **Okla.**—Sackett v. Rose, 55 Okla. 398, 154 Pac. 1177, L. R. A. 1916D, 820. **S. D.**—Goldberg v. Sisseton L. & T. Co., 24 S. D. 49, 123 N. W. 266.

[a] No custom, on the part of the defendant himself, or other abstractors, can be relied upon to relieve him from the obligations imposed upon him by the statute. Crook v. Chilvers, 99 Neb. 684, 157 N. W. 617, Ann. Cas. 1918E, 90.

abstract is for the information and use of a certain person, he may maintain the action.<sup>70</sup> But ordinarily, being an action *ex contractu*, it may be brought only by the party with whom the agreement is made, that is, the one for whom the abstract is furnished.<sup>71</sup> However, when an abstract is reaffirmed and recertified for another party, such person, being injured by any defect therein, may maintain an action against the abstractor.<sup>72</sup>

C. PLEADING. — In action against an abstractor or certifier of title, plaintiff must set forth the facts constituting the cause of action<sup>73</sup> in accordance with the general principles elsewhere treated.<sup>74</sup> The agreement should be stated,<sup>75</sup> as well as the incompleteness or imperfection of the abstract or certificate,<sup>76</sup> and the fact that plaintiff placed reli-

70. **Ind.**—*Brown v. Sims*, 22 Ind. App. 317, 53 N. E. 779, 72 Am. St. Rep. 308. **Mont.**—*Western Loan & S. Co. v. Silver Bow A. Co.*, 31 Mont. 448, 78 Pac. 774, 107 Am. St. Rep. 435. **N. J.**—*Economy B. & L. Assn. v. West Jersey Title Co.*, 64 N. J. L. 27, 44 Atl. 854. **Tenn.**—*Denton v. Nashville Title Co.*, 112 Tenn. 320, 79 S. W. 799; *Dickle v. Nashville Abst. Co.*, 89 Tenn. 431, 14 S. W. 896, 24 Am. St. Rep. 616. **Wash.**—*Anderson v. Spriestersbach*, 69 Wash. 393, 125 Pac. 166, 42 L. R. A. (N. S.) 176.

Action by one for whose benefit contract was made, see 20 STANDARD PROC. 914.

71. **U. S.**—*National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621; *Dundee Mtg. & Tr. Inv. Co. v. Hughes*, 20 Fed. 39. **Ark.**—*Talpey v. Wright*, 61 Ark. 275, 32 S. W. 1072, 54 Am. St. Rep. 206. **Mich.**—*Kenyon v. Charlevoix Imp. Co.*, 135 Mich. 103, 97 N. W. 407. **Mo.**—*Zweigardt v. Birdseye*, 57 Mo. App. 462. **N. Y.**—*Glawitz v. People's G. S. Co.*, 49 App. Div. 465, 63 N. Y. Supp. 691; *Lockwood v. New York Title Ins. Co.*, 130 N. Y. Supp. 824. **Ohio.**—*Thomas v. Guarantee, etc. Co.*, 81 Ohio St. 432, 91 N. E. 183, 26 L. R. A. (N. S.) 1210. **Tenn.**—*Equitable B. & L. Assn. v. Bank of Commerce & Tr. Co.*, 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. (N. S.) 448. **Tex.**—*Decatur L. L. & A. Co. v. Rutland* (Tex. Civ. App.), 185 S. W. 1064. **Wash.**—*Douglas v. Title Trust Co.*, 80 Wash. 71, 141 Pac. 177; *Bremerton Dev. Co. v. Title Trust Co.*, 67 Wash. 268, 121 Pac. 69.

72. *Decatur L. L. & A. Co. v. Rutland* (Tex. Civ. App.), 185 S. W. 1064.

[a] When an abstract is brought up

to date by extension, and (1) former certificates are made a part of the last certificate by reference and adoption, for an injury resulting from a defect in one of such prior certificates the party who orders the last certificate is the proper party to maintain the action and not the one for whom such prior certificate was made. *Bremerton Dev. Co. v. Title Trust Co.*, 67 Wash. 268, 121 Pac. 69. (2) But ordinarily the extension of an abstract is not of itself a recertification of former entries for the correctness of which the abstractor becomes liable. *Arnold v. Barner*, 100 Kan. 36, 163 Pac. 805.

73. *Batty v. Fout*, 54 Ind. 482; *Puckett v. Waco, etc. Co.*, 16 Tex. Civ. App. 329, 40 S. W. 812.

[a] In an action against a lawyer who holds himself out as an investigator of titles, his negligence in looking up a title for plaintiff, may be alleged. *Gilman v. Hovey*, 26 Mo. 280. See generally the title "Lawyer and Client."

74. See generally the titles "Declaration and Complaint;" "Implied and Express Agreements;" "Pleading;" and titles dealing with particular phases of pleading.

[a] **Facts Not Conclusions.**—*Hershiser v. Ward*, 29 Nev. 228, 87 Pac. 171; *Puckett v. Waco, etc. Co.*, 16 Tex. Civ. App. 329, 40 S. W. 812.

[b] **Negating Defenses Unnecessary.**—*Hershiser v. Ward*, 29 Nev. 228, 87 Pac. 171.

75. *Hershiser v. Ward*, 29 Nev. 228, 87 Pac. 171. See generally the title "Implied and Express Agreements."

76. *Hershiser v. Ward*, 29 Nev. 228, 87 Pac. 171. See *Sackett v. Rose*, 55 Okla. 398, 154 Pac. 1177, L. R. A. 1916D, 820.



ance upon it,<sup>77</sup> and thereby suffered the damage demanded.<sup>78</sup>

**III. PROTECTION OF PROPERTY PENDING TITLE IN CONTROVERSY.**—A. IN GENERAL.—It is well settled that, without indicating a desire to favor either party, an injunction will be granted to preserve or protect the status of property,<sup>79</sup> the title of which is in

[a] What is a defective abstract depends upon the circumstances of each case. So where an abstract is ordered to cover a certain period it is not incomplete because it fails to note something without the period. *Douglas v. Title Trust Co.*, 80 Wash. 71, 141 Pac. 177.

[b] Effect of mistake in party's middle initial, with reference to a judgment lien not shown by the abstract, see *Turk v. Benson*, 30 N. D. 200, 152 N. W. 354, L. R. A. 1915D, 1211.

[c] For failure to show a void mortgage, an action against the abstractor cannot be maintained, even though the amount of the mortgage, which is the damage sustained, and the cost of a suit to quiet title, are the same. *Manville v. Le Flore*, etc. Co. (Okla.), 162 Pac. 682.

77. Ind.—*Batty v. Fout*, 54 Ind. 482. Ia.—See *Young v. Lohr*, 118 Iowa 624, 92 N. W. 684. Mo.—See *Renkert v. Title Guaranty Trust Co.*, 102 Mo. App. 267, 76 S. W. 641. Okla.—*Sackett v. Rose*, 55 Okla. 398, 154 Pac. 1177, L. R. A. 1916D, 820.

[a] The proximate cause of the injury is (1) the failure of the abstractor to show in the abstract a true report of the record, and the fact that the title in the purchaser might have failed for some other cause not shown in the record would not itself defeat the plaintiff's right to recover. *Washington County Ab. Co. v. Harris*, 48 Okla. 577, 149 Pac. 1075. (2) Seller's fraud as a concurring cause, see *Decatur L. L. & A. Co. v. Rutland* (Tex. Civ. App.), 185 S. W. 1064.

78. Ind.—*Williams v. Hanley*, 16 Ind. App. 464, 45 N. E. 622. Kan.—*United States Wind-Eng. & P. Co. v. Linville*, 43 Kan. 455, 23 Pac. 597. Nev.—See *Hershiser v. Ward*, 29 Nev. 228, 87 Pac. 171.

[a] Liability for the damage sufficient. *Walker v. Bowman*, 27 Okla. 172, 111 Pac. 319, Ann. Cas. 1912B, 839, 30 L. R. A. (N. S.) 642.

[b] Damages should be particularly stated, by showing all items, but a general statement is sufficient in the absence of objection. *Decatur L. L. & A. Co. v. Rutland* (Tex. Civ. App.), 185 S. W. 1064.

79. U. S.—*Louisville & N. R. Co. v. Western U. Tel. Co.*, 252 Fed. 29, 164 C. C. A. 141; *Louisville & N. R. Co. v. Western U. Tel. Co.*, 207 Fed. 1, 124 C. C. A. 573; *Warren Featherbone Co. v. Landauer*, 151 Fed. 130. Ala.—*Mobile Co. v. Knapp*, 75 So. 881. Ark.—*Hampton v. Hickey*, 88 Ark. 324, 114 S. W. 707. Ga.—*Central of Ga. R. Co. v. Standard F. S. Co.*, 144 Ga. 92, 86 S. E. 228; *Johnson v. Hall*, 83 Ga. 281, 9 S. E. 783. Haw.—*Montgomery v. Montgomery*, 2 Hawaii 553. Idaho.—*Boise Dev. Co. v. Idaho Tr. & Sav. Bank*, 24 Idaho 36, 133 Pac. 916. Ill.—*Fugate v. Orndorff*, 162 Ill. App. 180. Ia.—*Snouffer v. Tipton*, 161 Iowa 223, 142 N. W. 97, L. R. A. 1915B, 173. La.—*Baldwin Lumb. Co. v. Delfares*, 130 La. 712, 58 So. 519. Neb.—*State v. Grimes*, 96 Neb. 719, 148 N. W. 942. N. Y.—*Urbano v. Hallenbeck*, 163 App. Div. 844, 147 N. Y. Supp. 244; *Fleitmenn v. Union Bank*, 93 Misc. 595, 158 N. Y. Supp. 439. N. C.—*Hayes v. Pace*, 162 N. C. 288, 78 S. E. 290; *East Lake Lumb. Co. v. East Coast Cedar Co.*, 142 N. C. 412, 55 S. E. 304. P. R.—*Abella v. Fernandez*, 17 Porto Rico 1024. Tex.—*Mendelsohn v. Gordon* (Tex. Civ. App.), 156 S. W. 1149. See *Montgomery County Dev. Co. v. Miller-Vidor Lumb. Co.* (Tex. Civ. App.), 139 S. W. 1015. Vt.—*Wilkins v. Somerville*, 80 Vt. 48, 66 Atl. 893, 130 Am. St. Rep. 906, 11 L. R. A. (N. S.) 1183. W. Va.—*Pardee v. Camden Lumber Co.*, 70 W. Va. 68, 73 S. E. 82, 43 L. R. A. (N. S.) 262. Wyo.—*Forde v. Libby*, 22 Wyo. 464, 143 Pac. 1190.

[a] There is no determination on the merits of the controversy between the parties as to title in granting or denying a petition for an injunction.

litigation, whether in a suit in equity,<sup>80</sup> action at law,<sup>81</sup> or before a special tribunal.<sup>82</sup> An injunction is proper to prevent the alienation or any change in the status of property which would interfere with the equitable adjustment of the parties' rights,<sup>83</sup> or cause irremediable

New Jersey Zinc & Iron Co. v. Trotter, 38 N. J. Eq. 3.

[b] **Must Be Necessary.**—(1) An injunction will not issue where the bill operates as a lis pendens and affords ample protection (*Zander v. Phillips*, 213 Fed. 29, 129 C. C. A. 615; *Barstow v. Becket*, 110 Fed. 826; *American V. Fibre Co. v. Taylor*, 10 Del. Ch. 202, 87 Atl. 1025), or (2) where a money judgment only is sought. *Campbell v. Ernest*, 64 Hun 188, 19 N. Y. Supp. 123, 22 Civ. Proc. 218, 46 N. Y. St. 154.

80. See the following: **U. S.**—*Lovell-McC. Mfg. Co. v. Auto. Supply Mfg. Co.*, 193 Fed. 658; *St. Louis Min. & M. Co. v. Mont. Min. Co.*, 58 Fed. 129.

**Ill.**—*Kallish v. Polakow*, 162 Ill. App. 591. **Ia.**—*Bankers' Surety Co. v. Linder*, 156 Iowa 486, 137 N. W. 496. **Md.** *Green v. Keen*, 4 Md. 98. **Miss.** *Kyle v. Rhodes*, 71 Miss. 487, 15 So. 40. **N. J.**—*New Jersey Zinc & Iron Co. v. Trotter*, 38 N. J. Eq. 3; *Huffman v. Hummer*, 17 N. J. Eq. 263. **N. Y.**—*Roskam-Scott Co. v. Thomas*, 175 App. Div. 84, 161 N. Y. Supp. 776; *Lozier Motor Co. v. Ball*, 53 Misc. 375, 104 N. Y. Supp. 771; *Rau v. Seidenberg*, 53 Misc. 386, 104 N. Y. Supp. 798. **S. C.**—*Lyles v. Williams*, 96 S. C. 290, 80 S. E. 470; *Jones v. Atlantic C. Lumber Co.*, 92 S. C. 418, 75 S. E. 698. **Wyo.**—*Weaver v. Richardson*, 21 Wyo. 343, 132 Pac. 1148.

81. **U. S.**—See the following: *Buskirk v. King*, 72 Fed. 22, 18 C. C. A. 418; *Western U. Tel. Co. v. Louisville & N. R. Co.*, 201 Fed. 946. **Del.**—*Dill v. Dill*, 10 Del. Ch. 257, 91 Atl. 450. **D. C.**—*Healey v. Maroney*, 34 App. Cas. 99. **Mont.**—*Bozeman v. Hobart*, 42 Mont. 290, 112 Pac. 388. **N. Y.** *Lehigh & H. R. Ry. Co. v. Warwick*, 78 Misc. 1, 137 N. Y. Supp. 658. **N. C.** *Sherrod v. Battle*, 147 N. C. 10, 60 S. E. 647. **Pa.**—*Coal Co. v. Savage*, 4 Pa. Dist. 557. **P. R.**—*P. J. Carlin Constr. Co. v. Guerini Stone Co.*, 6 Porto Rico Fed. 87. **Va.**—*Manchester Cotton Mills v. Manchester*, 25 Gratt. (66 Va.) 825. **W. Va.**—*West Virginia D. Co. v. Preston County Dev. Co.*, 76 W. Va. 492, 85 S. E. 668; *Pardee & C. Lum-*

*ber Co. v. Odell*, 71 W. Va. 206, 76 S. E. 343. **Eng.**—*Harman v. Jones, Cr. & Ph.* 299, 41 Eng. Reprint 505.

**Pending an appeal from a law judgment**, see *infra*, III, B.

82. See *infra*, this note.

[a] **State Railroad Commission.**—(1) Orders and decisions of a state railroad commission are enforceable by injunction. See *Fletcher Paper Co. v. Detroit & M. R. Co.*, 175 Mich. 234, 141 N. W. 613. (2) But to preserve the status of property, when the final determination of the controversy rests solely with the commission, equity will not interfere. *Fletcher Paper Co. v. Detroit & M. R. Co.*, 175 Mich. 234, 141 N. W. 613. Compare 21 STANDARD PROC. 906, 952.

[b] **Federal Land Office.**—Pending determination of the title in the federal land office an injunction will be granted to maintain the status quo of the property. **U. S.**—*Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. ed. 1116; *Stark v. Starrs*, 6 Wall. 402, 18 L. ed. 925; *Cosmos Exp. Co. v. Gray Eagle Oil Co.*, 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230; *Olive Land & Dev. Co. v. Olmstead*, 103 Fed. 568. **Cal.**—*Walker v. Emerson*, 89 Cal. 456, 26 Pac. 968; *Richards v. Dower*, 64 Cal. 62, 28 Pac. 113; *More v. Masini*, 32 Cal. 590. **Ia.**—*Wood v. Murray*, 85 Iowa 505, 52 N. W. 356. **Kan.** *Poirier v. Fetter*, 20 Kan. 47. **Mont.** *Boyd v. Desrozier*, 20 Mont. 444, 52 Pac. 53. **N. J.**—*Johnson v. Hughes*, 53 N. J. Eq. 406, 43 Atl. 901. **N. M.** *Elliott v. Rich*, 24 N. M. 52, 172 Pac. 194. **Okla.**—*Cox v. Garrett*, 7 Okla. 375, 54 Pac. 546; *Calhoun v. McCornack*, 7 Okla. 347, 54 Pac. 493. **Wash.** *West Coast Imp. Co. v. Winsor*, 8 Wash. 490, 36 Pac. 441. **W. Va.**—*Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566.

83. **U. S.**—*Murray v. Sioux A. Min. Co.*, 239 Fed. 818, 152 C. C. A. 604; *American Can Co. v. Williams*, 149 Fed. 200, 79 C. C. A. 158; *Rateau v. Bernard*, 3 Blatchf. 244, 20 Fed. Cas. No. 11,579; *Higgins v. Jenks*, 3 Ware 17, 12 Fed. Cas. No. 6,468. **La.**—*Sowell v. Cox*, 10 Rob. 68. **Md.**—*Stewart v.*

injury,<sup>84</sup> and to protect possession,<sup>85</sup> or to secure and preserve a trust fund,<sup>86</sup> especially when there is danger of its loss or dissipation.<sup>87</sup> The use of property by one in possession will not ordinarily be enjoined unless it is shown that the continuation thereof would defeat the plaintiff's action;<sup>88</sup> nor will an injunction be granted which would defeat

Stewart, 105 Md. 297, 66 Atl. 16. Mass. Rioux v. Cronin, 222 Mass. 131, 109 N. E. 898. See Bearse v. Lebowich, 212 Mass. 344, 99 N. E. 175. Mich. Sherman v. American Stove Co., 85 Mich. 169, 48 N. W. 537. N. J.—Hutchinson v. Johnson, 7 N. J. Eq. 40. N. Y. Castoriano v. Dupe, 145 N. Y. 250, 39 N. E. 1065; Manning v. Ogden, 70 Hun 399, 24 N. Y. Supp. 70, 54 N. Y. St. 113; Smith & Sons Carpet Co. v. Skinner, 36 N. Y. Supp. 1000. N. C.—McCless v. Meekins, 117 N. C. 34, 23 S. E. 99; Caldwell v. Stirewalt, 100 N. C. 201, 6 S. E. 262; Parker v. Grammer, 62 N. C. 28. S. C.—Gresham v. Atlantic C. Lumb. Corp., 96 S. C. 53, 79 S. E. 799; Pelzer v. Hughes, 27 S. C. 408, 3 S. E. 781. Wis.—Taylor v. Collins, 51 Wis. 123, 8 N. W. 22.

84. U. S.—Montana Min. Co. v. St. Louis Min., etc. Co., 168 Fed. 514, 93 C. C. A. 536. Cal.—People v. Kent, 6 Cal. 89. Conn.—Cole v. Jerman, 77 Conn. 374, 59 Atl. 425. Ga.—Merchants' & Mechanics' Bank v. Tillman, 106 Ga. 55, 31 S. E. 794. Ill. Baker v. National Biscuit Co., 96 Ill. App. 228. Ky.—Cottrell v. Moody, 12 B. Mon. 500. Mich.—Crane v. Dwyer, 9 Mich. 350, 80 Am. Dec. 87. N. Y. Campbell v. Ernest, 64 Hun 188, 19 N. Y. Supp. 123, 22 Civ. Proc. 218, 46 N. Y. St. 154; Shea v. Bergen, 110 N. Y. Supp. 572. N. C.—British & Am. M. Co. v. Long, 113 N. C. 123, 18 S. E. 165. Ohio.—Atkins v. Veach, 7 Ohio Dec. (Reprint) 176. Tenn.—Loftin v. Espy, 4 Yerg. 84; Smith v. Koontz, 4 Hayw. 189. Can.—Corham v. Kingston, 17 Ont. 432.

85. U. S.—La Chapelle v. Bubb, 69 Fed. 481; Western U. Tel. Co. v. St. Joseph & W. R. Co., 3 Fed. 430, 1 McCrary 565. Cal.—Gower v. Andrew, 59 Cal. 119, 43 Am. Rep. 242. Ga.—Dekle v. McLeod, 144 Ga. 289, 86 S. E. 1082; Comer v. Comer, 92 Ga. 569, 18 S. E. 417; Cottle v. Harrold, J. & Co., 72 Ga. 830. Ia.—Collins v. Collins, 72 Iowa 104, 33 N. W. 442. Mich.—Doane v. Allen, 172 Mich. 686, 138 N. W. 228. Miss.—Jones v. Brandon, 60 Miss. 556.

Neb.—State *ex rel.* Murphy v. Graves, 92 Neb. 333, 138 N. W. 153. N. Y. Stamm v. Bostwick, 30 Hun 70, 65 How. Pr. 358, 2 McCarty Civ. Proc. 467; Graham v. James, 7 Rob. 468; Reynolds v. Webber, 160 N. Y. Supp. 177. Okla.—Murphy v. Fitch, 35 Okla. 364, 130 Pac. 298. Pa.—Nittany Val. R. Co. v. Empire Steel & I. Co., 218 Pa. 224, 67 Atl. 349; Wilson v. Wilson, 19 Pa. Dist. 490. P. R.—See Abella v. Fernandez, 17 Porto Rico 1024. Tenn.—Rutherford v. Metcalf, 5 Hayw. 58. Tex.—Knox v. Askew, 62 Tex. Civ. App. 217, 131 S. W. 230. Utah.—Flagstaff Silver Min. Co. v. Patrick, 2 Utah 304. Wash.—Northern Pac. R. Co. v. Wadekamper, 70 Wash. 392, 126 Pac. 909; West Coast Imp. Co. v. Winsor, 8 Wash. 490, 36 Pac. 441.

86. U. S.—American Can Co. v. Williams, 153 Fed. 882, 82 C. C. A. 628. Ga.—Knight v. Knight, 75 Ga. 386. Mich.—Hodges v. McDuff, 69 Mich. 76, 36 N. W. 704. N. J.—See Mabee v. Mabee, 85 N. J. Eq. 353, 96 Atl. 495. N. C.—Morris v. Willard, 84 N. C. 293. Tex.—Driskill v. Boyd (Tex. Civ. App.), 181 S. W. 715.

87. Conn.—Phoenix Ins. Co. v. Carey, 80 Conn. 426, 68 Atl. 993. D. C. See Gritts v. Fisher, 37 App. Cas. 473. Ind.—Cheek v. Tilley, 31 Ind. 121. La. Denson v. Stewart, 15 La. Ann. 456. N. J.—Hopper v. Morgan (N. J. Eq.), 42 Atl. 171. N. Y.—Adams v. Ball, 24 App. Div. 69, 48 N. Y. Supp. 778; Rogers v. Marshall, 6 Abb. Pr. (N. S.) 457. N. C.—Jones v. Jones, 115 N. C. 209, 20 S. E. 370; Horton v. White, 84 N. C. 297. Pa.—Koons v. Koons, 4 Kulp 30. Vt.—Hanks v. Hanks, 75 Vt. 273, 54 Atl. 959. Wis.—Todd v. Lee, 15 Wis. 365.

88. Ala.—Williams v. Long, 129 Cal. 229, 61 Pac. 1087. Ga.—Kelly v. Morris, 31 Ga. 54. Kan.—Snyder v. Hopkins, 31 Kan. 557, 3 Pac. 367. N. C. Baldwin v. York, 71 N. C. 463. Pa. Newhart v. Sampsel, 2 Pa. Dist. 647. Vt.—White v. Booth, 7 Vt. 131.



the defendant's claim.<sup>89</sup>

**B. PENDING AN APPEAL.**—Pending an appeal from a decision determining the rights of the parties to the title of the property in controversy, on a showing that the injury would be irreparable or of a substantial nature,<sup>90</sup> want of an adequate remedy at law,<sup>91</sup> and a prima facie right,<sup>92</sup> an injunction, as a general rule, will issue to preserve the status of the property until the case is finally disposed of by the appellate court;<sup>93</sup> but it is held in some jurisdictions that when the original action is at law such injunction will not be granted.<sup>94</sup>

**C. CONSIDERATIONS GOVERNING RELIEF.**—In an application for an injunction to preserve the status of property the general rules relating to injunctions are applicable.<sup>95</sup> Thus there must be a real or sub-

89. When possession is the gist of the action the plaintiff will not be put in possession. *Lakes Island Realty Co. v. McDermott*, 96 Misc. 37, 160 N. Y. Supp. 450.

90. See *Maloney v. King*, 27 Mont. 428, 71 Pac. 469.

91. *Ark.*—*McFadden v. Owens*, 54 Ark. 118, 15 S. W. 84. *Kan.*—*Campbell v. Coonradt*, 26 Kan. 67. *N. Y.*—*Fleitzmann v. Union Bank*, 93 Misc. 595, 158 N. Y. Supp. 439; *Fellows v. Heermans*, 13 Abb. Pr. (N. S.) 1.

92. *Callaway v. Baltimore*, 99 Md. 315, 57 Atl. 661.

[a] In a second action, where the plaintiff's claim of title is identical with that asserted by him in a previous action, he is not entitled to an injunction pending an appeal by him. *Wetzstein v. Boston & M. C. C. & S. M. Co.*, 25 Mont. 85, 63 Pac. 799.

93. *U. S.*—*Parker v. Cir. Ct. Judges*, 12 Wheat. 561, 6 L. ed. 729; *Wood v. Braxton*, 54 Fed. 1005. *Ala.*—*Mobile & B. R. Co. v. Louisville, etc. R. Co.*, 190 Ala. 417, 67 So. 244. *Ga.*—*Walker v. Maddox-Rucker Bkg. Co.*, 97 Ga. 386, 23 S. E. 897. *Ia.*—*Wehrman v. Moore*, 177 Iowa 542, 159 N. W. 218; *Iowa College v. Davenport*, 7 Iowa 213. *La.*—*State v. Sommerville*, 112 La. 1091, 36 So. 864. *Miss.*—*Woods v. Riley*, 72 Miss. 73, 18 So. 384. *Mont.*—*Finlen v. Heinze*, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517. *N. Y.*—*Hart v. Albany*, 3 Paige Ch. 381. *Ohio.*—*Wagner v. Railway Co.*, 38 Ohio St. 32. *Ore.*—*Kollock v. Leyde*, 77 Ore. 569, 143 Pac. 621, 151 Pac. 733. *Eng.*—*Polini v. Gray*, 12 Ch. D. 438, 49 L. J. Ch. 41, 40 L. T. N. S. 861, 28 Wkly. Rep. 360.

[a] Discretionary.—“This court has

inherent power to make in its discretion such restraining orders as may be necessary to preserve the status quo between the parties until the final disposition of any pending appeal.” *Hall v. Ames*, 190 Fed. 138, 111 C. C. A. 178.

[b] Pending appeal from order dissolving injunction, the restraining order is usually revived, providing a sufficient showing is made. *Van Walkenburgh v. Rahway Bank*, 8 N. J. Eq. 725, motion denied on insufficient showing.

94. *Clark v. Board of Edu.*, 76 N. J. Eq. 326, 74 Atl. 319, 139 Am. St. Rep. 763, 25 L. R. A. (N. S.) 827, *overruling* *People's Traction Co. v. Central Pas. R. Co.*, 67 N. J. Eq. 370, 58 Atl. 597. See also *Supreme Lodge, O. S. F. v. Carey*, 57 Kan. 655, 47 Pac. 621; *Reisner v. Strong*, 24 Kan. 410; *Ludwig v. Lazarus*, 10 App. Div. 62, 41 N. Y. Supp. 773, 75 N. Y. St. 1169; *Coster v. Van Schaick*, 64 How. Pr. (N. Y.) 100.

[a] Except in Case of Fraud or Want of Jurisdiction.—*Coster v. Van Schaick*, 64 How. Pr. (N. Y.) 100.

[b] The reason (1) for the distinction is the opinion that such an injunction is an interference with the law judgment, which is here held to be outside equity jurisdiction. *Clark v. Board of Edu.*, 76 N. J. Eq. 326, 74 Atl. 319, 139 Am. St. Rep. 763, 25 L. R. A. (N. S.) 827. (2) On the other hand, it has been said that the object of such an order is not to stay the judgment or interfere therewith, but merely to preserve the status of the property pending the appeal. *Mobile & B. R. Co. v. Louisville, etc. R. Co.*, 190 Ala. 417, 67 So. 244.

95. See the title “Injunctions.”

stantial question or dispute as to the title between the parties,<sup>96</sup> the plaintiff must be able to show a prima facie right,<sup>97</sup> the court in the exercise of its discretion may be guided or influenced by the balance of equities between the parties,<sup>98</sup> and in granting the application may impose terms requiring a speedy determination of the controversy,<sup>99</sup> or security for the defendant's protection.<sup>1</sup>

**IV. ESTABLISHING TITLE IN CASE OF LOST OR DESTROYED RECORDS.**—A. **IN GENERAL.**—The destruction of public records by fire or earthquake has led to the enactment of statutes providing the procedure to be followed in establishing title to real estate under such conditions,<sup>2</sup> and the constitutionality of such statutes has been sustained by the federal supreme court.<sup>3</sup> The procedure specified by the statute should be strictly followed.<sup>4</sup>

B. **JURISDICTION.**—The jurisdiction to establish title to real estate under the burnt record acts is vested in equity,<sup>5</sup> although other questions may be incidentally involved.<sup>6</sup>

96. **Cal.**—Hunt *v.* Steese, 75 Cal. 620, 17 Pac. 920; State *v.* McGlynn, 20 Cal. 233, 81 Am. Dec. 118. **N. J.** New Jersey Zinc & Iron Co. *v.* Trotter, 38 N. J. Eq. 3. **N. C.**—Ellett *v.* Newman, 92 N. C. 519; Levenson & Co. *v.* Elson, 88 N. C. 182. **S. C.**—Middleton *v.* Ellison, 95 S. C. 158, 78 S. E. 739. **Eng.**—Great Western Ry. Co. *v.* Birmingham, etc. R. Co., 2 Ph. 597, 17 L. J. Ch. 243, 12 Jur. (O. S.) 106, 41 Eng. Reprint 1074.

97. **U. S.**—Goldfield Con. Mines Co. *v.* Goldfield Miners' Union, 159 Fed. 500; Western U. Tel. Co. *v.* New York, 38 Fed. 552, 3 L. R. A. 449. **Ga.** Hitt *v.* Americus Preston & L. W. & C. Co., 96 Ga. 788, 22 S. E. 926. **Md.** Whalen *v.* Dalashmutter, 59 Md. 250. **N. J.**—Huffman *v.* Hummer, 17 N. J. Eq. 263. **Pa.**—Rhea *v.* Forsyth, 37 Pa. 503, 78 Am. Dec. 441; Pennsylvania & M. St. Ry. Co. *v.* Kenneth Coal Co., 38 Pa. Co. Ct. 381. **S. C.**—Batson *v.* Southern R. Co., 106 S. C. 307, 91 S. E. 310.

98. **U. S.**—Allison *v.* Corson, 88 Fed. 581, 32 C. C. A. 12; Western U. Tel. Co. *v.* Pennsylvania R. Co., 120 Fed. 981. **N. H.**—Winnipissiopee Lake Co. *v.* Worster, 29 N. H. 433. **N. Y.**—Morris *v.* New York, 7 N. Y. Supp. 943. **Utah.**—Kahn *v.* Old Tel. Min. Co., 2 Utah 13. **Eng.**—Hilton *v.* Granville, 4 Beav. 130, 49 Eng. Reprint 288; Hills *v.* University of Oxford, 1 Vern. 275, 23 Eng. Reprint 467.

99. **U. S.**—Thomas *v.* Nantahala Marble & T. Co., 58 Fed. 485, 7 C. C.

A. 330. **Md.**—Clayton *v.* Shoemaker, 67 Md. 216, 9 Atl. 635. **N. J.**—Huffman *v.* Hummer, 17 N. J. Eq. 263. **N. C.** Irwin *v.* Davidson, 38 N. C. 311.

1. **U. S.**—McLure *v.* Sherman, 70 Fed. 190. **N. Y.**—Bennett *v.* Wright, 77 Hun 331, 28 N. Y. Supp. 453, 60 N. Y. St. 63; Humphreys *v.* Hurtt, 3 Hun 216. **Eng.**—Chappell *v.* Davidson, 8 De G. M. & G. 1, 44 Eng. Reprint 239.

2. Title & Dec. Restoration Co. *v.* Kerrigan, 150 Cal. 289, 88 Pac. 356, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682; Kelle *v.* Egan, 256 Ill. 45, 99 N. E. 859.

3. American Land Co. *v.* Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. ed. 82 (construing the California Burnt Record Act); Gormley *v.* Clark, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. ed. 909, construing the Illinois Burnt Record Act.

4. Lofstad *v.* Murasky, 152 Cal. 64, 91 Pac. 1008; Miller *v.* Stalker, 158 Ill. 514, 42 N. E. 79. See the cases cited *infra*, IV, C and D.

5. American Land Co. *v.* Zeiss, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. ed. 82; Gormley *v.* Clark, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. ed. 909; Smith *v.* Gage, 12 Fed. 32, 11 Biss. 217; Quinn *v.* Perkins, 159 Ill. 572, 43 N. E. 759.

[a] The loss or destruction is reason enough to sustain the jurisdiction of equity. South Chicago Brew. Co. *v.* Taylor, 205 Ill. 132, 68 N. E. 732.

6. Smith *v.* Gage, 12 Fed. 32, 11 Biss. 217; Gage *v.* Thompson, 161 Ill. 403, 43 N. E. 1067.

C. PARTIES.—The statute itself usually provides who may maintain the action.<sup>7</sup> Ordinarily it may be brought by any person who claims the inheritance,<sup>8</sup> or a life estate,<sup>9</sup> and who himself or through some one holding under him, is in actual and peaceable possession,<sup>10</sup> though in some jurisdictions possession is not required.<sup>11</sup> All known claimants must be made parties.<sup>12</sup>

D. PLEADING.—The establishment of title in a burnt record proceeding may be by petition or cross-petition.<sup>13</sup> In some jurisdictions the petition must be accompanied by an affidavit.<sup>14</sup> The showing required is that specified by the statutes,<sup>15</sup> which may differ somewhat in their provisions, but usually include the loss or destruction of the record,<sup>16</sup> the nature of the claimant's estate,<sup>17</sup> from whom obtained.<sup>18</sup>

7. See the statutes.

8. *Potrero N. L. Co. v. All Persons*, 158 Cal. 731, 112 Pac. 303.

[a] By a Trustee.—See *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053.

[b] Owner of fee subject to long period lease, see *Potrero N. L. Co. v. All Persons*, 158 Cal. 731, 112 Pac. 303.

9. *Potrero N. L. Co. v. All Persons*, 158 Cal. 731, 112 Pac. 303.

10. *American Land Co. v. Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. ed. 82; *Vanderbilt v. All Persons*, 163 Cal. 507, 126 Pac. 158; *Lofstad v. Murasky*, 152 Cal. 64, 91 Pac. 1008.

11. *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053.

12. **U. S.**—*American Land Co. v. Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. ed. 82; *Smith v. Gage*, 12 Fed. 32, 11 Biss. 217. **Cal.**—*Title & Doc. Restoration Co. v. Kerrigan*, 150 Cal. 289, 88 Pac. 356, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682. **Ill.**—*Thompson v. Maloney*, 199 Ill. 276, 65 N. E. 236, 93 Am. St. Rep. 133.

[a] Adverse claimants should be made parties. *Gage v. Gentzell*, 144 Ill. 450, 33 N. E. 536.

[b] A cestui qui trust need not be joined when, with his consent, the suit is brought by the trustee. *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053. See generally the title "**Trusts and Trustees.**"

13. *Fagan v. Bach*, 253 Ill. 588, 97 N. E. 1087, Ann. Cas. 1913A, 505.

14. *Hoffman v. San Francisco Super. Ct.*, 151 Cal. 386, 90 Pac. 939.

[a] The affidavit must allege in terms "that he, the plaintiff, does not know and has never been informed" of any adverse claimants whom he has not specifically named. *American*

*Land Co. v. Zeiss*, 219 U. S. 47, 65, 31 Sup. Ct. 200, 55 L. ed. 82; *Hoffman v. San Francisco Super. Ct.*, 151 Cal. 386, 90 Pac. 939.

15. **U. S.**—*Smith v. Gage*, 12 Fed. 32, 11 Biss. 217. **Cal.**—*Lofstad v. Murasky*, 152 Cal. 64, 91 Pac. 1008; *Hoffman v. San Francisco Super. Ct.*, 151 Cal. 386, 90 Pac. 939. **Ill.**—*Miller v. Stalker*, 158 Ill. 514, 42 N. E. 79; *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053.

[a] An affidavit is sufficient which alleges complainant's interest and possession, and shows who were his grantors and how he became entitled to possession. *Soher v. Cabaniss*, 161 Cal. 548, 119 Pac. 911.

16. *Loewenthal v. Elkins*, 175 Ill. 553, 51 N. E. 592.

[a] Loss of evidence of chain of title not (1) to be averred. *Gage v. Gentzell*, 144 Ill. 450, 33 N. E. 536. (2) But in some cases loss of deeds as well as record is jurisdictional and must be alleged. *Loewenthal v. Elkins*, 175 Ill. 553, 51 N. E. 592.

17. *Potrero N. L. Co. v. All Persons*, 158 Cal. 731, 112 Pac. 303; *Miller v. Stalker*, 158 Ill. 514, 42 N. E. 79.

18. *Potrero N. L. Co. v. All Persons*, 158 Cal. 731, 112 Pac. 303; *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053.

[a] Destroyed evidence of title sought to be restored should be specially pleaded. *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053.

[b] Plaintiff's Chain of Title To Be Set Out.—*Glos v. Cary*, 194 Ill. 214, 62 N. E. 555. It is not necessary, when a valid title is shown under the statute of limitations, to derain title from the United States. *Miller v.*



how long it has existed,<sup>19</sup> and actual, peaceable possession of the property,<sup>20</sup> though in some jurisdictions it is unnecessary either to allege possession<sup>21</sup> or to negative possession in others.<sup>22</sup> When an adverse claimant under a tax sale is made a party it is not necessary to deny the validity of his title,<sup>23</sup> since the burden is on him to establish his title.<sup>24</sup>

The defendant's pleas are sometimes specified by the statute, as that he may, if he answers, admit, confess and avoid, or traverse all material allegations of the petition.<sup>25</sup> If he claims title,<sup>26</sup> or merely a pecuniary interest,<sup>27</sup> his claim should be set out in full.

E. HEARING AND DECREE.<sup>28</sup> — All questions at issue between the parties, whether legal or equitable, relative to the property in question, but merely incidental to the main issue, may be considered and determined,<sup>29</sup> or the court may in the exercise of its discretion remit the parties to a court of law to try questions of title.<sup>30</sup> The recitals of the decree must be supported by the evidence.<sup>31</sup>

**Award of Title.** — The court may determine adverse claims,<sup>32</sup> and declare in whom the title is vested,<sup>33</sup> or make any order or decree necessary to render its decision effective.<sup>34</sup>

**Pecuniary Award.** — Where a tax sale purchase price and taxes are claimed<sup>35</sup> and proved,<sup>36</sup> a decree establishing the title in the plaintiff should also decree such remuneration to the adverse claimant.<sup>37</sup>

Stalker, 158 Ill. 514, 42 N. E. 79.

19. *Potrero N. L. Co. v. All Persons*, 158 Cal. 731, 112 Pac. 303.

20. *American Land Co. v. Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. ed. 82; *Potrero N. L. Co. v. All Persons*, 158 Cal. 731, 112 Pac. 303.

21. *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. ed. 909; *Heacock v. Lubuke*, 107 Ill. 396.

22. *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053; *Heacock v. Lubuke*, 107 Ill. 396.

23. *Kelle v. Egan*, 256 Ill. 45, 99 N. E. 859; *Gage v. Gentzell*, 144 Ill. 450, 33 N. E. 536; *Gage v. Caraher*, 125 Ill. 447, 17 N. E. 777.

24. *Kelle v. Egan*, 256 Ill. 45, 99 N. E. 859. See generally the title "Taxation."

25. *Miller v. Stalker*, 158 Ill. 514, 42 N. E. 79.

26. *Gage v. Harbert*, 145 Ill. 530, 32 N. E. 543; *Gage v. Du Puy*, 134 Ill. 132, 24 N. E. 866.

[a] Several defendants claiming title individually must set up their several claims in full. *Gage v. Du Puy*, 134 Ill. 132, 24 N. E. 866.

27. *Gage v. Harbert*, 145 Ill. 530, 32 N. E. 543.

[a] When a tax sale purchase price and taxes paid are claimed the facts

of such sale and payment must be pleaded. *Gage v. Harbert*, 145 Ill. 530, 32 N. E. 543.

28. See generally the titles "Decrees;" "Hearing;" "Judgments."

29. *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. ed. 909; *Gage v. Caraher*, 125 Ill. 447, 17 N. E. 777.

30. *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. ed. 909. See *Gage v. Caraher*, 125 Ill. 447, 17 N. E. 777, and generally the title "Transfer of Causes."

31. *Loewenthal v. Elkins*, 175 Ill. 553, 51 N. E. 592.

32. *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. ed. 909; *Gage v. Du Puy*, 134 Ill. 132, 24 N. E. 866; *Robinson v. Ferguson*, 78 Ill. 538.

33. *Gage v. Harbert*, 145 Ill. 530, 32 N. E. 543; *Mulvey v. Gibbons*, 87 Ill. 367.

34. *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053.

35. *Gage v. Harbert*, 145 Ill. 530, 32 N. E. 543.

36. *Glos v. Kelly*, 212 Ill. 314, 72 N. E. 378.

37. *Smith v. Gage*, 12 Fed. 32, 11 Biss. 217; *Glos v. Mulcahy*, 210 Ill. 639, 71 N. E. 629.

[a] **Void Tax Certificates.**—A defendant cannot recover reimbursement

**Conclusiveness of Decree.**—The decree, as in other cases to which the general rule of conclusiveness is applicable, is conclusive against all parties to the proceeding and their privies,<sup>38</sup> but persons interested in the property, not parties to the proceeding, providing they act within the period fixed by statute,<sup>39</sup> are not bound by the decree.<sup>40</sup>

**V. PROCEDURE FOR REGISTRATION OF LAND TITLES UNDER TORRENS OR SIMILAR ACTS.**—A. NATURE AND EXTENT OF THE PROCEEDING.—Proceedings for the registration by judicial proceedings, of the title to land, generally known as the "Torrens System," are provided for by statute in numerous states,<sup>41</sup> territories,<sup>42</sup> and possessions<sup>43</sup> of the United States, and in some other countries.<sup>44</sup> The purpose of such statutes is to afford a speedy and summary remedy to clear up and definitely establish an indefeasible title to land.<sup>45</sup> The proceeding, thus provided for is ordinarily considered a special,<sup>46</sup>

on tax sale certificates which show on their face that they are void. *Kelle v. Egan*, 256 Ill. 45, 99 N. E. 859.

38. *American Land Co. v. Zeiss*, 191 Fed. 125, 111 C. C. A. 605. See the titles "Judgments;" "Res Judicata."

[a] One who succeeds to the title of the complainant in a burnt record proceeding is in privity with him and the decree is binding upon both. *Close v. Chicago*, 257 Ill. 47, 100 N. E. 215.

39. See *American Land Co. v. Zeiss*, 219 U. S. 47, 31 Sup. Ct. 200, 55 L. ed. 82.

40. *Thompson v. Maloney*, 199 Ill. 276, 65 N. E. 236, 93 Am. St. Rep. 133.

41. Cal.—*Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90. Colo.—*White v. Ainsworth*, 62 Colo. 513, 163 Pac. 959, Ann. Cas. 1918E, 179. Ill.—*Miltenberger v. Glos*, 279 Ill. 501, 117 N. E. 84; *Rasch v. Rasch*, 278 Ill. 261, 115 N. E. 871. Mass.—*Hughes v. Williams*, 229 Mass. 467, 118 N. E. 914; *Cunningham v. Bright*, 228 Mass. 385, 117 N. E. 909. Minn.—*Shevlin-M. Lumb. Co. v. Fogarty*, 130 Minn. 456, 153 N. W. 871. N. Y.—*Barkenthien v. People*, 212 N. Y. 36, 105 N. E. 808. N. C.—*Empire Mfg. Co. v. Spruill*, 169 N. C. 618, 86 S. E. 522. Ore.—*Lewis v. Chamberlain*, 69 Ore. 476, 139 Pac. 571. Wash.—*Krutz v. Dodge*, 66 Wash. 178, 119 Pac. 188, Ann. Cas. 1913C, 869.

42. *In re Pa Pelekane*, 21 Hawaii 175.

43. *Lim Cumpao v. Rodriguez*, 24 Phil. Isl. 149; *Aguirre v. Villaba*, 10 Phil. Isl. 701; *Carino v. Insular Government*, 8 Phil. Isl. 150; *Merchant v. Lafuente*, 5 Phil. Isl. 638. See also

*Colon v. Registrar*, 23 Porto Rico 701; *Vega v. Registrar*, 23 Porto Rico 742; *Rivero v. Hernandez*, 18 Porto Rico 1001; *Sierra v. Registrar*, 14 Porto Rico 665; *Ex parte Pacheco*, 5 Porto Rico 160.

44. See *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044; *Cape Lookout Co. v. Gold*, 167 N. C. 63, 83 S. E. 3.

45. Cal.—*Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90. Mass.—*McQuesten v. Com.*, 198 Mass. 172, 83 N. E. 1037. Minn.—*Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044; *Reed v. Siddall*, 94 Minn. 216, 102 N. W. 453. N. Y.—*Lachmann v. Brookfield*, 135 N. Y. Supp. 261; *Crabbe v. Hardy*, 135 N. Y. Supp. 119; *Smith v. Martin*, 124 N. Y. Supp. 1064. P. I. *Legarda v. Saleeby*, 31 Phil. Isl. 590.

[a] The purpose of the registration act is to insure to the one to whom a certificate of title is issued, and to his vendees, an absolutely perfect and indefeasible title free from all claims of every kind and nature, except those expressly noted upon the certificate, and to put such title beyond attack. *Shevlin-M. Lumb. Co. v. Fogarty*, 130 Minn. 456, 153 N. W. 871.

[b] Effect Not To Confer Title, But Simply To Establish It.—*Carino v. Insular Government*, 212 U. S. 449, 463, 29 Sup. Ct. 334, 53 L. ed. 594.

46. *Krutz v. Dodge*, 66 Wash. 178, 119 Pac. 188, Ann. Cas. 1913C, 869.

[a] Brief history and extent of the Torrens system, see *Cape Lookout Co. v. Gold*, 167 N. C. 63, 83 S. E. 3. See also *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044.

judicial,<sup>47</sup> statutory proceeding,<sup>48</sup> substantially in rem,<sup>49</sup> of an equitable nature,<sup>50</sup> and governed, so far as applicable, by the rules of equity procedure,<sup>51</sup> although not affected by the availability or adequacy of other remedies,<sup>52</sup> and not superseding any existing remedy at law or in equity.<sup>53</sup> It is similar to a suit to quiet title or to remove a cloud,<sup>54</sup> and to maintain the action, it is not necessary that the applicant be in possession.<sup>55</sup> The proceeding is generally voluntary, not compulsory,<sup>56</sup> and its limitations, as well as the power of the tribunal administering it, are to be found in the act itself, and not by reference to the general rules of law.<sup>57</sup>

**B. JURISDICTION.**—A proceeding to register title to land, being of an equitable nature,<sup>58</sup> should be brought in a court having equity jur-

47. *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90. See *Title & Doc. Restoration Co. v. Kerrigan*, 150 Cal. 289, 88 Pac. 356, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682; *Legarda v. Saleeby*, 31 Phil. Isl. 590.

48. *O'Laughlin v. Covell*, 222 Ill. 162, 78 N. E. 59.

49. **U. S.**—*Carino v. Insular Government*, 212 U. S. 449, 456, 29 Sup. Ct. 334, 53 L. ed. 594. **Cal.**—*Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90. **Mass.**—*First Nat. Bk. of Woburn v. Woburn*, 192 Mass. 220, 78 N. E. 307; *Tyler v. Judges*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433. **Minn.**—*Dewey v. Kimball*, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704; *State v. Westfall*, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297. **N. Y.**—*Hawes v. United States Trust Co.*, 142 App. Div. 789, 127 N. Y. Supp. 632; *Smith v. Martin*, 124 N. Y. Supp. 1064.

50. *In re Title of Palmyra Island*, 21 Hawaii 431; *In re Pa Pelekane*, 21 Hawaii 175; *Brown v. Hagadorn*, 119 Minn. 491, 138 N. W. 941. See *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044; *Owsley v. Johnson*, 95 Minn. 168, 103 N. W. 903. But see *Carino v. Insular Government*, 212 U. S. 449, 456, 29 Sup. Ct. 334, 53 L. ed. 594, holding it nearer to law than to equity but not deciding the question.

51. *O'Laughlin v. Covell*, 222 Ill. 162, 78 N. E. 59.

52. *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044.

53. *Krutz v. Dodge*, 66 Wash. 178, 119 Pac. 188, Ann. Cas. 1913C, 869.

[a] **Ejectment**, not a substitute for. *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044.

[b] **Distinguished From Ejectment.** "The relief in ejectment is not co-extensive with that which may be had upon an application to register. As against any one party or set of parties, it may be practically the same; but it needs no argument to show that a title could never, in ejectment, be settled as against the whole world, as can be done upon an application to register. And, conversely, relief may be had in ejectment which cannot be had in the registration proceeding, viz., possession of the premises." *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044.

54. **U. S.**—*Carino v. Insular Government*, 212 U. S. 449, 456, 29 Sup. Ct. 334, 53 L. ed. 594. **Minn.**—*Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044. **Ore.**—*Lewis v. Chamberlain*, 61 Ore. 150, 121 Pac. 430, often resorted to as a substitute for a suit to quiet title.

55. *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044.

56. **Mass.**—*Tyler v. Judges*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433. **N. C.**—*Cape Lookout Co. v. Gold*, 167 N. C. 63, 83 S. E. 3. **Wash.**—*Krutz v. Dodge*, 66 Wash. 178, 119 Pac. 188, Ann. Cas. 1913C, 869.

[a] **Compulsory registration prevails** in some jurisdictions. *Government v. Municipality of Binalonan*, 32 Phil. Isl. 634.

57. *Krutz v. Dodge*, 66 Wash. 178, 119 Pac. 188, Ann. Cas. 1913C, 869.

58. See *supra*, V, A.



isdiction,<sup>59</sup> which is generally designated by the statute,<sup>60</sup> and is, according to the terminology of the forum, the district court,<sup>61</sup> circuit court,<sup>62</sup> superior court,<sup>63</sup> land court,<sup>64</sup> or court of land registration.<sup>65</sup>

C. PARTIES. — As a general rule, especially in the United States, the statutes provide that a proceeding to register title to land may be brought by the owner or owners of the fee.<sup>66</sup> All persons having an interest in, or lien on, the land, or whose interests may be affected by the judgment or decree, should be made parties.<sup>67</sup> So any one residing on the property is a necessary party,<sup>68</sup> and in some jurisdictions the state is required to be made a party.<sup>69</sup> Any one claiming an interest, whether named in the petition or published notice of the pro-

59. *Mullarky v. Trautvetter*, 276 Ill. 409, 114 N. E. 920; *Amundson v. Glos*, 271 Ill. 209, 110 N. E. 914; *Lewis v. Chamberlain*, 69 Ore. 476, 139 Pac. 571, 61 Ore. 150, 121 Pac. 430.

60. See the statutes and the cases cited *infra*, this section.

61. *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044; *State v. Westfall*, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297.

62. *Miltnerberger v. Glos*, 279 Ill. 501, 117 N. E. 84; *Lewis v. Chamberlain*, 61 Ore. 150, 121 Pac. 430.

63. Cal.—*Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90. N. C.—*Empire Mfg. Co. v. Spruill*, 169 N. C. 618, 86 S. E. 522. Wash. *Krutz v. Dodge*, 66 Wash. 178, 119 Pac. 188, Ann. Cas. 1913C, 869.

64. *Hughes v. Williams*, 229 Mass. 467, 118 N. E. 914; *Cunningham v. Bright*, 228 Mass. 385, 117 N. E. 909.

65. *Paahao v. Swinton*, 20 Hawaii 355; *Real Monasterio de Santa Clara v. Villamar*, 33 Phil. Isl. 411.

66. *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; *Brummel v. Glos*, 275 Ill. 28, 113 N. E. 996.

[a] **By a Receiver.**—*Teninga v. Glos*, 266 Ill. 121, 107 N. E. 126.

[b] **By a Trustee.**—*Rasch v. Rasch*, 278 Ill. 261, 115 N. E. 871.

[c] **By Joint Tenants.**—*Brummel v. Glos*, 275 Ill. 28, 113 N. E. 996.

[d] **If the plaintiff be married**, his wife should be made a party. *Lachman v. People*, 127 N. Y. Supp. 912.

[e] **Legal estate in fee simple**, by any person claiming to own. *Carino v. Insular Government*, 212 U. S. 449, 457, 29 Sup. Ct. 334, 53 L. ed. 594.

[f] **Title by adverse possession** is within the act providing for the regis-

tration of title to land by the owner thereof. *Tobias v. Kasprzyk*, 247 Ill. 80, 93 N. E. 52; *De la Cruz v. Dayrit*, 30 Phil. Isl. 139.

67. *Sherman v. People*, 169 App. Div. 17, 154 N. Y. Supp. 484; *Partenfelder v. People*, 157 App. Div. 462, 142 N. Y. Supp. 915; *Duffy v. Rodriguez*, 139 App. Div. 755, 124 N. Y. Supp. 529.

[a] **Failure to make record owners** defendants goes to the jurisdiction and is fatal. *City & Sub. Holmes Co. v. People*, 157 App. Div. 459, 142 N. Y. Supp. 924; *Partenfelder v. People*, 157 App. Div. 462, 142 N. Y. Supp. 915.

[b] **An interest in the proceeds of a sale of land** sought to be registered for the purpose of selling is not an interest in the title as would make it necessary to join the owner thereof. *Brummel v. Glos*, 275 Ill. 28, 113 N. E. 996.

[c] **Interest acquired pendente lite** authorizes (1) a person to answer and assert his rights. *Brown v. Hagadorn*, 119 Minn. 491, 138 N. W. 941. (2) But on receiving notice he must not delay, the statute requiring an answer "at once," and six months is sufficient delay to bar him from asserting such interest. *Brown v. Hagadorn*, 119 Minn. 491, 138 N. W. 941.

68. *Rasch v. Rasch*, 278 Ill. 261, 115 N. E. 871.

69. *Jamieson & Bond Co. v. Reynolds*, 169 App. Div. 107, 154 N. Y. Supp. 836; *Smith v. Martin*, 124 N. Y. Supp. 1064.

[a] **State must have an interest** (1) in or lien upon the land, otherwise it is not a proper party. *State ex rel Coburn v. Ries*, 123 Minn. 397, 143 N. W. 981. (2) But this is not true in all jurisdictions, in some states the right of the state to be made a party

ceeding or not, may answer.<sup>70</sup> Adjoining owners, while under some statutes entitled to notice of the proceeding, are not entitled as such to intervene or be made parties defendant.<sup>71</sup>

**D. JOINDER OF CAUSES.**—Two or more separate pieces of land in the same county belonging to the applicant may be joined in a single application when contiguous,<sup>72</sup> or when the chain of title is substantially the same,<sup>73</sup> but ordinarily several owners of separate lots or parcels of land cannot unite in one proceeding to have their titles registered.<sup>74</sup>

**E. PLEADING.**—**1. Application, Petition or Complaint.**—A proceeding to register title is commenced by the filing of a verified application,<sup>75</sup> petition,<sup>76</sup> or complaint,<sup>77</sup> the form and contents of which are prescribed by statute.<sup>78</sup> But irrespective of the statute, the application generally, as in other cases, must contain a plain and concise statement of the cause of action,<sup>79</sup> setting forth the essential facts which entitle the applicant to a judgment or decree of registration<sup>80</sup> and a demand for judgment.<sup>81</sup> Thus the application, always having

being based on the general public interest. *Barkenthien v. People*, 212 N. Y. 36, 105 N. E. 808. See also *Meighan v. Rohe*, 166 App. Div. 175, 151 N. Y. Supp. 785, *affirmed*, 216 N. Y. 677, 110 N. E. 165.

**70.** *Weeks v. Brooks*, 205 Mass. 458, 92 N. E. 45.

**71.** *Hawes v. United States Trust Co.*, 142 App. Div. 789, 127 N. Y. Supp. 632; *Duffy v. Rodriguez*, 139 App. Div. 755, 124 N. Y. Supp. 529; *Sunderman v. People*, 130 N. Y. Supp. 453.

**72.** *Gibson v. Glos*, 271 Ill. 368, 111 N. E. 123; *Culver v. Waters*, 248 Ill. 163, 93 N. E. 747.

**73.** *Gibson v. Glos*, 271 Ill. 368, 111 N. E. 123.

[a] “**Substantially**”—the same chain of title means “in the main.” *Gibson v. Glos*, 271 Ill. 368, 111 N. E. 123.

**74.** *Peter v. Dicus*, 254 Ill. 379, 98 N. E. 560.

[a] **A purchaser of part pendente lite** may be brought in, where the issues are not multiplied, and the titles of all parties determined and registered in the single proceeding. *Peters v. Dicus*, 254 Ill. 379, 98 N. E. 560.

**75.** See the following: **Colo.**—*People v. Crissman*, 41 Colo. 450, 92 Pac. 949. **Haw.**—*In re Pa Pelekane*, 21 Hawaii 175. **Ill.**—*Miltenberger v. Glos*, 279 Ill. 501, 117 N. E. 84; *McCrillis v. Glos*, 276 Ill. 617, 115 N. E. 224. **Minn.**—*Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.)

1044. See *Shevlin-M. Lumb. Co. v. Fogarty*, 130 Minn. 456, 153 N. W. 871. **Ore.**—*Lewis v. Chamberlain*, 69 Ore. 476, 139 Pac. 571. **Phil. Isl.**—*Solis v. De Guzman*, 33 Phil. Isl. 574.

**76.** See the following: **Cal.**—*Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90. **Mass.** *Hughes v. Williams*, 229 Mass. 467, 118 N. E. 914. **N. C.**—*Empire Mfg. Co. v. Spruill*, 169 N. C. 618, 86 S. E. 522.

**77.** See *Meighan v. Rohe*, 216 N. Y. 677, 110 N. E. 165; *Barkenthien v. People*, 212 N. Y. 36, 105 N. E. 808.

**78.** **Cal.**—*Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, but see later act of 1915, Gen. Laws, §1049. **Colo.**—*People v. Crissman*, 41 Colo. 450, 92 Pac. 949. **Ill.** *Mullarky v. Trautvetter*, 276 Ill. 409, 114 N. E. 920. **N. Y.**—*Barkenthien v. People*, 212 N. Y. 36, 105 N. E. 808.

**79.** *Barkenthien v. People*, 212 N. Y. 36, 105 N. E. 808.

**80.** *Tower v. Glos*, 256 Ill. 121, 99 N. E. 876; *Barkenthien v. People*, 212 N. Y. 36, 105 N. E. 808; *Partenfelder v. People*, 211 N. Y. 355, 105 N. E. 675.

[a] **Pleading the statute** is not necessary. *Duffy v. Rodriguez*, 139 App. Div. 755, 124 N. Y. Supp. 529.

[b] **A complaint which shows a life estate in another** is insufficient. *Partenfelder v. People*, 211 N. Y. 355, 105 N. E. 675.

**81.** *Barkenthien v. People*, 212 N. Y. 36, 105 N. E. 808.

reference to the statute involved, should contain the particular address of the applicant;<sup>82</sup> whether married or single, and if married the name and residence of the husband or wife;<sup>83</sup> an adequate description of the land;<sup>84</sup> the nature of the estate, interest or claim of the applicant;<sup>85</sup> the interest of the state, whether general or special;<sup>86</sup> whether or not the property is occupied,<sup>87</sup> and, if occupied, by whom,<sup>88</sup> together with the address and interest of any occupant other than the applicant;<sup>89</sup> adjoining land owners, so far as ascertainable;<sup>90</sup> also the names and postoffice addresses of all defendants, as far as known, or can be ascertained, together with a description of those whose names are unknown,<sup>91</sup> *e. g.*, adverse claimants,<sup>92</sup> together with the nature of such person's claim,<sup>93</sup> but it is not necessary to aver the invalidity of an adverse claim of title,<sup>94</sup> nor wherein an adverse claimant's title is invalid.<sup>95</sup>

**Survey and Abstract.** — The petition should be accompanied by a plat of a survey of the land,<sup>96</sup> and also an abstract of title, when the

82. *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; *Cregar v. Spitzer*, 244 Ill. 208, 91 N. E. 418.

83. *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90.

[a] If the applicant was once married, he should state how and when the marriage relation terminated. *Lachman v. People*, 127 N. Y. Supp. 912.

84. *Barkenthien v. People*, 213 N. Y. 554, 107 N. E. 1034; *In re Fetzer*, 104 Misc. 442, 172 N. Y. Supp. 78.

85. **Cal.**—*Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90. **Haw.**—See *In re Pa Pelekane*, 21 Hawaii 175. **Ill.**—*McCrillis v. Glos*, 276 Ill. 617, 115 N. E. 224. **N. Y.**—*Barkenthien v. People*, 213 N. Y. 554, 107 N. E. 1034. **N. C.**—*Empire Mfg. Co. v. Spruill*, 169 N. C. 618, 86 S. E. 522.

86. *Barkenthien v. People*, 212 N. Y. 36, 105 N. E. 808; *Smith v. Martin*, 124 N. Y. Supp. 1064.

87. **Colo.**—*People v. Crissman*, 41 Colo. 450, 92 Pac. 949. **Ill.**—*Strebel v. Glos*, 271 Ill. 65, 110 N. E. 778; *Bonner v. Glos*, 270 Ill. 567, 110 N. E. 916; *Jackson v. Glos*, 243 Ill. 280, 90 N. E. 717. **Minn.**—*Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044. **N. Y.**—*Barkenthien v. People*, 213 N. Y. 554, 107 N. E. 1034.

88. **Ill.**—*Mihalik v. Glos*, 247 Ill. 597, 93 N. E. 372. **Minn.**—*State v. Westfall*, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297. **N. Y.**—*Barkenthien v. People*, 213 N. Y. 554, 107 N. E. 1034.

89. *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044.

90. *Hawes v. United States Trust Co.*, 142 App. Div. 789, 127 N. Y. Supp. 632.

91. *Sherman v. People*, 169 App. Div. 17, 154 N. Y. Supp. 484; *Partenfelder v. People*, 157 App. Div. 462, 142 N. Y. Supp. 915; *Lachman v. People*, 127 N. Y. Supp. 912.

[a] **A known party**, *e. g.*, (1) a missing person in whose name the property stands, should be named as defendant, together with those claiming under such person, and it is improper in such case to use the omnibus clause "all persons, etc." *Sherman v. People*, 169 App. Div. 17, 154 N. Y. Supp. 484; *Belmont Powell Holding Co. v. Serial Bldg. L. & S. Inst.*, 167 App. Div. 124, 152 N. Y. Supp. 868. (2) But where all interested persons receive actual personal notice of the proceeding, the fact that some of them should have been named individually as defendants but were not is not fatal. *White v. Ainsworth*, 62 Colo. 513, 163 Pac. 959, Ann. Cas. 1918E, 179.

92. *Mullarky v. Trautvetter*, 276 Ill. 409, 114 N. E. 920.

93. *Mullarky v. Trautvetter*, 276 Ill. 409, 114 N. E. 920.

94. *Mullarky v. Trautvetter*, 276 Ill. 409, 114 N. E. 920.

95. *McCrillis v. Glos*, 276 Ill. 617, 115 N. E. 224.

96. **Cal.**—*Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep.



applicant does not rely upon adverse possession to establish his title,<sup>97</sup> which should show on its face that it is an original or a certified copy made in the ordinary course of business of a make of abstracts.<sup>98</sup>

**2. Answer.**—A defendant may resist an application for registration of title by relying solely upon the applicant's insufficiency of proof of title;<sup>99</sup> he is not limited to such questions as affect his individual interest;<sup>1</sup> but an answer must go to the material allegations of the application,<sup>2</sup> state particularly the defendant's interest in the land,<sup>3</sup> and the facts supporting his claim.<sup>4</sup>

**Affirmative Relief.**—In jurisdictions where a defendant may be granted affirmative relief,<sup>5</sup> if he desires to have the title to any part of the land in question registered in himself he must ask for it in a cross-demand,<sup>6</sup> and when he does so he must set up the precise interest he claims.<sup>7</sup>

**F. EXAMINER.**—The petition or application is generally referred to an examiner to take proofs and report his findings and conclusions to the court.<sup>8</sup> He is required to investigate fully all matters pertaining to the title,<sup>9</sup> and at a stated time for a hearing, which should not

90. **Mass.**—*Welsh v. Briggs*, 204 Mass. 540, 90 N. E. 1146. **N. Y.**—*Sunderman v. People*, 130 N. Y. Supp. 453.

97. *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90; *People v. Crissman*, 41 Colo. 450, 92 Pac. 949.

[a] **Original muniments of title** are required by some statutes. *Welsh v. Briggs*, 204 Mass. 540, 90 N. E. 1146.

98. See the following: *Keeney v. Glos*, 258 Ill. 555, 101 N. E. 943; *Carlson v. Glos*, 257 Ill. 149, 100 N. E. 512; *Bjork v. Glos*, 256 Ill. 447, 100 N. E. 233; *Tower v. Glos*, 256 Ill. 121, 99 N. E. 876.

99. *Töyger v. Glos*, 256 Ill. 121, 99 N. E. 876.

1. *Crabbe v. Hardy*, 135 N. Y. Supp. 119.

2. *Barkenthien v. People*, 155 App. Div. 285, 140 N. Y. Supp. 100; *Solis v. De Guzman*, 33 Phil. Isl. 574.

[a] **Rule not to apply to state** when appearing generally to protect the public interest. *Barkenthien v. People*, 155 App. Div. 285, 140 N. Y. Supp. 100.

3. *Barkenthien v. People*, 155 App. Div. 285, 140 N. Y. Supp. 100; *Solis v. De Guzman*, 33 Phil. Isl. 574.

4. *Barkenthien v. People*, 212 N. Y. 36, 105 N. E. 808; *Smith v. Martin*, 142 App. Div. 60, 126 N. Y. Supp. 877, 124 N. Y. Supp. 1064.

[a] **An answer is sufficient** which generally denies each of the allega-

tions of the complaint, including plaintiff's ownership, and sets forth the facts upon which its denial is based, and further states what the defendant's interest is. *Sunderman v. People*, 138 N. Y. Supp. 500.

5. See *infra*, V, J.

6. *Foss v. Atkins*, 201 Mass. 158, 87 N. E. 189. See also 204 Mass. 337, 90 N. E. 578.

7. *Hawes v. United States Trust Co.*, 142 App. Div. 789, 127 N. Y. Supp. 632; *Duffy v. Rodriguez*, 139 App. Div. 755, 124 N. Y. Supp. 529.

8. **Colo.**—*People v. Crissman*, 41 Colo. 450, 92 Pac. 949. **Ill.**—*Amundson v. Glos*, 271 Ill. 209, 110 N. E. 914. **Mass.**—*McQuesten v. Com.*, 198 Mass. 172, 83 N. E. 1037. **Minn.** *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044. **N. Y.**—*Lachman v. People*, 127 N. Y. Supp. 910. See *Jamieson & Bond Co. v. Reynolds*, 169 App. Div. 107, 154 N. Y. Supp. 836, holding examiner has power "to hear and determine," not merely to hear and report.

[a] **"The position of examiner** under this law is one of high responsibility. Unless the examiner performs his duties fully and thoroughly, the court is liable to be misled to the substantial prejudice of some property owner." *Shevlin-M. Lumb. Co. v. Fogarty*, 130 Minn. 456, 153 N. W. 871.

9. *Shevlin-M. Lumb. Co. v. Fogarty*, 130 Minn. 456, 153 N. W. 871.

be *ex parte*,<sup>10</sup> the parties should be given an opportunity to present proof of their claims in accordance with the general rules relating to that subject,<sup>11</sup> and to make objections and preserve their rights for review.<sup>12</sup>

The examiner's report should be a statement of facts, and conclusions based thereon,<sup>13</sup> and conclusions not supported by facts are valueless.<sup>14</sup> Thus it should specify, for the court's satisfaction, the steps taken by him to establish all material facts,<sup>15</sup> but, unless requested, the evidence is not properly a part of his report, the substance thereof being sufficient.<sup>16</sup> Application for an order to attach the evidence to the report should be made to the court.<sup>17</sup>

G. NOTICE.—Upon the return of the examiner's report and the setting of a day for hearing before the court, notice of the application and hearing is generally required to be published,<sup>18</sup> which notice is made on order of the court.<sup>19</sup>

All interested persons are entitled to notice of the proceeding, either

10. *Glos v. Grant, etc. Assn.*, 229 Ill. 387, 82 N. E. 304.

11. *Glos v. Cessna*, 207 Ill. 69, 69 N. E. 634.

12. *Glos v. Holberg*, 220 Ill. 167, 77 N. E. 80.

13. *Jamieson & Bond Co. v. Reynolds*, 169 App. Div. 107, 154 N. Y. Supp. 836.

[a] **Facts Must Be Clearly Established.**—*Meighan v. Rohe*, 166 App. Div. 175, 151 N. Y. Supp. 785.

14. *Partenfelder v. People*, 211 N. Y. 355, 105 N. E. 675; *Jamieson & Bond Co. v. Reynolds*, 169 App. Div. 107, 154 N. Y. Supp. 836; *Eldert v. Cross Country A. Co.*, 88 Misc. 684, 151 N. Y. Supp. 441; *Lachman v. People*, 127 N. Y. Supp. 912.

[a] **Referee Must Be Exact.**—The court may go outside the findings of the referee to support the judgment, but as this statute appears to come into larger use year by year it is most desirable that actions under it should be conducted in a regular and workmanlike order, and this work should be done adequately in the forum of its origin. *Jamieson & Bond Co. v. Reynolds*, 169 App. Div. 107, 154 N. Y. Supp. 836.

15. *Partenfelder v. People*, 157 App. Div. 462, 142 N. Y. Supp. 915.

[a] **Possible Claimants.**—The examiner's report should show what steps were taken to see if all possible claimants had been named or made parties. *Partenfelder v. People*, 157 App. Div. 462, 142 N. Y. Supp. 915.

[b] **Where adverse possession is**

relied upon the examiner's report must show search for the probate of the will or administration of the estate of the deceased record owner. *Lachman v. People*, 127 N. Y. Supp. 910.

[c] **That title has passed from the United States** must be shown when an essential fact is to be determined. *Shevlin-M. Lumb. Co. v. Fogarty*, 130 Minn. 456, 153 N. W. 871.

16. *Cregar v. Spitzer*, 244 Ill. 208, 91 N. E. 418; *McMahon v. Rowley*, 238 Ill. 31, 87 N. E. 66.

17. *Cregar v. Spitzer*, 244 Ill. 208, 91 N. E. 418; *McMahon v. Rowley*, 238 Ill. 31, 87 N. E. 66.

18. *Cal.—Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90. *Mass.—Weeks v. Brooks*, 205 Mass. 458, 92 N. E. 45. *N. C.—Cape Lookout Co. v. Gold*, 167 N. C. 63, 83 S. E. 3.

[a] **Technical defects in the publication of notice** are waived by general appearance. *Cape Lookout Co. v. Gold*, 167 N. C. 63, 83 S. E. 3.

[b] **Amendment and Second Notice.** When an amendment of the application is made after the notice required by the statute has been published, if such amendment is not prejudicial to the rights of interested parties, a second notice need not be published. *Tower v. Glos*, 256 Ill. 121, 99 N. E. 876.

19. *Lachman v. People*, 127 N. Y. Supp. 912.

[a] **Order granted on affidavit by the applicant.** *O'Laughlin v. Covell*, 222 Ill. 162, 78 N. E. 59.

personally or by publication as generally provided for in other actions;<sup>20</sup> and notice to adjoining land owners, which is necessary,<sup>21</sup> should contain a short form description of the property.<sup>22</sup>

**Waiver.**— Any one who is entitled to notice of the proceeding may waive all objections to a decree by filing an assent,<sup>23</sup> which, unless such person be the wife or husband of the applicant,<sup>24</sup> need not be acknowledged.<sup>25</sup>

**H. DEMURRER, OBJECTIONS AND AMENDMENTS.**— In some jurisdictions a demurrer to an application to register title is not permitted,<sup>26</sup> in others it is used as in other actions and governed by the same general rules.<sup>27</sup>

**Objections**, as in other proceedings, should be specific, not general,<sup>28</sup> and should be made at the proper time.<sup>29</sup> e. g., if to the evidence before the examiner, when such evidence is introduced, not later.<sup>30</sup>

**Amendments** are within the court's discretion,<sup>31</sup> and governed by the general rules relating to amendments.<sup>32</sup> Thus an application may be amended to supply a material averment or part which has been omitted,<sup>33</sup> or to restate a defective allegation of title,<sup>34</sup> or to implead<sup>35</sup> a

20. *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90.

21. *In re Fetzer*, 104 Misc. 442, 172 N. Y. Supp. 78.

[a] **By registered letter**, demanding a return, is sufficient. *In re Fetzer*, 104 Misc. 442, 172 N. Y. Supp. 78.

[b] **If sent to a wrong address**, but the adjoining landowner receives actual notice, the error is immaterial and an objection merely technical. *In re Fetzer*, 104 Misc. 442, 172 N. Y. Supp. 78.

22. *In re Fetzer*, 104 Misc. 442, 172 N. Y. Supp. 78.

23. *Mooney v. Valentynoviez*, 262 Ill. 355, 104 N. E. 645.

24. *McDonnell v. Glos*, 266 Ill. 504, 107 N. E. 897; *Teninga v. Glos*, 266 Ill. 94, 107 N. E. 125.

25. *McDonnell v. Glos*, 266 Ill. 504, 107 N. E. 897; *Teninga v. Glos*, 266 Ill. 121, 107 N. E. 126; *Mooney v. Valentynoviez*, 262 Ill. 355, 104 N. E. 645.

26. *McCrillis v. Glos*, 276 Ill. 617, 115 N. E. 224.

27. *Duffy v. Rodriguez*, 139 App. Div. 755, 124 N. Y. Supp. 529.

[a] **One not a necessary party**, but who is named as a defendant, and against whom the application fails to state a cause of action, may avail himself of a demurrer. *Duffy v. Rodriguez*, 139 App. Div. 755, 124 N. Y. Supp. 529.

28. *Teninga v. Glos*, 266 Ill. 121, 107 N. E. 126; *Carlson v. Glos*, 257 Ill. 149, 100 N. E. 512.

[a] **That an abstract is not sufficient** must indicate in what respect it is insufficient. *Gibson v. Glos*, 271 Ill. 368, 111 N. E. 123.

29. *Bjork v. Glos*, 256 Ill. 447, 100 N. E. 233.

30. *Carlson v. Glos*, 257 Ill. 149, 100 N. E. 512; *Bjork v. Glos*, 256 Ill. 447, 100 N. E. 233; *O'Laughlin v. Covell*, 222 Ill. 162, 78 N. E. 59.

31. *Kuby v. Ryder*, 114 Minn. 217, 130 N. W. 1100.

[a] **An amendment may properly be denied** which merely seeks to state more clearly an issue which the court has properly construed. *Hughes v. Williams*, 218 Mass. 448, 105 N. E. 1056.

32. See the title "**Amendments and Jeofails.**"

33. See the following:

[a] **By Adding the Applicant's Address.**—*Cregar v. Spitzer*, 244 Ill. 208, 91 N. E. 418.

[b] **By filing survey and abstract** or "plan of the land and original muniments of title." *Welsh v. Briggs*, 204 Mass. 540, 90 N. E. 1146.

34. *In re Pa Pelekane*, 21 Hawaii 175.

35. *McCrillis v. Glos*, 276 Ill. 617, 115 N. E. 224.

[a] **One who is shown by the proof to claim an interest in the land may**



necessary party, but not to reverse the status of the parties as applicant and defendant.<sup>36</sup>

I. HEARING. — So far as the title registration statute relates to the hearing and determination of a cause it is permissive and not mandatory.<sup>37</sup> A jury trial is not contemplated as a matter of right,<sup>38</sup> but under some constitutions cannot be denied.<sup>39</sup> The applicant is the moving party and entitled, irrespective of the form of the pleadings or of the shifting of the burden of proof, to the right to open and close.<sup>40</sup> The court is not bound by the examiner's report,<sup>41</sup> and should not rely upon the conclusions of the examiner without scrutinizing the facts upon which they are based.<sup>42</sup> but may hear the cause on the report alone, or may require additional evidence, the hearing in every case being finally before the court.<sup>43</sup> But the applicant must be required to establish his title,<sup>44</sup> to the satisfaction of the court,<sup>45</sup> and the court should hear and determine all controversies concerning such title.<sup>46</sup> Under a statute not permitting affirmative relief to the defendant, the court should dismiss the proceeding if for any reason the title is not a proper one for registration.<sup>47</sup> The applicant may voluntarily, without prejudice and on terms, withdraw at any time before final decree,<sup>48</sup> or the application may be dismissed as to a part of the land in ques-

be made a party by amending the application. *Schiessle v. Glos*, 271 Ill. 374, 111 N. E. 127.

[b] A purchaser pendente lite of part of the property may be impleaded by amendment. *Peters v. Dicus*, 254 Ill. 379, 98 N. E. 560.

36. *Foss v. Atkins*, 204 Mass. 337, 90 N. E. 578.

37. *Amundson v. Glos*, 271 Ill. 209, 110 N. E. 914.

38. *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044, whether discretionary with court mentioned but not decided.

39. *Weeks v. Brooks*, 205 Mass. 458, 92 N. E. 45. See *Bigelow Carpet Co. v. Wiggin*, 209 Mass. 542, 95 N. E. 938.

40. *Bigelow Carpet Co. v. Wiggin*, 209 Mass. 542, 95 N. E. 938.

41. *People v. Crissman*, 41 Colo. 450, 92 Pac. 949.

42. *Partenfelder v. People*, 211 N. Y. 355, 105 N. E. 675; *Eldert v. Cross Country R. Co.*, 88 Misc. 684, 151 N. Y. Supp. 441; *Crabbe v. Hardy*, 135 N. Y. Supp. 119; *Lachman v. People*, 127 N. Y. Supp. 912.

[a] The court should not rely absolutely upon the examiner's conclusions, but should satisfy itself by a personal examination of the record and evidence that the plaintiff has a title which should be registered. *Partenfelder v. People*, 157 App. Div. 462,

142 N. Y. Supp. 915.

43. *Haw.—In re Pa Pelekane*, 21 Hawaii 175. Ill.—*Amundson v. Glos*, 271 Ill. 209, 110 N. E. 914. Minn. *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044. N. Y.—*Jamieson & Bond Co. v. Reynolds*, 169 App. Div. 107, 154 N. Y. Supp. 836.

44. Mass.—See *Hughes v. Williams*, 218 Mass. 448, 105 N. E. 1056. N. Y. *Barkenthien v. People*, 213 N. Y. 554, 107 N. E. 1034. P. I.—*Legarda v. Saleeby*, 31 Phil. Isl. 590.

45. *Partenfelder v. People*, 157 App. Div. 462, 142 N. Y. Supp. 915.

46. *Partenfelder v. People*, 211 N. Y. 355, 105 N. E. 675.

47. *People v. Crissman*, 41 Colo. 450, 92 Pac. 949; *Krutz v. Dodge*, 66 Wash. 178, 119 Pac. 188, Ann. Cas. 1913C, 869.

48. Mass.—*Foss v. Atkins*, 204 Mass. 337, 90 N. E. 578; *McQuesten v. Com.*, 198 Mass. 172, 83 N. E. 1037. Minn. *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044. Wash.—*Krutz v. Dodge*, 66 Wash. 178, 119 Pac. 188, Ann. Cas. 1913C, 869.

[a] It is the intent of the act to provide for the registration of only such titles as are found to be in the applicant, with such liens or outstanding interests as he is willing to admit; and if there be a hostile or conflicting interest the title is not to be cer-

tion,<sup>49</sup> but not where the title to such part is found to be in a defendant who may be entitled to a decree of registration.<sup>50</sup>

**Findings of fact and conclusions of law**, when issue is joined, as in ordinary actions, should be made by the court,<sup>51</sup> and the facts found must support its conclusions.<sup>52</sup>

**J. JUDGMENT OR DECREE.**—The general rules relating to judgments and decrees, where applicable, should be observed in all things pertaining to a decree of registration,<sup>53</sup> but its form and contents are generally prescribed by statute,<sup>54</sup> requiring a description of the land,<sup>55</sup> and the owners estate therein,<sup>56</sup> together with all particular estates and encumbrances to which the land or the owner's estate is subject.<sup>57</sup> As a general rule the decree must be for the registration of a fee simple estate,<sup>58</sup> in all or a part of the land,<sup>59</sup> in favor of either plaintiff or defendant,<sup>60</sup> but under some statutes affirmative relief may be granted only to the plaintiff.<sup>61</sup> The court is not restricted to determining the title of the respective parties, but may quiet title or remove a cloud thereon,<sup>62</sup> although it has no jurisdiction to determine the validity of

tified forthwith, although the applicant may proceed at his peril, and upon the hearing show that the adverse interest is not in fact real; or he may take his discharge and clear his title in an independent action. *Krutz v. Dodge*, 66 Wash. 178, 119 Pac. 188, Ann. Cas. 1913C, 869.

49. *Foulkes v. Glos*, 272 Ill. 364, 112 N. E. 60.

[a] Where a tax deed for an infinitesimal portion of the land is found void, but remuneration is recommended, and the defendant owner of the tax deed objects, insisting that such deed is valid, the applicant may dismiss as to the land represented by such deed. *Foulkes v. Glos*, 272 Ill. 364, 112 N. E. 60; *Glos v. Murphy*, 225 Ill. 58, 80 N. E. 59.

50. *Foss v. Atkins*, 204 Mass. 337, 90 N. E. 578.

51. *Kuby v. Ryder*, 114 Minn. 217, 130 N. W. 1100; *Owsley v. Johnson*, 95 Minn. 168, 103 N. W. 903.

[a] On the question of possession there must be a finding, when vital, as in case of a mortgage which is barred as a lien unless the mortgagee is in possession. *Kuby v. Ryder*, 114 Minn. 217, 130 N. W. 1100.

52. *Kuby v. Ryder*, 114 Minn. 217, 130 N. W. 1100.

53. See generally the titles "Decrees;" "Judgments."

[a] Judgment by default on the examiner's report is not to be taken. *Crabbe v. Hardy*, 135 N. Y. Supp. 119.

[b] Not to Third Party.—While a

registrar's fees may be taxed as costs against a party, a judgment in favor of the registrar for such fees should not be rendered nor an execution awarded. *Peters v. Dicus*, 254 Ill. 379, 98 N. E. 560.

54. *Mullarky v. Trautvetter*, 276 Ill. 409, 114 N. E. 920.

55. *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep 90; *Sederquist v. Brown*, 225 Mass. 217, 114 N. E. 365.

56. *Sederquist v. Brown*, 225 Mass. 217, 114 N. E. 365.

57. *Sederquist v. Brown*, 225 Mass. 217, 114 N. E. 365.

58. *Shevlin-M. Lumb. Co. v. Fogarty*, 130 Minn. 456, 153 N. W. 871.

59. *Mundt v. Glos*, 246 Ill. 636, 93 N. E. 49; *Glos v. Holberg*, 220 Ill. 167, 77 N. E. 80; *Meighan v. Rohe*, 216 N. Y. 677, 110 N. E. 165.

60. **Haw.**—*In re Title of Palmyra Island*, 21 Hawaii 431. **Mass.**—*Foss v. Atkins*, 201 Mass. 158, 87 N. E. 189, and see 204 Mass. 337, 90 N. E. 578. **N. Y.**—*Hawes v. United States Trust Co.*, 142 App. Div. 789, 127 N. Y. Supp. 632. **Ore.**—See *Lewis v. Chamberlain*, 69 Ore. 476, 139 Pac. 571.

61. *People v. Crissman*, 41 Colo. 450, 92 Pac. 949; *Krutz v. Dodge*, 66 Wash. 178, 119 Pac. 188, Ann. Cas. 1913C, 869.

62. **Ill.**—*Harts v. Glos*, 279 Ill. 485, 117 N. E. 68; *Gage v. Consumers' Elec. L. Co.*, 194 Ill. 30, 64 N. E. 653. **Mass.**—*Cunningham v. Bright*, 228 Mass. 385, 117 N. E. 909. **Minn.**

existing encumbrances.<sup>63</sup> But any existing encumbrance must be noted for endorsement on the registrar's certificate.<sup>64</sup>

**Pecuniary Award to Defendant.**—When a defendant is found to be entitled to remuneration in satisfaction of a pecuniary interest, a decree in favor of the applicant should protect the defendant's rights,<sup>65</sup> e. g., by making the registration of title conditional upon payment of the amount due the defendant,<sup>66</sup> or by declaring such amount a lien upon the land.<sup>67</sup> Under a decree awarding the defendant remuneration it is improper to order registration of the title forthwith.<sup>68</sup>

**Conclusiveness.**—A decree of registration of title to land in a proceeding wherein the court has jurisdiction of the subject-matter binds the land and is conclusive as against the world.<sup>69</sup>

*Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044; *State v. Westfall*, 85 Minn. 437, 89 N. W. 175, 89 Am. St. Rep. 571, 57 L. R. A. 297. **N. Y.**—*Sherman v. People*, 169 App. Div. 17, 154 N. Y. Supp. 484. **N. C.**—*Empire Mfg. Co. v. Spruill*, 169 N. C. 618, 86 S. E. 522. **Ore.** *Lewis v. Chamberlain*, 69 Ore. 476, 139 Pac. 571.

*Contra*, *Krutz v. Dodge*, 66 Wash. 178, 119 Pac. 188, Ann. Cas. 1913C, 869.

63. *Sederquist v. Brown*, 225 Mass. 217, 114 N. E. 365; *Sherman v. People*, 169 App. Div. 17, 154 N. Y. Supp. 484.

64. *Hawes v. Clarke*, 159 App. Div. 65, 144 N. Y. Supp. 11.

65. *Cregar v. Spitzer*, 244 Ill. 208, 91 N. E. 418.

[a] The court is not compelled to order remuneration. *Snow v. Glos*, 258 Ill. 275, 101 N. E. 606, following *Kelle v. Egan*, 256 Ill. 45, 99 N. E. 859.

66. *Walther v. Glos*, 270 Ill. 390, 110 N. E. 509; *Cregar v. Spitzer*, 244 Ill. 208, 91 N. E. 418; *Lewis v. Chamberlain*, 69 Ore. 476, 139 Pac. 571.

[a] **Setting Aside Tax Deeds.**—(1) The decree should order payment as a condition precedent to setting aside a tax deed. *Cregar v. Spitzer*, 244 Ill. 208, 91 N. E. 418. (2) Even when such tax deed is to an infinitesimal part of the land, so small a part as not to constitute a cloud, if the applicant asks to have it set aside the decree should also provide for remuneration as a condition precedent. *Jackson v. Glos*, 243 Ill. 280, 90 N. E. 717.

67. *Lewis v. Chamberlain*, 69 Ore. 476, 139 Pac. 571.

68. *Hammond v. Glos*, 250 Ill. 32,

95 N. E. 39; *Mihalik v. Glos*, 247 Ill. 597, 93 N. E. 372.

69. **U. S.**—*Mills v. Denver & R. G. R. Co.*, 198 Fed. 137. **Cal.**—*Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90. **Colo.**—*White v. Ainsworth*, 62 Colo. 513, 163 Pac. 959, Ann. Cas. 1918E, 179. **Haw.**—*Paahao v. Swinton*, 20 Hawaii 355. **Mass.** *Cunningham v. Bright*, 228 Mass. 385, 117 N. E. 909. **Minn.**—*State v. Ries*, 123 Minn. 397, 143 N. W. 981; *Henry v. White*, 123 Minn. 182, 143 N. W. 324; *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044. **N. Y.**—*Barkenthien v. People*, 212 N. Y. 36, 105 N. E. 808; *Lachman v. Brookfield*, 135 N. Y. Supp. 261; *Smith v. Martin*, 124 N. Y. Supp. 1064. **N. C.**—*Empire Mfg. Co. v. Spruill*, 169 N. C. 618, 86 S. E. 522. **P. I.**—*Legarda v. Saleeby*, 31 Phil. Isl. 590.

[a] **Including the State.**—*Empire Mfg. Co. v. Spruill*, 169 N. C. 618, 86 S. E. 522.

[b] **Infancy or other disability** does not change the rule of conclusiveness. **Colo.**—*White v. Ainsworth*, 62 Colo. 513, 163 Pac. 959, Ann. Cas. 1918E, 179. **N. C.**—See also *Empire Mfg. Co. v. Spruill*, 169 N. C. 618, 86 S. E. 522. **P. I.**—*Mariano Velasco & Co. v. Gochuico & Co.*, 33 Phil. Isl. 363.

[c] **In a case of double registration** the title should remain in the person securing the first registration. *Acantilado v. De Santos*, 32 Phil. Isl. 350.

[d] **Land registered by the owner as trustee** will be regarded as belonging to such owner individually and subject to attachment and levy by his creditors; and, since one cannot be at the same time both the single trustee



**Vacating Decree.**—The general rules relating to opening and vacating decrees are applicable.<sup>70</sup>

**Collateral Attack.**—A decree of registration of title under the Torrens system, rendered by a court having proper jurisdiction, is not subject to collateral attack for error in the proceeding,<sup>71</sup> nor for want of jurisdiction unless that fact appears affirmatively on the face of the record.<sup>72</sup>

**K. APPEAL.**—A final judgment or decree of registration is appealable,<sup>73</sup> if applied for at the proper time,<sup>74</sup> the general rules relating to appeals being applicable.<sup>75</sup>

and the sole beneficiary of the same estate, this is not inconsistent with the rule that the decree of registration is conclusive against all persons. *Cunningham v. Bright*, 228 Mass. 385, 117 N. E. 909.

[e] **A subsequent purchaser** has the right to rely upon the certificate of title as an assurance that the court which decreed its issuance had jurisdiction of the subject matter of the title, and that the holder thereof possesses a title which the law authorized to be registered. *Shevlin-M. Lumb. Co. v. Fogarty*, 130 Minn. 456, 153 N. W. 871.

[f] **Land belonging to the United States** is not subject to registration, and a decree of registration thereof in favor of an individual before title has passed from the United States is void for want of jurisdiction of the subject matter. *Shevlin-M. Lumb. Co. v. Fogarty*, 130 Minn. 456, 153 N. W. 871.

70. See generally the titles "Decrees," "Judgments."

[a] **Lack of notice** of the proceeding is not proof of fraud sufficient to open a decree of registration. *Ruiz v. Laesamana*, 32 Phil. Isl. 650.

[b] **After the term** at which a decree of registration is granted, the court having jurisdiction to do so, it cannot set aside such decree, or alter or amend it, except as to matters of form or clerical errors. *Mooney v. Valentynovicz*, 255 Ill. 118, 99 N. E. 344.

[c] **Decree entered in absence of a party and his counsel** is merely an irregularity and the setting aside of such decree, upon seasonable motion and a showing of good grounds, rests in the discretion of the court. *Lewis v. Chamberlain*, 69 Ore. 476, 139 Pac. 571.

71. *Colo.*—*White v. Ainsworth*, 62

*Colo.* 513, 163 Pac. 959, Ann. Cas. 1918E, 179. *Minn.*—*Jones v. Wellcome*, 141 Minn. 352, 170 N. W. 224; *State ex rel. Coburn v. Ries*, 123 Minn. 397, 143 N. W. 981; *Henry v. White*, 123 Minn. 182, 143 N. W. 324. *P. I.*—*Legarda v. Saleeby*, 31 Phil. Isl. 590.

72. *Jones v. Wellcome*, 141 Minn. 352, 170 N. W. 224; *Henry v. White*, 123 Minn. 182, 143 N. W. 324.

As to collateral attack generally, see 15 STANDARD PROC. 377.

73. *Cal.*—*Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90. *Colo.*—*White v. Ainsworth*, 62 Colo. 513, 163 Pac. 959, Ann. Cas. 1918E, 179. *Ill.*—*Harts v. Glos*, 279 Ill. 485, 117 N. E. 68. *Mass.*—*Weeks v. Brooks*, 205 Mass. 458, 92 N. E. 45; *Foss v. Atkins*, 204 Mass. 337, 90 N. E. 578. *N. Y.*—*Partenfelder v. People*, 157 App. Div. 462, 142 N. Y. Supp. 915. *Ore.*—See *Lewis v. Chamberlain*, 69 Ore. 476, 139 Pac. 571. *P. I.*—*Tambunting v. Santos*, 33 Phil. Isl. 383.

[a] **Where the evidence is not included in the record on appeal**, and no question of law is apparent on the face of the record, an appeal from a decision of the land court will not lie. *Van Ness v. Boinay*, 214 Mass. 340, 101 N. E. 979.

[b] **A decree in the alternative**, quieting title and decreeing registration on payment within a certain time of taxes paid by the defendant, otherwise that the petition be dismissed, is a final decree and appealable. *Harts v. Glos*, 279 Ill. 485, 117 N. E. 68.

74. See the statutes.

[a] **At Time of Entering Decree.** *Lewis v. Chamberlain*, 61 Ore. 150, 121 Pac. 430.

75. *White v. Ainsworth*, 62 Colo. 513, 163 Pac. 959, Ann. Cas. 1918E, 179.

[a] **An error which the transcript**

**Recording Notice of Appeal.**—When an appeal is taken from a decree of registration, under some statutes, a notation of the pendency of such appeal should be ordered by the court to be made upon the record in the office of the registrar.<sup>76</sup>

**L. COSTS.**—The taxing of costs is discretionary with the court.<sup>77</sup> As a general rule they are assessed against the applicant,<sup>78</sup> but when the circumstances of a case make it inequitable and unjust to require the applicant to pay, either all or merely certain items of costs, they should be charged against the defendant.<sup>79</sup>

**fails to show** cannot be claimed. *Cregar v. Spitzer*, 244 Ill. 208, 91 N. E. 418.

**[b] Objections** not raised below will not be considered on appeal. *Skinner v. Glos*, 274 Ill. 58, 113 N. E. 59.

**[c] Appellant must be prejudiced** (1) by the error complained of, and so cannot object for failure of the applicant to join as a party one who has an interest in the nature of a "mortgage, lien or charge." *Brummel v. Glos*, 275 Ill. 28, 113 N. E. 996; *Skinner v. Glos*, 274 Ill. 58, 113 N. E. 59. (2) Where the application relates to several lots and a decree is entered as to all but one, a party claiming an interest in that lot alone cannot question the decree as to the others. *Schiessle v. Glos*, 271 Ill. 374, 111 N. E. 127; *Mundt v. Glos*, 246 Ill. 636, 93 N. E. 49.

**[d] Questions of fact** (1) determined by the land court unless a trial by jury is claimed, are final. *Carr v. Frye*, 225 Mass. 531, 114 N. E. 745, L. R. A. 1917E, 814. *Hartt v. Rueter*, 223 Mass. 207, 111 N. E. 1045. (2) In the absence of the evidence. *Van Ness v. Boinay*, 214 Mass. 340, 101 N. E. 979.

**[e] Technical objections** not based on any meritorious claim will not justify a reversal. *McCrillis v. Glos*, 276 Ill. 617, 115 N. E. 224.

**[f] Parties.**—One who is not a party may appeal from a decree of registration upon filing an affidavit showing that he is aggrieved thereby and that he had no notice of the proceedings. *In re Waban Rose Conservatories*, 218 Mass. 533, 106 N. E. 137.

**[g] Invited Errors.**—A party who invokes the provisions of the registration law, cannot be heard to say that it is not constitutional. *Lewis v. Chamberlain*, 69 Ore. 476, 139 Pac. 571.

**[h] Decisions Applicable.**—(1) An order permitting the filing of an answer to a petition for registration of title after the time limit is a matter of discretion and not appealable because it is not a final decision. *Empire Mfg. Co. v. Spruill*, 169 N. C. 618, 86 S. E. 522. (2) An appeal will not lie from an order denying a motion to dismiss the application. *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044. (3) An appeal will not lie from a denial of a party's application for a jury trial. *Peters v. Duluth*, 119 Minn. 96, 137 N. W. 390, 41 L. R. A. (N. S.) 1044.

**76. People ex rel. Realty Assoc. v. O'Loughlin**, 136 N. Y. Supp. 339; *Lachmann v. Brookfield*, 135 N. Y. Supp. 261.

**77. Harts v. Glos**, 279 Ill. 485, 117 N. E. 68; *Peters v. Dieus*, 254 Ill. 379, 98 N. E. 560; *Wells v. Messenger*, 249 Ill. 72, 94 N. E. 87.

**78. Stallings v. Glos**, 271 Ill. 201, 110 N. E. 915; *Waugh v. Glos*, 246 Ill. 604, 92 N. E. 974, 138 Am. St. Rep. 259.

**79. Peters v. Dieus**, 254 Ill. 379, 98 N. E. 560; *Waugh v. Glos*, 246 Ill. 604, 92 N. E. 974, 138 Am. St. Rep. 259.

**[a] A defendant who merely appears** and insists upon the applicant establishing his title does not become liable for any part of the costs of the proceeding. *Waugh v. Glos*, 246 Ill. 604, 92 N. E. 974, 138 Am. St. Rep. 259.

**[b] Unnecessary costs incurred** (1) by defendants will usually be charged against them, such as filing sham answers (*Miltnerberger v. Glos*, 279 Ill. 501, 117 N. E. 84; *Tomeczak v. Bergman*, 269 Ill. 330, 109 N. E. 1003), or (2) separate sets of exceptions and separate appeals which are united in the appellate court. *Hammond v. Glos*, 250 Ill. 32, 95 N. E. 39.

**[c] Costs against the holder of a**  
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<p>tax title (1) who contests the proceeding may be adjudged when the applicant makes and keeps good a sufficient tender of the taxes, costs, and interest before filing his bill. <i>Ambler v. Glos</i>, 247 Ill. 31, 93 N. E. 85. (2) But the refusal of a tender by the</p>	<p>holder of a tax title who merely appears and insists upon the applicant establishing his title is not of itself ground for charging costs against the holder of such title. <i>Waugh v. Glos</i>, 246 Ill. 604, 92 N. E. 974, 138 Am. St. Rep. 259.</p>
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**TITLE INSURANCE.** — See **Insurance**.

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**TOLL ROADS.** — See **Private and Toll Roads**.

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**TORTS.** — See **Choice and Election of Remedies; Parties; Venue;** and titles dealing with particular torts and forms of action.

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# TOWNS

By the Editorial Staff.

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### CROSS-REFERENCES:

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For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. JUDICIAL REVIEW AND CONTROL OF TOWN PROCEEDINGS AND DECISIONS.** — A. **GENERALLY.** — Where a town transcends or unlawfully exercises its powers, its acts are subject to judicial review in appropriate proceedings.<sup>1</sup> But when acting within the scope of their jurisdiction, decisions of town boards are not subject to collateral attack.<sup>2</sup>

B. **APPEAL.** — There is no appeal to the courts from town proceedings and decisions except as authorized by statute.<sup>3</sup> In some jurisdictions an appeal to the courts is permitted in favor of any interested party from orders or decisions of the body creating a town or towns,<sup>4</sup> or from an auditor's settlement of an officer's account, by the officer, the town, or a taxpayer on the town's behalf;<sup>5</sup> but an appeal cannot be used as a means for compelling an auditor to act,<sup>6</sup> nor for collecting an ordinary claim against a town.<sup>7</sup>

C. **CERTIORARI.** — Subject to the limitations and in accordance with the rules and principles elsewhere treated,<sup>8</sup> where there is no other method provided,<sup>9</sup> certiorari will issue to review town proceedings and official decisions,<sup>10</sup> such as the making of an illegal ordinance,<sup>11</sup> or proceedings of a board of auditors.<sup>12</sup>

1. See 20 STANDARD PROC. 232, and *infra*, this section.

2. *People v. Illinois Cent. R. Co.*, 267 Ill. 469, 103 N. E. 706; *People v. Parker*, 231 Ill. 478, 83 N. E. 282; *Osgood v. Welch*, 19 N. H. 405. See also 20 STANDARD PROC. 332, 238; 15 STANDARD PROC. 396.

3. See 20 STANDARD PROC. 237, and *In re Weymouth*, 2 Cush. (Mass.) 335.

As to appeals from decisions of county boards, see 20 STANDARD PROC. 233.

As to appeals from highway proceedings, see the title "Highways, Streets and Bridges."

Appeal from tax proceedings, see the title "Taxation."

4. *People v. Garner*, 47 Ill. 246.

5. Dallas Borough Auditor's Report, 23 Pa. Dist. 1068. See *In re Bryn Mawr Trust Co.*, 14 Pa. Dist. 17; *In re Plains Tp. Audit*, 15 Pa. Co. Ct. 408.

[a] To the court of common pleas, not to the supreme court. *Thomas v. Upper Merion*, 148 Pa. 116, 23 Atl. 986.

[b] Appeal must be taken within thirty days (1) from filing report by auditors with the clerk of the court of quarter sessions. *In re Eshelman's Account*, 25 Pa. Dist. 820. (2) An appeal taken before the report is filed is premature and will be set aside. *Columbus Tp. Auditors*, 23 Pa. Dist. 357.

[c] The appellant must show that he is one of the parties authorized by statute to make the appeal, and what particular audit is appealed from. *Hanover Tp. School Dist. v. Hughes*, 17 Pa. Dist. 781.

[d] Judgment of the court of common pleas is final and no further appeal to the appellate court can be had. *Lower Merion v. Cline*, 211 Pa. 559, 61 Atl. 77.

[e] The time for taking appeal cannot be extended by the court and if not filed within the required time the decision of the auditors is final and conclusive. *Chanceford v. Craley*, 11 Pa. Dist. 724.

6. Dallas Borough Auditors' Report, 23 Pa. Dist. 1068.

7. See *Kendig v. Comrs. of Greene County*, 82 Ohio 315, 92 N. E. 469.

8. See the title "Certiorari;" 20 STANDARD PROC. 237; and *State v. Middletown Clerk*, 24 N. J. L. 124.

9. See *State v. Middletown Clerk*, 24 N. J. L. 124.

10. *State v. Kingsland*, 23 N. J. L. 85.

11. *Browning v. Pensauken Tp.*, 76 N. J. L. 110, 68 Atl. 1063.

12. *People ex rel. Myers v. Barnes*, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739.

[a] The denial of an unliquidated claim may be reviewed by certiorari, although the board has adjourned.

**D. MANDAMUS** to town officers is governed by the general rules elsewhere discussed,<sup>13</sup> and in accordance therewith the writ will lie to compel auditors to settle an officer's account,<sup>14</sup> or to adjust a claim,<sup>15</sup> and in some cases to compel the payment of adjusted and liquidated claims,<sup>16</sup> but ordinarily not to review a decision of auditors allowing or denying a claim.<sup>17</sup>

**E. IN EQUITY.**—Subject to the limitations and in accordance with the general rules elsewhere treated<sup>18</sup> a bill in equity will lie by a taxpayer<sup>19</sup> to annul an order of the board of trustees,<sup>20</sup> to set aside a void contract,<sup>21</sup> or to restrain any illegal official act,<sup>22</sup> such as to enjoin the enforcement of a void ordinance,<sup>23</sup> the collection of a void tax,<sup>24</sup> or bond,<sup>25</sup> the making<sup>26</sup> or performance<sup>27</sup> of illegal contracts by town

*Murphy v. Benton*, 86 Misc. 72, 148 N. Y. Supp. 273.

13. See 20 STANDARD PROC. 126, and the title "Mandamus."

14. *Dallas Borough Auditors' Report*, 23 Pa. Dist. 1068.

15. *People v. Oran*, 121 Ill. 650, 13 N. E. 726, affirming 19 Ill. App. 174. See *Carlstadt v. Bergen*, 60 N. J. L. 360, 37 Atl. 612, and 20 STANDARD PROC. 144.

16. *Norwich v. Hampden*, 4 Gray (Mass.) 172; *Stambaugh Tp. v. Iron County Treasurer*, 153 Mich. 104, 116 N. W. 569; *Courtright v. Brooks*, 54 Mich. 182, 19 N. W. 945; *Marathon v. Oregon*, 8 Mich. 372. See 20 STANDARD PROC. 150.

17. **III.**—*Cottonwood v. People*, 38 Ill. App. 239. **N. Y.**—*People ex rel. Myers v. Barnes*, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739. **R. I.**—*Foster v. Angell*, 19 R. I. 285, 33 Atl. 406. See 20 STANDARD PROC. 144.

18. See 20 STANDARD PROC. 164.

19. See *Sexton v. Smith*, 32 Okla. 441, 122 Pac. 686. See 20 STANDARD PROC. 167.

[a] **By non-resident taxpayer.** *Menasha Woodenware Co. v. Winter*, 159 Wis. 437, 150 N. W. 526. See 20 STANDARD PROC. 172.

[b] **By One or More Taxpayers on Behalf of All.**—(1) *Menasha Woodenware Co. v. Winter*, 159 Wis. 437, 150 N. W. 526. (2) A taxpayer having no equitable ground of complaint in himself alone, if belonging to the general class pecuniarily interested, may maintain a suit to restrain the unauthorized expenditure of public funds in behalf of all. *McGowan v. Paul*, 141 Wis. 388, 123 N. W. 253.

20 *Reed v. Wing*, 168 Cal. 706, 144 Pac. 964.

21. *Shoemaker v. Buffalo Steam Roller Co.*, 83 Misc. 162, 144 N. Y. Supp. 721; *Gardner v. Town of Cameron*, 131 N. Y. Supp. 894.

22. *Daly v. Haight*, 170 App. Div. 469, 156 N. Y. Supp. 538; *Montgomery v. Smead*, 97 Misc. 283, 161 N. Y. Supp. 431; *Russell v. Fulton County*, 6 Ohio C. C. 185. See 20 STANDARD PROC. 164, et seq.

**To Prevent Diversion of Subject of a Dedication to Another Use.**—See 18 STANDARD PROC. 687.

23. *Bloomsburg Town Election Case*, 18 Pa. Co. Ct. 449. See 20 STANDARD PROC. 182.

24. **U. S.**—*Sully v. Drennan*, 112 U. S. 287, 5 Sup. Ct. 453, 28 L. ed. 1007. **Ill.**—*Haggard v. Fay*, 255 Ill. 85, 99 N. E. 365. **Ind.**—*Williams v. Hall*, 65 Ind. 129. **Ia.**—*Sinnett v. Moles*, 38 Iowa 25. **Mich.**—*Curtenius v. Hoyt*, 37 Mich. 583. **Mo.**—*Hays v. Dowis*, 75 Mo. 250. **N. C.**—*Graves v. Moore*, 135 N. C. 49, 47 S. E. 134.

See the title "Taxation."

[a] **The body imposing the tax and courts of law**, in some states, have jurisdiction of objections to the levy and collection of a town tax. *Kilbourne v. St. John*, 59 N. Y. 21, 17 Am. Rep. 291; *Lewis v. Eagle*, 135 Wis. 141, 115 N. W. 361; *Judd v. Fox Lake*, 28 Wis. 583. See the title "Taxation."

25. *Strang v. Cook*, 47 Hun 46, 14 N. Y. St. 150. See 20 STANDARD PROC. 197.

26. *Craft v. Lent*, 103 N. Y. Supp. 366. See 20 STANDARD PROC. 197.

27. **Mich.**—*Bartlett v. Austin*, etc. Co., 147 Mich. 58, 110 N. W. 123. **Okla.**—*Sexton v. Smith*, 32 Okla. 441, 122 Pac. 686. **Wis.**—*McGowan v. Paul*, 156 Wis. 214, 145 N. W. 666, 141 Wis. 388, 123 N. W. 253.



officers, misappropriation of town funds,<sup>28</sup> the illegal audit of claims and levy for their payment,<sup>29</sup> illegal expenditures,<sup>30</sup> and as incidental relief may decree the recovery, for the benefit of the town, of expenditures illegally made.<sup>31</sup> The general rules as to parties<sup>32</sup> and pleadings<sup>33</sup> govern in such proceedings.

**II. CIVIL ACTIONS GENERALLY BY AND AGAINST TOWNS AND THEIR OFFICERS.**<sup>34</sup> — A. GENERALLY. — Actions by and against towns and their officers follow the general rules elsewhere treated.<sup>35</sup> Capacity to sue and be sued is generally fully conferred upon towns by statute.<sup>36</sup> As to its form an action by or against a

28. *McCrea v. Chahoon*, 54 Hun 577, 8 N. Y. Supp. 88, 28 N. Y. St. 242; *Menasha Wooden Ware Co. v. Winter*, 159 Wis. 437, 150 N. W. 526. See 20 STANDARD PROC. 190.

29. *Armstrong v. Fitch*, 126 App. Div. 527, 110 N. Y. Supp. 736. See 20 STANDARD PROC. 194, and the title "Taxation."

30. *Rockefeller v. Taylor*, 69 App. Div. 176, 74 N. Y. Supp. 812. See 20 STANDARD PROC. 190.

31. *Annis v. McNulty*, 51 Misc. 121, 100 N. Y. Supp. 951, *affirmed*, 116 App. Div. 909, 101 N. Y. Supp. 1111.

[a] When the Act Done Is Ultra Vires or Tainted With Fraud.—*Daly v. Haight*, 170 App. Div. 469, 156 N. Y. Supp. 538. See also *Shoemaker v. Buffalo Steam Roller Co.*, 83 Misc. 162, 144 N. Y. Supp. 721.

32. See 20 STANDARD PROC. 166, et seq., and the titles "Injunctions;" "Parties;" "Taxation."

Taxpayer as plaintiff, see *supra*, this section.

[a] The town is the proper defendant in a suit to set aside contracts made in its behalf by an officer. *Siegel v. Liberty*, 111 Wis. 470, 87 N. W. 487. See 20 STANDARD PROC. 173.

[b] The officer is the proper defendant in a suit to restrain an illegal official act by such officer. *Riley v. Brodie*, 22 Misc. 374, 50 N. Y. Supp. 347; *Uren v. Walsh*, 57 Wis. 98, 14 N. W. 902. See 20 STANDARD PROC. 173.

[c] Joinder of Parties.—(1) A town board, controlling and directing an officer, may be joined with such officer in a suit to restrain illegal acts by him. *Rockefeller v. Taylor*, 69 App. Div. 176, 74 N. Y. Supp. 812. (2) Claimants should be joined in suits to enjoin the payment or allowance of claims. *Armstrong v. Fitch*, 113 App. Div. 317, 99 N. Y. Supp. 471; *Men-*

*asha Wooden Ware Co. v. Winter*, 159 Wis. 437, 150 N. W. 526. (3) Where a tax is voted to aid a corporation, the corporation should be joined in a suit to enjoin the tax. *Sully v. Drennan*, 113 U. S. 287, 5 Sup. Ct. 453, 28 L. ed. 1007; *McCleary v. Babcock*, 169 Ind. 228, 82 N. E. 453. See 20 STANDARD PROC. 174.

[d] Though having an interest in the subject matter, a railroad company is not a necessary party in an action by a taxpayer to annul an order of a board of town trustees declaring an ordinance granting such railroad a franchise rejected at a referendum election. *Reed v. Wing*, 168 Cal. 706, 144 Pac. 964.

33. See 20 STANDARD PROC. 175, and the following cases: *Ind.*—See *Hill v. Probst*, 120 Ind. 528, 22 N. E. 664. *Ia.* *Zorger v. Rapids*, 36 Iowa 175. *N. Y.* *McCrea v. Chahoon*, 54 Hun 577, 8 N. Y. Supp. 88, 28 N. Y. St. 242.

See also the titles "Bills and Answers;" "Injunctions."

34. Injunctive relief against towns and town officers, see *supra*, I, E.

As to mandamus to town officers, see *supra*, I, B, 3.

Action by town to recover penalty for failure to do road work, see 11 STANDARD PROC. 143.

35. See the titles "Municipal Corporations;" "Officers;" "Sheriffs, Constables and Marshals." See also the title "Highways, Streets and Bridges."

36. *Ind.*—*Sebrell v. Fall Creek*, 27 Ind. 86. *Me.*—*Ripley v. Inhabitants of Harmony*, 111 Me. 91, 88 Atl. 161; *Augusta v. Leadbetter*, 16 Me. 45. *Neb.* *Denver v. Myers*, 63 Neb. 107, 88 N. W. 191. *N. Y.*—*Hempstead v. Lawrence*, 138 App. Div. 473, 122 N. Y. Supp. 1037. *Ohio.*—*Wilson v. Butler Tp.*, 8 Ohio 174. *Okl.*—*McGuire v. Skelton*,

town or its officers does not differ from other similar actions.<sup>37</sup> Boundary disputes between adjoining towns are sometimes settled in the courts,<sup>38</sup> and an accounting in equity will lie to settle claims arising out of a change of boundaries,<sup>39</sup> or to enforce the claims of creditors of a town absorbed by other towns,<sup>40</sup> excepting where an adequate remedy is available at law.<sup>41</sup>

**B. JURISDICTION AND VENUE.**—Jurisdiction and venue of actions by and against towns and their officers are determined in accordance with the principle and rules elsewhere treated, except as modified by statute,<sup>42</sup> some cases being properly brought in a justice's court.<sup>43</sup>

**C. PARTIES.**—Parties in actions by or against towns or their officers are governed by the rules elsewhere treated.<sup>44</sup> As a general rule an action for a town should be brought<sup>45</sup> by the board of trustees in the

36 Okla. 500, 129 Pac. 739. **R. I.**—Town of East Greenwich v. Guenond, 32 R. I. 224, 78 Atl. 1015. See *Richmond v. Kettelle*, Town Treasurer (R. I.), 106 Atl. 292.

**Capacity of municipal corporations generally**, see 20 STANDARD PROC. 90.

[a] **Not to sue before organization effected** in the manner provided by statute. *State v. Arnold*, 38 Ind. 41.

37. See 20 STANDARD PROC. 98 and the titles "Officers;" "Sheriffs, Constables and Marshals."

[a] **Assumpsit will lie against a town to recover a liquidated claim.** *South Portland v. Cape Elizabeth*, 92 Me. 328, 42 Atl. 503, 69 Am. St. Rep. 502. See *Kendig v. Comrs. of Greene County*, 82 Ohio 315, 92 N. E. 469.

38. **Ill.**—*Colvin v. Fell*, 40 Ill. 418. **N. H.**—*Bath v. Haverhill*, 73 N. H. 511, 63 Atl. 307; *In re Chatham*, 18 N. H. 227. **Ohio.**—See *Russell v. Fulton County*, 6 Ohio C. C. 185. **Vt.**—*Searsburg v. Woodford*, 76 Vt. 370, 57 Atl. 961.

39. **Mich.**—See *Gladwin v. Bourrett*, 131 Mich. 353, 91 N. W. 618. **Minn.**—Town of Kettle River v. Bruno, 106 Minn. 58, 118 N. W. 63. **Wis.**—*Ackley v. Vilas*, 79 Wis. 157, 48 N. W. 257; *La Pointe v. Ashland*, 47 Wis. 251, 2 N. W. 306.

40. *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699.

41. *Franklin Tp. v. Crane*, 80 N. J. Eq. 509, 85 Atl. 408, 43 L. R. A. (N. S.) 604.

42. See the titles "Jurisdiction;" "Officers;" "Venue;" 20 STANDARD PROC. 98, 166, 214; and *Spencer v. Cline*, 28 Ind. 51.

[a] **The district court has jurisdiction of actions against township officers for misappropriation of funds.** *McGuire v. Skelton*, 36 Okla. 500, 129 Pac. 739.

43. **Ind.**—*Spencer v. Cline*, 28 Ind. 51. **Mich.**—*Hart v. Port Huron*, 46 Mich. 428, 9 N. W. 481. **N. Y.**—*Lapham v. Rice*, 55 N. Y. 472. **Ohio.**—*Harding v. New Haven Tp.*, 3 Ohio 227. **Pa.**—*Wolff v. Salem Tp. Suprs.*, 17 Pa. Dist. 1006.

44. See the titles "Highways, Streets and Bridges;" "Municipal Corporations;" "Officers;" "Parties;" "Sheriffs, Constables and Marshals;" "Taxation."

45. **U. S.**—See *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. ed. 996, New York statute. **Conn.**—*Farrel v. Derby*, 58 Conn. 234, 20 Atl. 460, 7 L. R. A. 776; *Union v. Crawford*, 19 Conn. 331. **Ill.**—*Winne v. People*, 177 Ill. 268, 52 N. E. 377. **Ind.**—*Johnson v. Harris*, 3 Blackf. 387, 26 Am. Dec. 424. **Kan.**—*Ralston v. Dodge City, M. & T. Ry. Co.*, 53 Kan. 337, 36 Pac. 712. **Me.**—*Strout v. Durham*, 23 Me. 483; *Garland v. Reynolds*, 20 Me. 45. **Mass.**—*Weston v. Gibbs*, 23 Pick. 205. **N. H.**—See *Sunapee v. Eastman*, 32 N. H. 470. **N. Y.**—*Hempstead v. Lawrence*, 138 App. Div. 473, 122 N. Y. Supp. 1037; *Adee v. Arnow*, 91 Hun 329, 36 N. Y. Supp. 1020, 72 N. Y. St. 293. **Ohio.**—*Green v. Robinson*, 5 Ohio 186; *Copcord v. Miller*, 5 Ohio 184. **Pa.**—*Anderson v. Hamilton*, 25 Pa. 75. **R. I.**—Town of East Greenwich v. Guenond, 32 R. I. 224, 78 Atl. 1015; *Middleton v. Newport Hospital*, 16 R. I. 319, 15 Atl. 800, 1 L. R. A. 191. **Vt.**—*Jamaica*

name of the town, not in the name of the town's trustees.<sup>46</sup> Town officers, taxpayers, or other individuals, in general, cannot institute or defend actions on behalf of a town,<sup>47</sup> except when duly authorized to do so,<sup>48</sup> but town officers may maintain actions incidental and necessary to a full performance of their duties.<sup>49</sup>

Actions on the official bonds of town officers are properly brought in the name of the town,<sup>50</sup> unless a provision of the statute or bond requires that it be brought in the name of the state,<sup>51</sup> or a particular officer,<sup>52</sup> as, for example, the officer to whom the bond was issued or his successor,<sup>53</sup> or the official custodian of the funds in question;<sup>54</sup> but under some statutes, upon failure of the proper officers to act, such action may be brought by a taxpayer in the name of the state.<sup>55</sup>

*v. Hart*, 52 Vt. 549; *Middlebury v. Case*, 6 Vt. 165. **Wis.**—*Pine Valley v. Unity*, 40 Wis. 682; *Haner v. Polk*, 6 Wis. 350.

See 20 STANDARD PROC. 98.

[a] **Not By Inhabitants.**—*State v. Arnold*, 38 Ind. 41. See 20 STANDARD PROC. 99, note 84.

[b] **Actions begun before the division of a town** (1) may generally be continued in the name of the original plaintiff (*Springfield v. Connecticut R. Co.*, 4 Cush. [Mass.] 63), or (2) in the name of the new town. *Butternut v. O'Malley*, 50 Wis. 333, 7 N. W. 248.

[c] **Boundary disputes** between adjoining towns (1) should be in the name of the town, not in the name of individuals (*Enfield v. Permit*, 5 N. H. 280, 20 Am. Dec. 580; *Govers v. Westchester*, 171 N. Y. 403, 64 N. E. 193), except (2) where such a dispute is necessarily involved in an equity case between individuals. *Forest River Lead Co. v. Salem*, 165 Mass. 193, 42 N. E. 802.

46. *Tuma v. Piepenbrink*, 160 App. Div. 225, 145 N. Y. Supp. 474, *affirming*, 136 N. Y. Supp. 343.

47. **Ill.**—*Kankakee v. Kankakee etc. R. Co.*, 115 Ill. 88, 3 N. E. 741, *affirming*, 16 Ill. App. 542. **N. Y.**—*People ex rel. McMillen v. Vanderpool*, 35 App. Div. 73, 54 N. Y. Supp. 436. **R. I.** *Town of East Greenwich v. Guenond*, 32 R. I. 224, 78 Atl. 1015.

But see *Bd. of Highway Comrs. v. Bloomington*, 253 Ill. 164, 97 N. E. 280, *Ann. Cas.* 1913A, 471.

**Suits in equity by taxpayers**, see *supra*, I, E.

48. **Ill.**—*Mt. Vernon v. Patton*, 94 Ill. 65. **Ind.**—*Manor v. State*, 149 Ind. 310, 49 N. E. 160; *Robbins v. Dishon*, 19 Ind. 204. **Me.**—See *Fossett v. Bearce*, 29 Me. 523. **Mass.**—*Great Barrington*

*v. Gibbons*, 199 Mass. 527, 85 N. E. 737. **Mich.**—See *Bixby v. Steketee*, 44 Mich. 613, 7 N. W. 229. **N. J.**—*Woodbridge v. Hall*, 47 N. J. L. 388, 1 Atl. 492. **N. Y.**—*Comesky v. Blackledge*, 114 App. Div. 834, 100 N. Y. Supp. 241; *Mitchell v. Strough*, 35 Hun 83.

[a] **By a General Agent.**—*Knowlton v. Plantation No. 4*, 14 Me. 20; *Rollins v. Chester*, 46 N. H. 411.

[b] **By a Highway Commissioner.** *Crooked Creek v. King*, 252 Ill. 126, 96 N. E. 905; *Saratoga v. Jacobson*, 193 Ill. App. 110.

[c] **Actions for Default of Town Officers.**—(1) Actions to recover money or property from a defaulting officer of a town should be brought in the name of the town (*Guilford v. Cooley*, 58 N. Y. 116), or (2) individual or body duly authorized to bring such action. *Taylor v. Gurnee*, 26 Hun (N. Y.) 624.

49. *Long v. Emsley*, 57 Iowa 11, 10 N. W. 280; *Burton v. Norwich*, 34 Vt. 345. See 20 STANDARD PROC. 747.

50. *Salem v. Cunningham*, 45 Mo. App. 614; *Platteville v. Hooper*, 63 Wis. 381, 385, 23 N. W. 581, 583. See generally 20 STANDARD PROC. 750.

51. *State v. Wilson*, 113 Ind. 501, 15 N. E. 596.

[a] **A bond payable to people of the state** should be sued on in the name of the state on relation of the town, not in the name of the town. *Lagrange v. Chapman*, 11 Mich. 499.

52. *Robinson v. State*, 60 Ind. 26; *Palmer v. Roods*, 116 App. Div. 66, 101 N. Y. Supp. 186.

53. *Berrien Treasurer v. Bunbury*, 45 Mich. 79, 7 N. W. 704.

54. *Keller v. Bare*, 62 Iowa 468, 17 N. W. 666.

55. *Miller v. Jackson Tp.*, 178 Ind.



The town itself is the proper defendant in actions to enforce its liability on claims in general,<sup>56</sup> and to recover damages resulting from the acts of officers committed within the scope of their authority,<sup>57</sup> although in tort actions generally the town and officer may be joined.<sup>58</sup> Statutes sometimes provide for action against the town treasurer, as such, to enforce claims against the town.<sup>59</sup> The town may sue one of its officers for money unlawfully expended by him, without joining other officers who participated in the unlawful act.<sup>60</sup> The proper parties to mandamus and injunction proceedings are elsewhere treated.<sup>61</sup>

D. PLEADING.—The pleadings in actions by or against towns or their officers, follow the general rules elsewhere treated.<sup>62</sup> The declaration or petition must state the necessary substantive facts,<sup>63</sup> whether the plaintiff seeks to settle a boundary dispute,<sup>64</sup> or to recover damages for negligence,<sup>65</sup> or to recover from a defaulting officer,<sup>66</sup> or his

503, 99 N. E. 102; *McGuire v. Skelton*, 36 Okla. 500, 129 Pac. 739.

56. See *Andes v. Ely*, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. ed. 996 (*In re* New York statute); *Shea v. Plains*, 7 Kulp (Pa.) 554. See 20 STANDARD PROC. 99.

[a] The statute sometimes directs that such action may be brought against a designated officer. *Quinn v. Barber*, 31 R. I. 538, 77 Atl. 1003.

[b] A township may be sued in Ohio on account of any liabilities incurred by it. *Loeb v. Columbia Tp. Trustees*, 179 U. S. 472, 21 Sup. Ct. 174, 45 L. ed. 280.

57. *Koeper v. Louisville*, 106 Minn. 269, 118 N. W. 1025; *McGregor v. Walden*, 14 Vt. 450.

58. *Lyman v. Windsor*, 24 Vt. 575. See 20 STANDARD PROC. 939, 942.

59. See *Richmond v. Kettelle*, Town Treasurer, 106 Atl. 292.

60. *Town of Humboldt v. Schoen*, 168 Wis. 414, 170 N. W. 250.

61. See the titles "Injunctions;" "Mandamus;" "Municipal Corporations;" "Officers;" "Taxation;" and also *supra*, I, D and E.

62. See the titles "Municipal Corporations;" "Officers;" "Sheriffs, Constables and Marshals;" "Taxation;" and titles dealing with specific pleadings, actions and causes of action.

Plea of statute of limitations by or against town, see 18 STANDARD PROC. 1026, 1032.

[a] Estoppel, to be available as a defense, must be specially pleaded. *Center School v. State*, 150 Ind. 168, 49

N. E. 961. See generally the title "Estoppel."

63. *Robinson v. Jones*, 71 Mo. 582. [a] Fraud must be pleaded specially by setting forth the facts which show wherein the alleged acts are fraudulent in an action by a taxpayer based on fraud against a town board and other officials. *Daly v. Haight*, 163 App. Div. 239, 148 N. Y. Supp. 46.

64. Me.—*Monmouth v. Leeds*, 76 Me. 28. N. H.—*Bath v. Haverhill*, 73 N. H. 511, 63 Atl. 307. Pa.—*In re Line between Tps.*, 4 Lanc. 269. Vt.—*Searsburg v. Woodford*, 76 Vt. 370, 57 Atl. 961.

65. *Hunter v. Windsor*, 24 Vt. 327. See the title "Negligence." See also 20 STANDARD PROC. 104 and the titles "Highways, Streets and Bridges;" "Injuries to Persons and Property."

66. *McCrea v. Chahoon*, 54 Hun 577, 8 N. Y. Supp. 88, 28 N. Y. St. 242. See generally the title "Officers."

[a] Demand Must Be Alleged.—(1) See *Stinnett v. Noggle*, 148 Wis. 603, 135 N. W. 167. (2) A sufficient demand, in an action against a former treasurer in default, is averred by the allegation that he unlawfully converted the money and refused to pay it over. *Stinnett v. Noggle*, 148 Wis. 603, 135 N. W. 167.

[b] Election or appointment and qualifying of a successor to be alleged in an action against a town treasurer for failing to pay over town funds in his possession. *Hawthorn v. State*, 48 Ind. 464. See *Stinnett v. Noggle*, 148 Wis. 603, 135 N. W. 167.

sureties.<sup>67</sup> In general, the plaintiff must show the liability of the town in the capacity in which it is sued,<sup>68</sup> the performance of conditions precedent to the validity of the claim sued on,<sup>69</sup> that a contract sued on was duly authorized,<sup>70</sup> and that certain acts by officers resulting in damage to the plaintiff were within the scope of their authority.<sup>71</sup>

E. TRIAL OR HEARING. — 1. **Generally.** — The trial in actions involving towns and their officers, proceeds as in other similar cases.<sup>72</sup>

2. **In Boundary Disputes.** — In boundary disputes between adjoining towns the finding or locating of the true boundary is generally referred to commissioners,<sup>73</sup> and the case heard on their report<sup>74</sup> and exceptions thereto,<sup>75</sup> which must conform substantially to the requirements of the statute.<sup>76</sup>

3. **Questions of Law and Fact.** — As in other civil cases, disputed questions of fact are for the jury,<sup>77</sup> as for example, whether a contract was made in the manner prescribed by law,<sup>78</sup> whether the employment of an architect for a town hall was necessary,<sup>79</sup> whether an unauthor-

67. *Morback v. State*, 34 Ind. 308. See generally the titles "Officers;" "Principal and Surety."

[a] **Breach Must Be Assigned.** *Wolff v. Stoddard*, 25 Wis. 503.

[b] **Fraud** must be pleaded specifically, and it is insufficient to aver that an alleged settlement was fraudulently procured on a promise of immediate reimbursement. *State v. Prather*, 44 Ind. 287.

68. *Utica v. Miller*, 62 Ind. 230. See also *Jackson v. Barnes*, 55 Ind. 136.

69. *Mitchelltree v. Hall*, 163 Ind. 667, 72 N. E. 641.

**Notice or claim**, see 20 STANDARD PROC. 92, 102.

[a] **When an appropriation is necessary** before a contract for the expenditure of money may be entered into, a complaint to recover on such a contract must allege facts showing such appropriation. *Henderson v. Middle Civil Tp.*, 54 Ind. App. 396, 102 N. E. 968.

[b] **In actions to enforce town bonds** the declaration must show that conditions precedent to their validity were complied with. *Cotton v. New Providence*, 47 N. J. L. 401, 2 Atl. 253; *Ft. Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973.

70. *Clinton School Tp. v. Lebanon Nat. Bank*, 18 Ind. App. 42, 47 N. E. 349; *Holroyd v. Indian Lake*, 85 App. Div. 246, 83 N. Y. Supp. 533. See 20 STANDARD PROC. 103.

71. *Kreger v. Bismarck*, 59 Minn. 3, 60 N. W. 675.

[a] **An objection that an action in the name of a town is not authorized** should be made by a motion to dismiss, since it is not a matter for allegation or proof at the trial. *Ft. Covington v. United States etc. R. Co.*, 8 App. Div. 223, 40 N. Y. Supp. 313, *affirmed* in 156 N. Y. 702, 51 N. E. 1094.

72. See the titles "Municipal Corporations;" "Officers;" "Trial;" and other titles dealing with particular aspects of trial practice or with trial in particular actions.

73. **Conn.**—*Suffield v. East Granby*, 52 Conn. 175. **Ill.**—*People v. Garner*, 47 Ill. 246. **Me.**—*Lisbon v. Bowdoin*, 53 Me. 324. **N. H.**—*Bath v. Haverhill*, 73 N. H. 511, 63 Atl. 307. **Pa.**—*In re Line between Tps.*, 4 Lanc. 269. **Vt.** *Searsburg v. Woodford*, 76 Vt. 370, 57 Atl. 961.

74. *Winthrop v. Readfield*, 90 Me. 235, 38 Atl. 93.

75. **Me.**—*Monmouth v. Leeds*, 79 Me. 171, 8 Atl. 828. **N. H.**—*Bath v. Haverhill*, 73 N. H. 511, 63 Atl. 307. **Pa.**—*In re Line between Townships*, 4 Lanc. 269.

76. *Lisbon v. Bowdoin*, 53 Me. 324; *Somerset v. Glastenbury*, 61 Vt. 449, 17 Atl. 748.

77. See the titles "Municipal Corporations;" "Province of Judge and Jury."

78. *Austin Mfg. Co. v. Ayr*, 17 Pa. Super. 419.

79. *Vinal v. Inhabitants of Nahant* (Mass.), 122 N. E. 295.

ized town order has been ratified,<sup>80</sup> and the good faith of a purchaser in an action to enforce town bonds.<sup>81</sup>

**F. JUDGMENT.—1. In General.**—Judgments and decrees in actions of a town or its officers must conform to the rules elsewhere treated.<sup>82</sup>

**2. Enforcement and Satisfaction.**<sup>83</sup>—In a few states a judgment against a town may be enforced by execution,<sup>84</sup> though as a general rule it cannot be so enforced,<sup>85</sup> but should be audited as town charge and paid accordingly,<sup>86</sup> or, if not paid, mandamus should be resorted to.<sup>87</sup>

A town board, as a general rule, may order a judgment in favor of the town satisfied only on receipt of its amount in money or its equivalent.<sup>88</sup>

Where an execution issues it may be levied upon the property of the inhabitants of the town,<sup>89</sup> or of the town itself, if not exempt or used

80. *Burnham v. Strafford*, 53 Vt. 610.

81. *Doty v. Garfield Tp.*, 89 Kan. 719, 133 Pac. 172.

82. See the titles "Decrees;" "Judgments;" and 20 STANDARD PROC. 111. See also titles dealing with judgments or decrees in particular classes of cases.

[a] **Judgment Against Persons Not Parties.**—In a suit to enjoin the payment of illegal orders issued by a town, a judgment cannot be rendered affecting orders owned by persons not made parties. *Menasha Wooden Ware Co. v. Winter*, 159 Wis. 437, 150 N. W. 526.

[b] **More irregularities in a judgment for or against a town will not justify either a collateral or a direct attack thereon.** *Lyons v. Cooledge*, 89 Ill. 529; *Hart's Heirs v. Johnson*, 6 Ohio 87.

83. See 20 STANDARD PROC. 111, and generally the titles "Judgments and Decrees, Enforcement of;" "Judgments, Satisfaction of."

As to garnishment, see 10 STANDARD PROC. 401.

84. *Conn.*—*Beardsley v. Smith*, 16 Conn. 368, 41 Am. Dec. 148. *Me.*—*Ripley v. Inhabitants of Harmony*, 111 Me. 91, 88 Atl. 161; *Littlefield v. Greenfield*, 69 Me. 86. *Mass.*—*Chase v. Merrimack Bank*, 19 Pick. 564, 31 Am. Dec. 163. *Vt.*—*Hopkins v. Elmore*, 49 Vt. 176.

85. See 20 STANDARD PROC. 111 and *United States v. Bd. of Auditors*, 28 Fed. 407 (Illinois statute); *Richmond v. Kettelle*, Town Treasurer (R. I.), 106 Atl. 292.

[a] **A judgment against the town treasurer as such cannot be enforced against his individual property.** *Richmond v. Kettelle*, Town Treasurer (R. I.), 106 Atl. 292.

86. *United States v. Bd. of Auditors*, 28 Fed. 407. See also *People ex rel. McKenzie v. Bd. of Supervisors of Ulster*, 94 N. Y. 263; *State v. Elba*, 34 Wis. 169.

[a] **When authorized to do so the town treasurer (1) may pay a judgment against a town** (*State v. Kispert*, 21 Wis. 387), but (2) generally he should wait until ordered to pay by the town board. *Coon Dist. Tp. v. Providence Dist. Tp.*, 52 Iowa 287, 3 N. W. 109.

87. See *Richmond v. Kettelle*, Town Treasurer (R. I.), 106 Atl. 292; 20 STANDARD PROC. 112; and the title "Taxation."

[b] **In Pennsylvania a judgment against a town is enforced by a writ from the court in which the judgment is obtained, or to which it may be removed from a justice's court, directing the town to pay such judgment out of the first unappropriated money it may have.** *Wolf v. Salem Tp. Suprs.*, 17 Pa. Dist. 1006.

88. *Butternut v. O'Malley*, 50 Wis. 329, 7 N. W. 246.

89. *U. S.*—*Bloomfield v. Charter Oak Bank*, 121 U. S. 121, 7 Sup. Ct. 865, 30 L. ed. 923 (in Connecticut). *Conn.*—*McLoud v. Selby*, 10 Conn. 390, 27 Am. Dec. 689. *Me.*—*Littlefield v. Greenfield*, 69 Me. 86. *Mass.*—*Gaskill v. Dudley*, 6 Mete. 546, 39 Am. Dec.



by the town in the performance of its public functions.<sup>90</sup>

G. **APPEAL.**—Actions by or against towns are subject to the general rules applicable to other civil cases on appeal.<sup>91</sup>

H. **COSTS.**—Costs are determined as in other similar cases.<sup>92</sup>

In boundary disputes costs, in some jurisdictions, are divided equally between the plaintiff and defendant, irrespective of the number of towns,<sup>93</sup> but generally such costs are within the court's discretion and will be apportioned equally among all towns to the dispute,<sup>94</sup> except when a different rule is justified by frivolous and unfounded demands of one or more towns.<sup>95</sup>

III. **CRIMINAL PROSECUTIONS.**<sup>96</sup>—Criminal prosecutions of town officers for negligence or unlawful disposition of funds or failure to account are regulated by statute,<sup>97</sup> and indictments for such offenses should be drawn in substantial compliance therewith.<sup>98</sup>

750. **Vt.**—*Hopkins v. Elmore*, 49 Vt. 176.

[a] The method pursued in such cases is for the town board of assessors, to assess each inhabitant a certain portion of the judgment, upon payment of which an inhabitant is perpetually exempt from any further liability on the judgment. *Spencer v. Brighton*, 49 Me. 326.

90. *Ripley v. Inhabitants of Harmony*, 111 Me. 91, 88 Atl. 161.

91. See *Union v. Crawford*, 19 Conn. 331; *State v. Wertzel*, 84 Wis. 344, 54 N. W. 579; and generally the titles "Appeals;" "Writ of Error;" and other titles with particular aspects of appellate practice.

[a] Objections and exceptions not to be raised for the first time on appeal. *People v. Illinois Cent. R. Co.*, 267 Ill. 469, 108 N. E. 706; *Town of St. George v. Tilley*, 87 Vt. 427, 89 Atl. 474.

**Necessity of undertaking on appeal**, see the title "Undertakings."

92. See *Hobbs v. Cowden*, 20 Ind. 310; *In re Hempstead*, 36 App. Div. 321, 55 N. Y. Supp. 345, affirmed, 160 N. Y. 685, 55 N. E. 1101. See also 20 STANDARD PROC. 111 and the title "Costs."

[a] **In Favor of Prevailing Party.** *Anchor v. Stewart*, 153 Ill. App. 205.

[b] **Discretionary with court in suit** to enjoin payment of illegal orders issued by a town, and costs may be awarded against all defendants except the town. *Menasha Wooden Ware Co. v. Winter*, 159 Wis. 437, 150 N. W. 526.

[a] **An appeal by the town in prosecutions under its ordinances, costs, even on a reversal, are properly awarded against the town.** *Columbus City v. Catecomp*, 61 Iowa 672, 17 N. W. 47.

93. *Bethel v. Albany*, 65 Me. 200.

94. *Campton v. Holderness*, 25 N. H. 225.

95. *Campton v. Holderness*, 25 N. H. 225.

96. **Criminal prosecutions against municipal corporations**, see 20 STANDARD PROC. 239.

**Enforcement of municipal ordinances**, see 20 STANDARD PROC. 213.

**Criminal prosecution of officers**, see the title "Officers."

97. See the statutes and *Johnson v. People*, 123 Ill. 624, 15 N. E. 37; *Baysinger v. People*, 115 Ill. 419, 5 N. E. 375.

98. *Duty v. State*, 9 Ind. App. 595, 36 N. E. 655; *People v. Castleton Town Auditors*, 44 How. Pr. (N. Y.) 238. See generally the title "Indictment and Information."

# TRADE-MARKS AND TRADE NAMES

By the Editorial Staff.

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## II. CRIMINAL PROSECUTIONS, 880

### CROSS-REFERENCES:

Copyright Proceedings;  
Injunctions;

Patents;  
Restraint of Trade.

Enforcing contracts for sale of business and good-will, see the title "Restraint of Trade."

For forms, see 9 STANDARD PROC. 1208.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**Scope Note.**— This article includes procedure in actions relating to unfair competition as well as in those concerning trade-marks, trade names and labels.

**I. CIVIL REMEDIES.**— **A. EXISTENCE AND NATURE OF.**— Trade-marks and trade names are property and courts of law and equity will protect their owner.<sup>1</sup> And the owner of a business, although without a lawful trade-mark, is entitled to protection against what is known as “unfair competition,” which consists in passing off or attempting to pass off upon the public, the goods or business of one man as the goods or business of another.<sup>2</sup> These rights are in general derived from and dependent upon the common law or state statutes, rather than upon federal law, since the congress has no general constitutional power to legislate upon them.<sup>3</sup> However, as an incident to its power to regulate

1. *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170; *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640. And see cases cited in succeeding notes.

[a] **Definition of, and Property Right in Trade-Mark.**—“Any name, symbol, letter, figure or device adopted by the persons manufacturing or selling goods, and used and put upon such goods to distinguish them from those manufactured or sold by others, and employed so often and for such a length of time, as to raise the presumption that the public would know that it was used to indicate ownership of the goods in the person manufacturing or selling them, constitutes his trade mark. His right to the trade mark accrues to him from its adoption and use for the purpose of designating the particular goods he manufactures or sells, and although it has no value except when so employed, and indeed has no separate abstract existence, but is appurtenant to the goods designated, yet the trade mark is property, and the owner's right of property in it is as complete as that which he possesses in the goods to which he attaches it, and the law protects him in the enjoyment of the one as fully as of the other. In order that the claimant of the trade mark may primarily acquire the right of property in it, it must have been originally adopted and used by him—that is, the assumed name or designation must not be one that was then in actual use by others, (*Upton's Trade Marks*, 46)—and such adoption and use confer upon him the right of property in the trade mark. . . . The right of prop-

erty does not in any manner depend for its inceptive existence or support upon statutory law, though its enjoyment may be better secured and guarded, and infringements upon the rights of the proprietor may be more effectually prevented or redressed by the aid of the statute than at common law. . . . The right is not limited in its enjoyment by territorial bounds, but subject only to such statutory regulations as may be properly made concerning the use and enjoyment of other property, or the evidences of title to the same; the proprietor may assert and maintain his property right wherever the common law affords remedies for wrongs.” *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170.

Remedies at law, see *infra*, I, C.

Remedies in equity, see *infra*, I, D, 1.

2. *International News Service v. Associated Press*, 248 U. S. 215, 39 Sup. Ct. 68, 63 L. ed. —, 2 A. L. R. 293; *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. ed. 365; *A. Leschen & Sons Rope Co. v. Fuller*, 218 Fed. 786, 134 C. C. A. 570; *Hanover Star Milling Co. v. Allen & Wheeler Co.*, 208 Fed. 513, 125 C. C. A. 515; *Ludlow Valve Mfg. Co. v. Pittsburgh Mfg. Co.*, 166 Fed. 26, 92 C. C. A. 60; *Merriam Co. v. Ogilvie*, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. (N. S.) 549, 14 Ann. Cas. 796; *Scriven v. North*, 134 Fed. 366, 67 C. C. A. 348; *Sayre v. McGill Ticket Punch Co.*, 200 Fed. 771.

3. *Trade Mark Cases*, 100 U. S. 82, 25 L. ed. 550; *Schumacher v. Schwencke*, 26 Fed. 818; *Luyties v. Hollender*, 21 Fed. 281.



foreign and interstate commerce, the congress has authority to regulate trade-marks and tradenames used in such commerce,<sup>4</sup> and it has exercised this power.<sup>5</sup> And in the exercise of their jurisdiction upon other grounds, federal courts are frequently called upon to apply the common law or state statutes.<sup>6</sup>

Statutes have been enacted in numerous states providing for the registration of trade-marks and labels and giving remedies at law and in equity to the owner of such property,<sup>7</sup> however these remedies existed at common law and may be availed of by one who has not registered his trade-mark pursuant to statute.<sup>8</sup>

**B. JURISDICTION.—1. United States Courts.**—The jurisdiction of the United States courts over trade-marks and trade names depends upon the general principles and rules elsewhere treated.<sup>9</sup> They have jurisdiction where the trade-mark has been registered under federal statutes, irrespective of the citizenship of the parties,<sup>10</sup> and without regard to the amount in controversy,<sup>11</sup> provided such registered trade-mark is placed on goods intended to be used in the commerce specified in the trade-mark statute.<sup>12</sup> But federal courts have no jurisdiction of suits for infringement of an unregistered trade-mark,<sup>13</sup> or of suits for unfair competition,<sup>14</sup> unless some other grounds of jurisdiction

4. *Rossmann v. Garnier*, 211 Fed. 401, 128 C. C. A. 73. See also *Planten v. Gedney*, 221 Fed. 281 (decree reversed in 224 Fed. 382, 140 C. C. A. 68); *Given v. New York Athletic Club*, 42 App. Cas. (D. C.) 558.

5. See Act of Feb. 20, 1905, and subsequent amendments; U. S. Comp. St., 1916, §§9485-9516.

6. See *infra*, I, B, 1, and the title "United States Courts."

7. See the statutes.

8. *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170.

9. See the title "United States Courts."

10. *Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.*, 201 U. S. 166, 26 Sup. Ct. 425, 50 L. ed. 710; *Warner v. Searle & Hereth Co.*, 191 U. S. 195, 24 Sup. Ct. 79, 48 L. ed. 145; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. ed. 402; *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. ed. 365; *Glen Cove Mfg. Co. v. Ludeling*, 22 Fed. 823, 23 Blatchf. 46.

[a] In what district suit should be brought, see *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. ed. 402; *Rubber & Celluloid Harness Trim. Co. v. John L. Whiting-J. J. Adams Co.*, 210 Fed. 393; and the title "United States Courts,"

11. *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. ed. 365; *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. ed. 402.

12. *Warner v. Searle & Hereth Co.*, 191 U. S. 195, 24 Sup. Ct. 79, 48 L. ed. 145; *Ryder v. Holt*, 128 U. S. 525, 9 Sup. Ct. 145, 32 L. ed. 529.

13. *Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.*, 201 U. S. 166, 26 Sup. Ct. 425, 50 L. ed. 710; *Allen B. Wrisley Co. v. George E. Rouse Soap Co.*, 90 Fed. 5, 32 C. C. A. 496; *Winchester Repeating Arms Co. v. Butler Bros.*, 128 Fed. 976; *Hennesy v. Braunschweiger & Co.*, 89 Fed. 664; *Prince's Metallic Paint Co. v. Prince Mfg. Co.*, 53 Fed. 493.

14. *Leschen & Sons Rope Co. v. Broderick, etc. Rope Co.*, 201 U. S. 166, 26 Sup. Ct. 425, 50 L. ed. 710 (where the supreme court says: "Nor can we assume jurisdiction of this case as one wherein the defendant had made use of plaintiff's device for the purpose of defrauding the plaintiff and palming off its goods upon the public as of the plaintiff's manufacture. Our jurisdiction depends solely upon the question whether plaintiff has a registered trade-mark valid under the act of congress."); *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. ed. 365; *Thad-*

exist, such as the requisite diversity of citizenship.<sup>15</sup>

**2. State Courts.**—State courts have jurisdiction in matters relating to trade-marks<sup>16</sup> having concurrent jurisdiction with the federal courts over suits affecting trade-marks registered under federal statutes.<sup>17</sup>

**C. ACTIONS AT LAW.**—**1. Nature and Form of.**—At law an action for damages will lie against one who infringes another's exclusive right to a trade-mark,<sup>18</sup> or is guilty of unfair competition.<sup>19</sup> So where the defendant has used,<sup>20</sup> or simulated<sup>21</sup> the plaintiff's trade-

deus Davids Co. v. Davids, 192 Fed. 915, 114 C. C. A. 355.

15. See the title "**United States Courts.**"

16. **Ind.**—Smail v. Sanders, 118 Ind. 105, 20 N. E. 296. **Mass.**—Traiser v. J. W. Doty Cigar Co., 198 Mass. 327, 84 N. E. 462, 15 Ann. Cas. 219. **N. Y.** Kayser & Co. v. Italian Silk U. Co., 160 App. Div. 607, 146 N. Y. Supp. 22. **Ohio.**—Reeder v. Brodt, 4 Ohio N. P. 265, a suit to enjoin infringement of trade-mark, the court said: "The relief sought is clearly within the common law powers of a court of chancery, and the power to grant this relief, in a proper case, exists, independent of any act of congress."

17. **U. S.**—*In re* Keasbey & Mattison Co., 160 U. S. 221, 16 Sup. Ct. 273, 40 L. ed. 402. See Ohio Baking Co. v. National Biscuit Co., 127 Fed. 116, 62 C. C. A. 116, writ of certiorari denied in 195 U. S. 630, 25 Sup. Ct. 788, 49 L. ed. 352. **Ind.**—Smail v. Sanders, 118 Ind. 105, 20 N. E. 296, "Congress has no more power to deprive the state courts of jurisdiction in trade-mark cases than it would have to deprive them of power to decide controversies concerning any other species of property. A trade-mark is not within the provisions of the Federal Constitution respecting copyrights and patents." **Mass.**—Traiser v. J. W. Doty Cigar Co., 198 Mass. 327, 84 N. E. 462, 15 Ann. Cas. 219. **N. Y.**—Oneida Community v. Oneida Game Trap Co., 168 App. Div. 769, 154 N. Y. Supp. 391; Julius Kayser & Co. v. Italian Silk U. Co., 160 App. Div. 607, 146 N. Y. Supp. 22.

18. **U. S.**—Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537, 11 Sup. Ct. 396, 34 L. ed. 997; Baker v. Baker, 115 Fed. 297, 53 C. C. A. 157; Lorillard Co. v. Peper, 86 Fed. 956, 30 C. C. A.

496; La Republique Francaise v. Schultz, 57 Fed. 37; Taylor v. Carpenter, 2 Woodb. & M. 1, 23 Fed. Cas. No. 13,785. **Ga.**—Hagan & Dodd Co. v. Rigbers, 1 Ga. App. 100, 57 S. E. 970. **La.**—Handy v. Commander, 49 La. Ann. 1119, 22 So. 230. **Mass.**—Thomson v. Winchester, 19 Pick. 214, 31 Am. Dec. 135; Marsh v. Billings, 7 Cush. 322, 54 Am. Dec. 723. **Mich.**—Smith v. Walker, 57 Mich. 456, 22 N. W. 267, 24 N. W. 830, 26 N. W. 783. **Mo.**—Lampert v. Judge & Dolph Drug Co., 238 Mo. 409, 141 S. W. 1095, Ann. Cas. 1913A, 351; Conrad v. Joseph Uhrig Brewing Co., 8 Mo. App. 277; Addington v. Cullinane, 28 Mo. App. 238. **N. Y.**—Pollen v. Le Roy, 30 N. Y. 549; Stokes v. Landgraff, 17 Barb. 608. **N. C.**—McElwee v. Blackwell, 94 N. C. 261. **Ohio.**—Burekhardt v. Burekhardt, 42 Ohio St. 474, 51 Am. Rep. 842. **Tex.**—Radam v. Capital Microbe Destroyer Co., 81 Tex. 122, 16 S. W. 990, 26 Am. St. Rep. 783. **Eng.**—Millington v. Fox, 3 Myl. & C. 338, 40 Eng. Reprint 956.

19. **Ga.**—Thedford Medicine Co. v. Curry, 96 Ga. 89, 22 S. E. 661. **Ind.**—Hartzler v. Goshen Churn & Ladder Co., 55 Ind. App. 455, 104 N. E. 34. **N. J.**—Miller Tobacco Manufactory v. Commerce, 45 N. J. L. 18, 46 Am. Rep. 750. **Eng.**—Crawshay v. Thompson, 11 L. J. C. P. 301, 4 M. & G. 357, 43 E. C. L. 189, 134 Eng. Reprint 146.

20. Taylor v. Carpenter, 2 Woodb. & M. 1, 23 Fed. Cas. No. 13,785.

21. **Ga.**—Thedford Medicine Co. v. Curry, 96 Ga. 89, 22 S. E. 661. **Mo.**—Conrad v. Joseph Uhrig Brewing Co., 8 Mo. App. 277. **Eng.**—Crawshay v. Thompson, 11 L. J. C. P. 301, 4 M. & G. 357, 43 E. C. L. 189, 134 Eng. Reprint 146; Morison v. Salmon, 10 L. J. C. P. 91, 2 Scott W. R. 449, 2 M. & G. 385, 40 E. C. L. 654, 133 Eng. Reprint 795.

mark, an action in the nature of deceit is proper.<sup>22</sup> An action on the case has been held proper where one has used the trade-mark of another,<sup>23</sup> and the federal statute provides for such an action for the damages caused by falsely or fraudulently procuring the registration or entry of a trade-mark.<sup>24</sup>

**2. Pleading and Proof.**—The declaration or complaint should allege facts showing plaintiff's right and the violation thereof by defendant.<sup>25</sup> In so far as these matters are also involved in equity suits, they will be found more fully discussed elsewhere in this article.<sup>26</sup> Plaintiff need not anticipate purely defensive matter.<sup>27</sup>

**Questions of Law and Fact.**<sup>28</sup>—In accordance with the general principles elsewhere treated,<sup>29</sup> what constitutes a trade-mark is a question of law for the court,<sup>30</sup> while whether in a particular case a trade-mark has been acquired,<sup>31</sup> and whether there has in fact been an infringement of it,<sup>32</sup> or unfair competition,<sup>33</sup> are ordinarily questions for the jury. So whether the plaintiff's label has become such a badge of origin and ownership as to be the subject of protection against a colorable imitation,<sup>34</sup> whether the falling off of plaintiff's trade was due to defendant's use of the trade-mark,<sup>35</sup> the fraudulent intent of defendant,<sup>36</sup> or whether there is a variance between the trade-mark declared on and that proved,<sup>37</sup> are for the jury to determine.

**22. As to action of deceit generally,** see the title "Fraud and Deceit."

**23. Sykes v. Sykes,** 3 Barn. & C. 541, 5 D. & R. 292, 3 L. J. K. B. O. S. 46, 27 Rev. Rep. 420, 10 E. C. L. 248, 107 Eng. Reprint 834.

**24. See** Act of Feb. 20, 1905, c. 592, §25; U. S. Comp. St., 1916, §9510; and also *W. A. Gaines & Co. v. Rock Spring Dist. Co.*, 226 Fed. 531, 141 C. C. A. 287.

**25. Thedford Medicine Co. v. Curry,** 96 Ga. 89, 22 S. E. 661, holding sufficient a declaration alleging that plaintiffs were profitably engaged in the manufacture and sale of a certain valuable medicine; that the defendant fraudulently, deceitfully and with intent to injure plaintiff's business, did manufacture, under a similar name, a spurious and inferior medicine in imitation of that made by the plaintiffs, and by simulating the wrappers used by plaintiffs in putting up their medicine, did deceive the public and thus sell large quantities of the spurious medicine as genuine, to plaintiff's injury and damage in a certain sum.

**26. See** *infra*, I, D, 3, a.

**27. See** *Julian v. Hoosier Drill Co.*, 78 Ind. 408, abandonment by non-user is a matter of defense to be pleaded in the answer, unless clearly shown by the complaint.

**28. As to evidence in this class of cases** see the "ENCY. OF EV.," title "Trade-Marks and Trade Names."

**29. See** the title "Province of Judge and Jury."

**30. Alff v. Radam,** 77 Tex. 530, 14 S. W. 164, 19 Am. St. Rep. 792, 9 L. R. A. 145.

**31. Alff v. Radam,** 77 Tex. 530, 14 S. W. 164, 19 Am. St. Rep. 792, 9 L. R. A. 145.

**32. Lies v. Daniel,** 82 Ga. 272, 8 S. E. 432; *Alff v. Radam*, 77 Tex. 530, 14 S. W. 164, 19 Am. St. Rep. 792, 9 L. R. A. 145.

[a] **Whether label used by defendant resembles that of plaintiff and is such as to deceive, for the jury.** *Lies v. Daniel*, 82 Ga. 272, 8 S. E. 432; *Foster v. Blood Balm Co.*, 77 Ga. 216, 3 S. E. 284.

**33. Hartzler v. Goshen Churn & Ladder Co.**, 55 Ind. App. 455, 104 N. E. 34.

**34. Thedford Medicine Co. v. Curry,** 96 Ga. 89, 22 S. E. 661.

**35. Shaw v. Pilling,** 175 Pa. 78, 34 Atl. 446.

**36. Thedford Medicine Co. v. Curry,** 96 Ga. 89, 22 S. E. 661; *Shaw v. Pilling*, 175 Pa. 78, 34 Atl. 446.

**37. Goodman v. Bohls,** 3 Tex. Civ. App. 183, 22 S. W. 11.



D. SUITS IN EQUITY. — 1. In General. — In equity, protection for trade-marks, trade names, and against unfair competition, may be had by means of injunction,<sup>38</sup> and an accounting of profits.<sup>39</sup>

2. Parties. — a. *Plaintiff*. (I.) Generally. — The suit should be brought by the owner of the trade-mark or trade name,<sup>40</sup> and one who has acquired the right to a trade-mark or trade name may resort to equity for its protection, though he is not the original designer or owner,<sup>41</sup> but one who has no more right to the trade-mark than the

38. U. S.—International News Service v. Associated Press, 248 U. S. 215, 39 Sup. Ct. 68, 63 L. ed. —, 2 A. L. R. 293; Elgin Nat. Watch Co. v. Illinois Watch Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. ed. 365; Lorillard Co. v. Peper, 86 Fed. 956, 30 C. C. A. 496; Coffeen v. Brunton, 5 McLean 256, 5 Fed. Cas. No. 2,947; Hostetter v. Vowinkle, 1 Dill. 329, 12 Fed. Cas. No. 6,714. Cal.—Morton v. Morton, 148 Cal. 142, 82 Pac. 664, 1 L. R. A. (N. S.) 660. Conn.—Bradley v. Norton, 33 Conn. 157, 87 Am. Dec. 200. Ga.—Ellis v. Zeilin & Co., 42 Ga. 91. Ia.—Shaver v. Shaver, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194. Ky.—Avery v. Meikle, 85 Ky. 435, 3 S. W. 609, 7 Am. St. Rep. 604. La.—Handy v. Commander, 49 La. Ann. 1119, 22 So. 230; Funke v. Dreyfus, 34 La. Ann. 80, 44 Am. Rep. 413. Md.—Stonebraker v. Stonebraker, 33 Md. 252. Mo.—McCartney v. Garnhart, 45 Mo. 593, 100 Am. Dec. 397. N. J.—Hilton v. Hilton (N. J. Eq.), 104 Atl. 375. N. Y.—Taendstickfabrikas Aktiebolaget Vulcan v. Myers, 139 N. Y. 364, 34 N. E. 904; Gillott v. Esterbrook, 48 N. Y. 374, 8 Am. Rep. 553; Bell v. Locke, 8 Paige 75, 34 Am. Dec. 371; Snowden v. Noah, Hopkins Ch. 347, 14 Am. Dec. 547. Tenn.—Simmons Medicine Co. v. Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165. Eng.—Hogg v. Kirby, 8 Ves. Jr. 215, 32 Eng. Reprint 336; Knott v. Morgan, 2 Keen 213, 48 Eng. Reprint 610.

[a] Theory on which court of equity acts is that a resemblance in, or an imitation of the names, signs, or marks, under which another conducts a business, is a deception practiced upon the public and an injury to the proprietor, in the loss of custom, and patronage; to redress which an action at law for damages is not a sufficient remedy. This is the principle one may extract from the very often cited opin-

ions of Lord Eldon, in Hogg v. Kirby, 8 Ves. Jr. 215, 32 Eng. Reprint 336, of Lord Langdale, in Knott v. Morgan, 2 Keen 213, 48 Eng. Reprint 610, and of our own chancellors, in the early cases of Snowden v. Noah, Hopk. Ch. (N. Y.) 347, 14 Am. Dec. 547, and of Bell v. Locke, 8 Paige (N. Y.) 75, 34 Am. Dec. 371.

Preliminary injunction, see *infra*, I, D, 6, a.

Permanent injunction, see *infra*, I, D, 6, b.

39. See *infra*, I, D, 7.

40. Huwer v. Dannenhoffer, 82 N. Y. 499 (one of several partners after dissolution cannot sue other partners unless he show he has acquired exclusive right to the trade-mark); Prince Mfg. Co. v. Prince's Metallic Paint Co., 60 Hun 583, 15 N. Y. Supp. 249, 39 N. Y. St. 488; Hill v. Lockwood, 62 Wis. 507, 22 N. W. 581.

41. U. S.—Cuervo v. Landauer, 63 Fed. 1003; Jennings v. Johnson, 37 Fed. 364; Estes v. Williams, 21 Fed. 189; Walton v. Crowley, 3 Blatchf. 440, 29 Fed. Cas. No. 17,133. Cal.—Spieker v. Lash, 102 Cal. 38, 36 Pac. 362. Colo.—Solis Cigar Co. v. Pozo, 16 Colo. 388, 26 Pac. 556, 25 Am. St. Rep. 279. Mass.—Hoxie v. Chaney, 143 Mass. 592, 10 N. E. 713, 58 Am. Rep. 149. N. Y.—Congress & Empire Spring Co. v. High Rock Congress Spring Co., 45 N. Y. 291, 10 Abb. Pr. (N. S.) 348, 6 Am. Rep. 82.

[a] Assignee pendente lite may be substituted and have benefit of prior proceedings in suit for infringement of a trade-mark. Walter Baker & Co. v. Baker, 89 Fed. 673.

[b] Trade-mark of one partner on formation of partnership to sell goods using the same, becomes the property of the partnership and the partnership may sue to protect it. Filkins v. Blackman, 13 Blatchf. 440, 9 Fed. Cas. No. 4,786. To same effect, Bury v.

defendant cannot maintain a suit for its protection.<sup>42</sup> The owner of the trade-mark is the proper complainant though the goods on which it is placed are manufactured for, and not by him;<sup>43</sup> so one for whom the goods are manufactured is the proper complainant in a suit arising out of unfair competition.<sup>44</sup> That one is an alien does not prevent him from protecting his trade-mark in the courts of this country.<sup>45</sup>

(II.) Unions and Associations. — Where an unincorporated association is the owner of a device to designate its product one or more members may bring suit to restrain infringement of the device.<sup>46</sup> Where a label is owned by a national union the officers of a local tributary association cannot maintain a suit to enjoin infringement of the label,<sup>47</sup> though a local union having the right to use the label may be joined with the national union owning the label as a party plaintiff.<sup>48</sup> An association not itself engaged in trade cannot maintain a bill for unfair competition.<sup>49</sup>

(III.) Joinder of.<sup>50</sup> — One having the exclusive right to the use of a

Bedford, 10 Jur. (N. S.) pt. 1, 503, 4 De G. J. & S. 352, 4 N. R. 180, 33 L. J. Ch. 465, 10 L. T. N. S. 470, 12 W. R. 726, 46 Eng. Reprint 954.

[c] Assignee in insolvency of owner of trade-mark may sue, see Warren v. Warren Thread Co., 134 Mass. 247.

42. *La.—Lacroix v. Nodal*, 41 La. Ann. 1018, 6 So. 795. *Md.—Parlett v. Guggenheimer*, 67 Md. 542, 10 Atl. 81, 1 Am. St. Rep. 416. *Mass.—Warren v. Warren Thread Co.*, 134 Mass. 247. *N. Y.—Societe des Huiles d'Olive de Nice v. Rorke*, 5 App. Div. 175, 39 N. Y. Supp. 28; *Weston v. Ketcham*, 7 Jones & S. 54.

43. *Walton v. Crowley*, 3 Blatchf. 440, 29 Fed. Cas. No. 17,133; *Godillot v. Harris*, 81 N. Y. 263.

44. *Billiken Co. v. Baker & Bennet Co.*, 174 Fed. 829.

45. *Taylor v. Carpenter*, 2 Woodb. & M. 1, 23 Fed. Cas. No. 13,785; *Coffeen v. Brunton*, 5 Fed. Cas. No. 2,946, 4 McLean 516; *Taylor v. Carpenter*, 11 Paige (N. Y.) 292, 2 Sandf. Ch. 603, 42 Am. Dec. 114; *Coats v. Holbrook*, 2 Sandf. Ch. (N. Y.) 586.

Right of alien enemy to sue, see the title "War."

46. *Strasser v. Moonelis*, 23 Jones & S. 197, 11 N. Y. St. 270; *Bloete v. Simon*, 19 Abb. N. Cas. (N. Y.) 88, 12 Civ. Proc. 114, 7 N. Y. St. 87, holding that a code allowing suit by one or more persons for the benefit of all who are united in interest, where the parties are so numerous that it is impracticable to bring them all before

the court, applies to actions by individual members of an unincorporated association, although the code also provides for suit by the president or treasurer thereof.

[a] In the Absence of Statute.—But where a union having many members adopted or agreed on a certain symbol or device to be used by their several members, by placing it on boxes of cigars made by such members, the device not indicating by what persons the cigars were made but only that they were made by some member of the union, the device was held not to be a trade-mark which the courts would protect. *Cigar-Makers' Protective Union v. Conheim*, 40 Minn. 243, 41 N. W. 943, 12 Am. St. Rep. 726, 3 L. R. A. 125. To same effect, *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640. But in Massachusetts this decision has been remedied by statute, see *Tracy v. Banker*, 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508.

47. *McVey v. Brendel*, 144 Pa. 235, 22 Atl. 912, 27 Am. St. Rep. 625, 13 L. R. A. 377.

48. *Lynch v. John Single Paper Co.*, 115 App. Div. 911, 101 N. Y. Supp. 824.

49. *Key West Cigar Mfg. Assn. v. Rosenbloom*, 171 Fed. 296, the corporations composing the association being the ones engaged in trade were the proper parties plaintiff.

50. Joinder of national and local unions in suit affecting union label, see *supra*, I, D, 2, a, (II).

trade-mark for a certain period of time should join the owner thereof as a party plaintiff,<sup>51</sup> though the owner of a trade-mark may sue for its infringement without joining his licensee or agent.<sup>52</sup> Where the trade name belongs to a partnership all members thereof should join as plaintiffs in the suit for unfair competition,<sup>53</sup> but one who owns the legal title to a trade-mark and is apparently the sole proprietor of the business, need not join a silent partner whose existence is unknown to the public.<sup>54</sup> Persons having a common interest in preventing the infringement by defendant of a trade-mark may join as parties plaintiff.<sup>55</sup>

b. *Defendant*.—All persons assisting in the infringement of the plaintiff's trade-mark may be joined as defendants,<sup>56</sup> so the joining of defendants who it is alleged are using the defendant corporation as a means of infringement and are substantially the corporation, is not a misjoinder,<sup>57</sup> but the corporation in such a case is an indispensable

51. *Krauss v. Jos. R. Peebles' Sons Co.*, 58 Fed. 585, failure to do so may be cured by amendment.

52. *Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed. 720, 119 C. C. A. 164 (manufacturer may sue for unfair competition without joining his exclusive agent in the state where such unfair competition exists); *Moxie Nerve Food Co. v. Baumbach*, 32 Fed. 205; *Rubber & Celluloid H. T. Co. v. Rubber-Bound Brush Co.*, 81 N. J. Eq. 419, 88 Atl. 210, Ann. Cas. 1915B, 365, need not join corporation organized by plaintiff which is mere agent for convenience in the transaction of business.

53. *Frese v. Bachof*, 9 Fed. Cas. No. 5,110, 14 Blatchf. 432 (where case was a meritorious one opportunity allowed to bring in other partner); *Longenecker v. Longenecker Bros.*, 140 N. Y. Supp. 403.

54. *Bradley v. Norton*, 33 Conn. 157, 87 Am. Dec. 200.

55. *U. S.—Pillsbury-Washburn Flour-Mills Co. v. Eagle*, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; *Jewish Colonization Assn. v. Solomon*, 125 Fed. 994. "The bill shows that the plaintiffs have actual, although not equal, interests in the use of the trade-mark and the labels, and that both the trade-mark and the labels are made use of by the defendants in the same acts that would constitute a violation of the rights of the plaintiffs as to both. While parties so situated might not be entitled to maintain an action at law, in equity all those having interests involved in the suit may join therein for the protection of such rights in

the subject matter as they may have, and that the same acts may be proceeded against in one action, although the rights may be diverse—as, for example, the infringement of separate patents by one machine." *Ky.—Northcutt v. Turney*, 101 Ky. 314, 41 S. W. 21, owners of two mineral sprays containing same ingredients using a trade-mark adopted by each without objection from the other may join in preventing a third person from using such trade-mark. *Mass.—Morse v. Hall*, 109 Mass. 409.

[a] Merchants in same locality may join in suit for unfair competition by use of geographical name. *Key West Cigar Mfg. Assn. v. Rosenbloom*, 171 Fed. 296.

56. *Estes v. Worthington*, 30 Fed. 465, agents and servants may be joined in torts of misfeasance like the violation of a trade-mark.

[a] Dealers who are not the publishers or makers of the infringing article but who are engaged in selling the same may be joined. *Matsell v. Flanagan*, 2 Abb. Pr. N. S. (N. Y.) 459.

57. *Williams Soap Co. v. J. B. Williams Soap Co.*, 193 Fed. 384, 113 C. C. A. 310; *California Fig Syrup Co. v. Improved Fig Syrup Co.*, 51 Fed. 296 (*affirmed*, 54 Fed. 175, 4 C. C. A. 264); *Burrow v. Marceau*, 124 App. Div. 665, 109 N. Y. Supp. 105, one who organized the corporation, owned substantially all of stock, and was carrying on business as president.

[a] Executive officers of corporation holding full power of attorney author-



party.<sup>58</sup> Stockholders of the defendant corporation are not generally proper parties.<sup>59</sup> The manufacturer of goods wrongfully stamped, with a trade-mark who does business through an agent who is held up to the public as the proprietor need not be joined as a party defendant with such agent.<sup>60</sup>

**3. Pleadings.**—a. *Bill or Complaint.*—(I.) **Generally.**<sup>61</sup>—The bill or complaint must show the existence of a trade-mark or name entitled to protection,<sup>62</sup> a proprietary interest of the plaintiff in the trade-mark or name entitling him to sue,<sup>63</sup> and the compliance with any

izing them to act in all matters pertaining to corporation, proper parties. *Saxlehner v. Eisner*, 147 Fed. 189, 77 C. C. A. 417.

58. *Wm. A. Rogers v. Nichols*, 224 Fed. 415, 139 C. C. A. 643. See also *Elgin Nat. Watch Co. v. Loveland*, 132 Fed. 41, that where persons are charged with having assumed a corporate name, but there is no allegation that a corporation exists or it one exists that it committed any of the acts complained of, the de facto corporation, if such it be, need not be joined as a defendant.

59. *Hall's Safe Co. v. Herring-Mall-Martin Safe Co.*, 146 Fed. 37, 76 C. C. A. 495, 14 L. R. A. (N. S.) 1182.

60. *Bradley v. Norton*, 33 Conn. 157, 87 Am. Dec. 200.

61. **Complaint for Infringement Held Sufficient.**—See *U. S.*—*Heileman Brewing Co. v. Independent Brewing Co.*, 191 Fed. 489, 112 C. C. A. 133; *Investor Pub. Co. v. Dobinson*, 72 Fed. 603. *Minn.*—*Watkins Medical Co. v. Sands*, 80 Minn. 89, 82 N. W. 1109. *Mo.*—*Plant Seed Co. v. Michel Plant & Seed Co.*, 23 Mo. App. 579. *N. Y.* *Bloete v. Simon*, 19 Abb. N. Cas. 88, 12 Civ. Proc. 114, 7 N. Y. St. 87. *Wash.*—*Wright Restaurant Co. v. Seattle Restaurant Co.*, 67 Wash. 690, 122 Pac. 348.

62. *Cal.*—*Los Angeles Creamery Co. v. J. R. Newberry Co.*, 21 Cal. App. 567, 132 Pac. 289. *Mass.*—*Frank v. Sleeper*, 150 Mass. 583, 23 N. E. 213. *N. Y.*—*Payn's Sons Tobacco Co. v. Payette*, 86 Misc. 276, 149 N. Y. Supp. 183.

63. *U. S.*—*Actiengesellschaft v. Amberg*, 109 Fed. 151, 48 C. C. A. 264; *Diamond Match Co. v. Safe Harbor Match Co.*, 109 Fed. 154. *Md.*—*Smith-Dixon Co. v. Stevens*, 100 Md. 110, 59 Atl. 401. *Mass.*—*Pennell v. Lothrop*, 191 Mass. 357, 77 N. E. 842. *Minn.*

*Allen v. McCarthy*, 37 Minn. 349, 34 N. W. 416. *Mo.*—*St. Louis C. & Mfg. Co. v. Eclipse Carbonating Co.*, 58 Mo. App. 411. *N. Y.*—*McCardel v. Peek*, 28 How. Pr. 120. *Wis.*—*Hill v. Lockwood*, 62 Wis. 507, 22 N. W. 581.

[a] **Express assignment of trade-mark** need not be alleged where the right to use it passed to plaintiff by reason of his purchase of the business. *Congress & Empire Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291, 10 Abb. Pr. N. S. (N. Y.) 348, 6 Am. Rep. 82.

[b] **Written assignment from a former partner** need not be shown as against a wrongdoer. *Hostetter v. Vowinkle*, 1 Dill. 329, 12 Fed. Cas. No. 6,714.

[c] **Profert of instruments from which plaintiff claims title** to the property to which the trade name involved is attached is not necessary. *La Republique Francaise v. Schultz*, 57 Fed. 37.

[d] **Exclusive right to name or mark** need not be alleged in suit for unfair competition, an exclusive proprietary right such as a trade-mark or copyright not being necessary in such a case, an interest in the good will of the business using the trade name or device is sufficient. *U. S.* *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. ed. 365; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. ed. 118; *Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. ed. 847. *Cal.*—See *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879. *Ill.*—*The Fair v. Morales & Co.*, 82 Ill. App. 499. *Ind.*—*Computing Cheese Cutter Co. v. Dunn*, 45 Ind. App. 20, 88 N. E. 93. *Ia.*—*Dyment v. Lewis*, 144 Iowa 509, 123 N. W. 244, 26 L. R. A. (N. S.) 73. *Me.* *Lynn Shoe Co. v. Auburn-Lynn Shoe*

statutory conditions precedent to his right to bring suit.<sup>64</sup> In United States courts if the trade-mark is not registered facts conferring jurisdiction must be alleged.<sup>65</sup> Use or threatened use of plaintiff's trade-mark or name to deceive the public into buying defendant's goods as those of plaintiff,<sup>66</sup> and to defraud the plaintiff,<sup>67</sup> should be alleged.

(II.) *Allegation as to Intent.*—A fraudulent intent need not be alleged to obtain an injunction against infringement,<sup>68</sup> but such an allegation should generally be made in a suit for unfair competition,<sup>69</sup>

Co., 100 Me. 461, 62 Atl. 499, 4 L. R. A. (N. S.) 960. **Mass.**—American Waltham Watch Co. v. United States Watch Co., 173 Mass. 85, 53 N. E. 141, 73 Am. St. Rep. 263, 43 L. R. A. 826. **Tex.**—Alff v. Radam, 77 Tex. 530, 14 S. W. 164, 19 Am. St. Rep. 792, 9 L. R. A. 145. **Eng.**—Lee v. Haley, L. R. 5 Ch. 155, 39 L. J. Ch. 284, 22 L. T. N. S. 251, 18 W. R. 242.

64. *Lacroix v. Escobal*, 37 La. Ann. 533, holding a bill by a citizen of a foreign country which fails to allege the deposit of a copy of the trade-mark as required by a treaty between the United States and the foreign country is fatally defective.

65. *Wrisley Co. v. George E. Rouse Soap Co.*, 90 Fed. 5, 32 C. C. A. 496; *Winchester Repeating Arms Co. v. Butler Bros.*, 128 Fed. 976. See *infra*, I, B.

66. **U. S.**—*Merriam v. Holloway Pub. Co.*, 43 Fed. 450; *Putnam Nail Co. v. Bennett*, 43 Fed. 800; *Enoch Morgan's Sons Co. v. Hunkele*, 8 Fed. Cas. No. 4493. **Ga.**—*Thedford Medicine Co. v. Curry*, 96 Ga. 89, 22 S. E. 661. **Ill.**—*Merchants' Detective Assn. v. Detective Mercantile Agency*, 25 Ill. App. 250. **Me.**—*Ricker v. Portland & R. F. Ry.*, 90 Me. 395, 38 Atl. 338. **Md.**—*Smith-Dixon Co. v. Stevens*, 100 Md. 110, 59 Atl. 401. **Mass.**—*Hallet v. Cumston*, 110 Mass. 29. **Mo.**—*Plant Seed Co. v. Michel Plant & Seed Co.*, 23 Mo. App. 579. **N. Y.**—*Payn's Sons Tobacco Co. v. Payette*, 86 Misc. 276, 149 N. Y. Supp. 183.

[a] *Wrongful acts by defendant must be alleged to sustain a bill for unfair competition, merely alleging lawful acts and characterizing them as "wrongful" is not sufficient.* *Van Kannel Revolving Door Co. v. American Revolving Door Co.*, 215 Fed. 582, 131 C. C. A. 650.

67. See *infra*, I, D, 3, a, (II).

[a] *Though no damage to plaintiff is alleged he may have an injunction*

restraining use of trade name by defendant. *Bagby & Rivers Co. v. Rivers*, 87 Md. 400, 40 Atl. 171, 40 L. R. A. 632, 67 Am. St. Rep. 357.

68. **U. S.**—*Thaddeus Davids Co. v. Davids Mfg. Co.*, 233 U. S. 461, 34 Sup. Ct. 648, Ann. Cas. 1915B, 322, 58 L. ed. 1046; *Goldsmith Silver Co. v. Savage*, 229 Fed. 623, 144 C. C. A. 33; *W. A. Gaines & Co. v. Turner-Looker Co.*, 204 Fed. 553, 123 C. C. A. 79; *Stephano v. Satmatopoulos*, 199 Fed. 451. **Fla.**—*El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823. **Ia.**—*Atlas Assur. Co. v. Atlas Ins. Co.*, 138 Iowa 228, 112 N. W. 232, 114 N. W. 609, 128 Am. St. Rep. 189, 15 L. R. A. (N. S.) 625. **Mass.**—*Reading Stove Works v. S. M. Howes Co.*, 201 Mass. 437, 87 N. E. 751, 21 L. R. A. (N. S.) 979. **Mich.**—See *Dayton v. Imperial Sales & Parts Co.*, 195 Mich. 397, 161 N. W. 958. **Mo.**—*Liggett & Myers Tobacco Co. v. Sam Reid Tobacco Co.*, 104 Mo. 53, 15 S. W. 843, 24 Am. St. Rep. 313. **N. J.**—*National Biscuit Co. v. Pacific Coast Biscuit Co.*, 83 N. J. Eq. 369, 91 Atl. 126. **N. Y.**—*Taendsticksfabriks Aktiebolaget Vulcan v. Myers*, 139 N. Y. 364, 34 N. E. 904; *German-American Button Co. v. Heymsfeld*, 170 App. Div. 416, 156 N. Y. Supp. 223. **Wis.**—*Listman Mill Co. v. William Listman Milling Co.*, 88 Wis. 334, 60 N. W. 261, 43 Am. St. Rep. 907.

69. **U. S.**—*Goldsmith Silver Co. v. Savage*, 229 Fed. 623, 144 C. C. A. 33; *Industrial Press v. W. R. C. Smith Pub. Co.*, 164 Fed. 842, 90 C. C. A. 604, allegation that defendant's use of name was "calculated to deceive" insufficient. **Mass.**—*Hallet v. Cumston*, 110 Mass. 29. **Mo.**—*Plant Seed Co. v. Michel Plant & Seed Co.*, 23 Mo. App. 579. **N. Y.**—*Morris v. Altstedter*, 93 Misc. 329, 156 N. Y. Supp. 1103. *Wash.*—*Woodcock v. Guy*, 33 Wash. 234, 74 Pac. 358.

and where damages and profits are sought such an allegation may be essential.<sup>70</sup>

(III.) Joinder of Causes. — Causes of action for infringement of a trade-mark and for unfair competition arising out of the same acts of the defendant may be joined.<sup>71</sup> A bill seeking to restrain a publication because its title violates a trade-mark and its contents violate copyrights owned by plaintiff is not multifarious.<sup>72</sup> Asking for an accounting as to profits and for damages is not a misjoinder.<sup>73</sup>

b. *Demurrer or Motion To Dismiss* — If the bill as a whole states facts entitling complainant to some relief a general demurrer will be overruled.<sup>74</sup> An objection that the trade-marks are invalid because consisting of geographical names will not be considered on demurrer in a suit for infringement of a trade-mark and unfair competition.<sup>75</sup> Where the exhibits attached to the bill or complaint shows there is no infringement a demurrer will be sustained.<sup>76</sup>

c. *Answer*. — The answer should be responsive to the bill,<sup>77</sup> and be under oath.<sup>78</sup> An answer denying intentional use to imitate and to deceive the public or defraud the complainant is a sufficient answer to a claim for damages.<sup>79</sup> The defendant will be allowed to plead by

70. See *infra*, I, D, 7.

71. Heileman Brewing Co. v. Independent Brewing Co., 191 Fed. 489, 112 C. C. A. 133; Sayre v. McGill Ticket Punch Co., 200 Fed. 771; Jewish Colonization Assn. v. Solomon & German-ski, 125 Fed. 994.

72. Harper v. Holman, 84 Fed. 222.

73. Leidersdorf v. Flint, 50 Wis. 401, 7 N. W. 252. See *infra*, I, D, 7.

74. U. S.—Holeproof Hosiery Co. v. Richmond Hosiery Mills, 167 Fed. 381 (though complainant not entitled to all relief prayed for demurrer will be overruled); Merriam v. Holloway Pub. Co., 43 Fed. 450; La Croix v. May, 15 Fed. 236. Fla.—Bluthenthal v. Mohlmann, 49 Fla. 275, 38 So. 709. R. I. Barrows v. Knight, 6 R. I. 434, 78 Am. Dec. 452.

[a] *Indirect Allegation*. — Where a necessary allegation is pleaded by way of recital but in such a manner that it appears by necessary implication, the bill is good as against a general demurrer. Investor Pub. Co. v. Dobinson, 72 Fed. 603.

[b] *Uncertainty*. — Where the bill shows that defendant in combination with others has infringed complainant's trade-mark, a demurrer for uncertainty as to whether complaint is made of use by defendant himself or in combination with others will be overruled. California Fig Syrup Co. v. Improved Fig Syrup Co., 51 Fed. 296,

*affirmed*, 54 Fed. 175, 4 C. C. A. 264.

75. Jewish Colonization Assn. v. Solomon & Germanski, 125 Fed. 994.

76. Sprigg v. Fisher, 222 Fed. 964 (motion to dismiss under new federal equity practice); Collins Chemical & Mfg. Co. v. Capitol City Mfg. Co., 42 Fed. 64; Desmond's Appeal, 103 Pa. 126, 49 Am. Rep. 118.

[a] But the dissimilarity must be so marked as to leave no doubt in the mind of the court, otherwise the question of infringement will await the proofs. Barrows v. Knight, 6 R. I. 434, 78 Am. Dec. 452; Leidersdorf v. Flint, 50 Wis. 401, 7 N. W. 252.

77. Uri v. Hirsch, 123 Fed. 568 (holding answer sufficient); Guilhon v. Lindo, 9 Bosw. (N. Y.) 605.

[a] Though a plea may not be a complete defense it should not be excluded as frivolous where there is a possibility that some of the acts of unfair competition may be justified by an invention and patent of defendant's. Silver & Co. v. Waterman, 122 App. Div. 373, 106 N. Y. Supp. 899.

78. Uri v. Hirsch, 123 Fed. 568.

79. Guilhon v. Lindo, 9 Bosw. (N. Y.) 605 (an answer alleging that defendants sold only a specified small quantity of goods bearing the label complained of, and such sale was to plaintiffs' agent at their request, that use of label was accidental, without intent to defraud, and did not repre-



supplemental answer matter arising since the joinder of issue.<sup>80</sup>

d. *Counterclaim or Cross-Bill*.—The defendant may by cross-bill seek affirmative relief, regarding the trade-mark or trade name, against the plaintiff.<sup>81</sup> In an action under the code to restrain the use of a trade-mark or name the defendant may by counterclaim set up that he is the owner of such trade-mark or name and ask an injunction and damages against the plaintiff.<sup>82</sup> However, the defendant in a suit for infringement of a patent cannot seek affirmative relief for alleged unfair competition.<sup>83</sup>

4. *Bill of Particulars*.—The general rules as to bills of particulars apply to suits of this nature.<sup>84</sup> The complainant in a suit for unfair competition need not supply the names of persons to whom it alleged sales were made by the defendant.<sup>85</sup> The plaintiff in a bill to enjoin the imitation of his labels and trade-mark cannot be compelled to disclose the ingredients of his goods, because the defendant sets up in his answer that they are injurious.<sup>86</sup>

5. *Hearing*.—The disputed questions of fact may be referred to a master to hear the evidence and report as to his findings,<sup>87</sup> as may the matter of ascertaining the damages.<sup>88</sup>

6. *Injunctions*.—a. *Preliminary Injunction*.<sup>89</sup>—A preliminary injunction will issue where the plaintiff's bill presents a clear case of infringement calculated to deceive the public,<sup>90</sup> but not in a doubtful

sent the article to be plaintiffs' is sufficient); *Faber v. D'Utassy*, 11 Abb. Pr. N. S. (N. Y.) 399.

80. *Silver & Co. v. Waterman*, 122 App. Div. 373, 106 N. Y. Supp. 899, suit for unfair competition in manufacture of a lamp, defendant allowed to plead by supplemental answer the issuance to him of letters patent in connection with the lamp issued by them.

81. *Ogilvie v. G. & C. Merriam Co.*, 149 Fed. 858.

82. *Glen & Hall Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278; *O K Bus & Baggage Co. v. O K Transfer & Storage Co. (Okla.)*, 165 Pac. 136, L. R. A. 1918A, 956.

83. *George Frost Co. v. Kora Co.*, 136 Fed. 487.

84. *United Lace & Braid Mfg. Co. v. Barthels Mfg. Co.*, 213 Fed. 535. See the title "*Bills of Particulars*."

85. *United Lace & Braid Mfg. Co. v. Barthels Mfg. Co.*, 213 Fed. 535, being matters known to defendant much better than to the plaintiff.

Supplying information, by bill of particulars, as to matters within knowledge of adverse party, see 4 STANDARD PROC. 380.

86. *Tetlow v. Savournin*, 15 Phila. (Pa.) 170.

87. *Osgood v. Allen*, Holmes 185, 18 Fed. Cas. No. 10,603; *Gibson Distilling Co. v. Netter*, 62 Pa. Super. 136. See the title "*References*."

88. *Gibson Distilling Co. v. Netter*, 62 Pa. Super. 136.

As to accounting, see *infra*, I, D, 7.

89. See 13 STANDARD PROC. 146, et seq.

90. **U. S.**—*Scheuer v. Muller*, 74 Fed. 225, 20 C. C. A. 161; *Wamsutta Mills v. Fox*, 49 Fed. 141; *Moxie Nerve Food Co. v. Beach*, 33 Fed. 248; *Estes v. Leslie*, 29 Fed. 91. **Md.**—*Robertson v. Berry*, 50 Md. 591, 33 Am. Rep. 328. **N. Y.**—*Seeman v. Zechnowitz*, 136 App. Div. 937, 121 N. Y. Supp. 125; *Kassel v. Juda*, 61 App. Div. 613, 70 N. Y. Supp. 480; *Baeder v. Baeder*, 52 Hun 170, 5 N. Y. Supp. 123, 23 N. Y. St. 408, 1 Silvernail 73. **Pa.**—*Arthur v. Howard*, 19 Pa. Co. Ct. 81.

[a] Possibility or even probability that defendant will desist from infringing in the future furnishes no ground for denying an injunction. *Ricker & Sons v. Leigh*, 74 App. Div. 138, 77 N. Y. Supp. 540.

case,<sup>91</sup> the whole matter resting, however, in the discretion of the court.<sup>92</sup> The probability of irreparable damage,<sup>93</sup> the solvency of the defendant,<sup>94</sup> complainant's delay in bringing the suit,<sup>95</sup> or in asking for a preliminary injunction,<sup>96</sup> will be considered by the court in passing on the application. Where the trade-mark has been held valid in other litigation a preliminary injunction will generally issue.<sup>97</sup> Any unconscionable conduct on the part of the plaintiff will defeat his request for an injunction.<sup>98</sup> The defendant may file affi-

91. **U. S.**—Samson Cordage Works v. Puritan Cordage Mills, 197 Fed. 205; H. Mueller Mfg. Co. v. A. Y. McDona-ly, etc. Co., 132 Fed. 585; French v. Alter & Julian Co., 74 Fed. 788; Philadelphia Novelty Mfg. Co. v. Blakesley Novelty Co., 37 Fed. 365; Portuondo v. Monne, 28 Fed. 16; Le-clancha Battery Co. v. Wester Electric Co., 21 Fed. 538; Frese v. Bachof, 13 Blatchf. 234, 9 Fed. Cas. No. 5,109. **Ga.**—Lies v. Daniel, 82 Ga. 272, 8 S. E. 432; Foster v. Blood Balm Co., 77 Ga. 216, 3 S. E. 284; Ellis v. Zeilin & Co., 42 Ga. 91. **N. Y.**—Foster v. Webster Piano Co., 59 Hun 624, 13 N. Y. Supp. 338, 36 N. Y. St. 1005; Wolfe v. Goulard, 18 How. Pr. 64; Merrimack Mfg. Co. v. Garner, 4 E. D. Smith 387; Whiting Mfg. Co. v. Joseph H. Bauland Co., 56 N. Y. Supp. 114, 28 N. Y. Civ. Proc. 230. **Pa.**—Dodd v. Smith, 144 Pa. 340, 22 Atl. 710; Platt v. Stackhouse, 2 Pa. Dist. 601. **Wis.**—Marshall v. Pinkham, 52 Wis. 572, 9 N. W. 615, 38 Am. Rep. 756.

[a] **If the Answer Denies the Fact and Equity of the Bill.**—Tucker Mfg. Co. v. Boyington, 24 Fed. Cas. No. 14,229.

92. **U. S.**—Standard Chocolate Co. v. Robert A. Johnston Co., 200 Fed. 53, 118 C. C. A. 281; Samson Cordage Works v. Puritan Cordage Mills, 197 Fed. 205; White Co. v. Miller, 50 Fed. 277; Tucker Mfg. Co. v. Boyington, 24 Fed. Cas. No. 14,229; Blackwell v. Armistead, 3 Hughes 163, 3 Fed. Cas. No. 1,474. **Cal.**—Temple v. Gordon, 31 Cal. App. 127, 159 Pac. 983. **N. Y.**—Schenker v. Awerbach, 89 App. Div. 612, 85 N. Y. Supp. 129.

[a] **On appeal from an order** (1) granting preliminary injunction, the only question is whether a reasonable discretion has been exercised. Stand-ard Chocolate Co. v. Robert A. John-ston Co., 200 Fed. 53, 118 C. C. A. 281. (2) The discretion of lower court will not be reviewed unless it clearly

appear there was an abuse of its dis-cretion. Temple v. Gordon, 31 Cal. App. 127, 159 Pac. 983. (3) But where it appears that the equities are with the plaintiff an injunction will be or-dered though denied by the lower court. Rorke v. Societe, etc. de Nice, 14 App. Div. 173, 43 N. Y. Supp. 548.

93. Lies v. Daniel, 82 Ga. 272, 8 S. E. 432; Foster v. Blood Balm Co., 77 Ga. 216, 3 S. E. 284.

94. Richmond Hosiery Mills v. Julius Kayser & Co., 204 Fed. 778, 123 C. C. A. 590; H. Mueller Mfg. Co. v. A. Y. McDona-ly, etc. Co., 132 Fed. 585; Lies v. Daniel, 82 Ga. 272, 8 S. E. 432; Foster v. Blood Balm Co., 77 Ga. 216, 3 S. E. 284.

95. H. Mueller Mfg. Co. v. A. Y. McDona-ly, etc. Co., 132 Fed. 585; Estes v. Worthington, 23 Blatchf. 65, 22 Fed. 822 (injunction denied because of delay and implied acquiescence by plaintiff); Schenker v. Awerbach, 89 App. Div. 612, 85 N. Y. Supp. 129.

**Delay may prevent an accounting,** see *infra*, I, D, 7.

96. Richmond-Hosiery Mills v. Julius Kayser & Co., 204 Fed. 778, 123 C. C. A. 590.

97. Atwater v. Castner, 88 Fed. 642, 32 C. C. A. 77; Carmel Wine Co. v. Palestine Hebrew Wine Co., 161 Fed. 654 (where essential questions in-volved have been tried and decided in other litigation); Symonds v. Greene, 28 Fed. 834; Hanford v. Westcott, 11 Fed. Cas. No. 6,022 (decision of pat-ent office in interference proceeding on application for registration); Phenix Cheese Co. v. Kirp, 176 App. Div. 735, 164 N. Y. Supp. 71.

[a] **That defendant has pleaded guilty to acts of infringement in a criminal proceeding** will be considered. Rieker & Sons v. Leigh, 74 App. Div. 138, 77 N. Y. Supp. 540.

98. McVey v. Brendel, 144 Pa. 235, 22 Atl. 912, 27 Am. St. Rep. 625, 13 L. R. A. 377.

davits on the application for a preliminary injunction,<sup>99</sup> and the complainant may fortify his position by affidavits.<sup>1</sup> Where the affidavits of the plaintiff are contradicted by those of the defendant the injunction may be denied.<sup>2</sup>

The merits of the defense will not be determined on the application for a preliminary injunction.<sup>3</sup>

Terms may be imposed on granting,<sup>4</sup> or denying,<sup>5</sup> a preliminary injunction. The preliminary injunction should be prohibitory and not mandatory.<sup>6</sup>

The preliminary injunction may be enlarged on a proper showing under a supplemental bill.<sup>7</sup>

b. *Permanent Injunction.*<sup>8</sup> — A permanent injunction will issue to prevent any future infringement by the defendant where plaintiff's right and defendant's infringement are clear,<sup>9</sup> though the defendant

99. *Walton v. Crowley*, 3 Blatchf. 440, 29 Fed. Cas. No. 17,133; *Keasbey v. Brooklyn Chemical Works*, 61 Hun 627, 16 N. Y. Supp. 318, 41 N. Y. St. 437; *Lavanburg v. Pfeiffer*, 23 Misc. 577, 52 N. Y. Supp. 801.

1. *Walton v. Crowley*, 3 Blatchf. 440, 29 Fed. Cas. No. 17,133. See also 13 STANDARD PROC. 154.

[a] Affidavit of use "for a long time" is too indefinite. *De Bevoise Co. v. H. & W. Co.*, 69 N. J. Eq. 114, 60 Atl. 407.

2. *National Starch Co. v. Koster*, 146 Fed. 259; *Lavanburg v. Pfeiffer*, 23 Misc. 577, 52 N. Y. Supp. 801.

[a] Defendant's affidavit to defeat the application should be a clear explanation of all the matters contained in the bill, see *Walton v. Crowley*, 3 Blatchf. 440, 29 Fed. Cas. No. 17,133.

3. *Blackwell v. Armistead*, 3 Hughes 163, 3 Fed. Cas. No. 1,474.

4. *J. A. Scriven Co. v. Girard Co.*, 140 Fed. 794.

[a] Bond by plaintiff to pay all damages to defendant in event it be determined that plaintiff not entitled to the injunction. *Roberts v. Sheldon*, 8 Biss. 398, 20 Fed. Cas. No. 11,916; *Appollinaris Brunnen v. Somborn*, 14 Blatchf. 380, 1 Fed. Cas. No. 496.

[b] Bond for payment of a liquidated sum in event judgment is for defendant, may be required where the damage by the injunction will be serious but largely or wholly incapable of proof. *Coca-Cola Co. v. Nashville Syrup Co.*, 200 Fed. 153. See also *Commercial Acetylene Co. v. Acme Acetylene Appliance Co.*, 188 Fed. 89,

*affirmed*, in 192 Fed. 321, 112 C. C. A. 573.

[c] Require proof to be put in in thirty days and give bond. *Roberts v. Sheldon*, 8 Biss. 398, 20 Fed. Cas. No. 11,916.

5. *Romanoff Cigarette Co. v. Vucicino*, 118 N. Y. Supp. 535, bond required of defendant to answer any judgment.

[a] Defendants may be required to keep an account of goods sold with the label at issue on as a condition of the denial of an injunction. *Stirling Silk Mfg. Co. v. Stirling Silk Co.*, 59 N. J. Eq. 394, 46 Atl. 199.

6. See *Morton v. Morton*, 148 Cal. 142, 82 Pac. 664, 1 L. R. A. (N. S.) 660, injunction held to be prohibitory.

Form of injunction, see *infra*, I, D, 6, c.

7. *Chickering & Sons v. Chickering*, 198 Fed. 958.

8. See 13 STANDARD PROC. 172, et seq.

9. *Julius Kessler & Co. v. Goldstrom*, 177 Fed. 392, 101 C. C. A. 476; *Enterprise Mfg. Co. v. Landers, F. & C.*, 131 Fed. 240, 65 C. C. A. 587; *Von Mumm v. Frash*, 56 Fed. 830; *Low v. Fels*, 35 Fed. 361; *Smith v. Woodruff*, 48 Barb. (N. Y.) 438; *Peterson v. Humphrey*, 4 Abb. Pr. (N. Y.) 394.

[a] That defendants have made no actual sales using simulated labels does not prevent an injunction where it appears that they were preparing to do so. *Cuervo v. Landauer*, 63 Fed. 1003.

[b] Unintentional infringement held insufficient. *Appeal of Wilcox (Pa.)*, 12 Atl. 578.



may have gone out of business subsequent to the commencement of the suit,<sup>10</sup> or ceased his acts of infringement.<sup>11</sup> Though the use by the defendant has not been such as to justify an accounting, an injunction may issue.<sup>12</sup>

c. *Form of.*—The injunction should be plain, distinct, and specific,<sup>13</sup> though it may be aided by reference to the bill.<sup>14</sup> It should give complainant adequate protection in the use of his trade-mark or name,<sup>15</sup> but should be no broader than necessary to protect com-

[c] **Actual damage need not be shown**, it is sufficient if injury to plaintiff's business is threatened or imminent. *Walter M. Steppacher & Bro. v. Karr*, 236 Fed. 151; *Cuervo v. Landauer*, 63 Fed. 1003; *Taendsticks-fabriks Aktiebolagat Vulcan v. Myers*, 139 N. Y. 364, 34 N. E. 904.

10. *Hutchinson v. Blumberg*, 51 Fed. 829.

11. **U. S.**—*Thomas G. Plant Co. v. May Mercantile Co.*, 153 Fed. 229 (where defendant continued to infringe after notification to desist and contested suit); *Hutchinson v. Blumberg*, 51 Fed. 829 (especially where defendant has contested every step of the case); *Frese v. Bachof*, 13 Blatchf. 234, 9 Fed. Cas. No. 5,109. **N. J.** *Clark Thread Co. v. William Clark Co.*, 55 N. J. Eq. 658, 37 Atl. 599, promise of perpetual discontinuance of the infringement will not defeat the injunction. **N. Y.**—*United States F. & P. Co. v. Horowitz*, 51 Misc. 101, 100 N. Y. Supp. 705; *Schmid v. Maeurer*, 45 Hun 590, 9 N. Y. St. 843. See also *Ricker & Sons v. Leigh*, 74 App. Div. 138, 77 N. Y. Supp. 540. **Ohio.**—See *United Hatters v. Loeb*, 22 Ohio C. C. 339. **Pa.**—*Seranton Stove Works v. Clark*, 255 Pa. 23, 99 Atl. 170.

[a] **Where defendant in good faith has ceased to infringe** there is no occasion to issue an injunction. *Ferguson-McKinney Dry Goods Co. v. J. A. Scriven Co.*, 165 Fed. 655, 91 C. C. A. 491 (the court saying: "To entitle a party to an injunction, it must appear that defendant, at the time of filing the bill, is doing or threatening to do, that which constitutes or will constitute, an invasion of complainant's rights"); *Dodge Mfg. Co. v. Sewall & Day Cordage Co.*, 142 Fed. 288.

12. *Devlin v. McLeod*, 135 Fed. 164.

13. *William Rogers Mfg. Co. v. Rogers*, 38 Conn. 121; *Boardman v.*

*Meriden Britannia Co.*, 36 Conn. 207.

[a] **Remedy if decree too uncertain** is application to court to modify decree. *Boardman v. Meriden Britannia Co.*, 36 Conn. 207.

14. *William Rogers Mfg. Co. v. Rogers*, 38 Conn. 121, where a petition for injunction against the use of certain trade-marks described the trade-marks particularly and the injunction forbade the respondents from "issuing and delivering any bill, invoice, or other written or printed paper, having thereon the representation of said trade-marks," the injunction by reference to the petition held sufficiently explicit.

[a] **Will follow terms of decree in another jurisdiction** between the same parties, as nearly as may be, such decree being relied on by both parties as stating scope of plaintiff's right to an injunction. *Clark Thread Co. v. William Clark Co.*, 56 N. J. Eq. 789, 40 Atl. 686.

15. *Knabe Bros. Co. v. American Piano Co.*, 229 Fed. 23, 143 C. C. A. 325; *Dayton v. Imperial Sales & Parts Co.*, 195 Mich. 397, 161 N. W. 958, not adequate protection to permit defendant to continue using name if accompanied by a disclaimer of connection with complainant.

[a] **Where defendant's name is similar to plaintiff's**, the defendant may be required to place notice on packages of his goods that they are not manufactured by plaintiff. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. ed. 118; *Keystone Oil & Mfg. Co. v. Buzby*, 219 Fed. 473, 135 C. C. A. 185; *A. Reed Cushion Shoe Co. v. Frew*, 162 Fed. 887, 89 C. C. A. 577; *Rowley v. J. F. Rowley Co.*, 161 Fed. 94, 88 C. C. A. 258; *Tanqueray, Gordon & Co. v. Gordon D. & D. Co.*, 213 Fed. 510; *Allegratti v. Allegratti Chocolate Cream Co.*, 177 Ill. 129, 52 N. E. 487, so use

plainant.<sup>16</sup> Where the arrangement rather than the use of words constitutes the infringement the injunction will issue restraining the use of the words in a certain manner.<sup>17</sup> The court may prescribe a proper form for the defendant to use,<sup>18</sup> though some authorities hold that the court in settling a decree cannot prescribe that certain forms may be used.<sup>19</sup> Where there is a conflict of rights to the use of a particular name the court will so regulate the use by each that there will be as little injury as possible to the right of the other.<sup>20</sup> While a clause

name as to indicate goods are manufactured by defendant and not by plaintiff. See, however, *Scranton Stove Works v. Clark*, 255 Pa. 23, 99 Atl. 170, that this cannot be required where defendant has been infringing plaintiff's trade-mark or device, enjoining the acts of infringement will be sufficient.

16. **U. S.**—*Moline Plow Co. v. Omaha Iron Store Co.*, 235 Fed. 519, 149 C. C. A. 65; *Fransoli v. Prest-O-Lite Co.*, 234 Fed. 63, 148 C. C. A. 79; *Knabe Bros. Co. v. American Piano Co.*, 229 Fed. 23, 143 C. C. A. 325; *Gaines & Co. v. Rock Spring Distilling Co.*, 226 Fed. 531, 141 C. C. A. 287; *Grier Bros. Co. v. Baldwin*, 219 Fed. 735, 135 C. C. A. 433; *Warner Bros. Co. v. Wiener*, 214 Fed. 30, 130 C. C. A. 424; *Stix, Baer & Fuller Dry Goods Co. v. American Piano Co.*, 211 Fed. 271, 127 C. C. A. 639; *A. Y. McDonald & Mfg. Co. v. H. Mueller Mfg. Co.*, 183 Fed. 972, 106 C. C. A. 312; *Rowley v. J. F. Rowley Co.*, 161 Fed. 94, 88 C. C. A. 258; *Walter M. Steppacher & Bro. v. Karr*, 236 Fed. 151. **Cal.**—*Spieker v. Lash*, 102 Cal. 38, 36 Pac. 362, should not prohibit manufacture and sale of an unpatented preparation. **Conn.**—*Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 70 Conn. 516, 40 Atl. 534 (judgment set aside because too broad); *Meriden Britannia Co. v. Parker*, 39 Conn. 450, 12 Am. Rep. 401, should not absolutely show the use of a proper name, as it may be used without infringing. **Mass.** *Reading Stove Works v. S. M. Howes Co.*, 201 Mass. 437, 87 N. E. 751, 21 L. R. A. (N. S.) 979, should leave defendant free to sell his goods with the infringing marks omitted. **N. Y.** *Fischer v. Blank*, 138 N. Y. 244, 33 N. E. 1040; *Bernhard v. Bernhard*, 156 App. Div. 739, 142 N. Y. Supp. 94. **Pa.**—*Scranton Stove Works v. Clark*, 255 Pa. 23, 99 Atl. 170; *Ogilvie Pub. Co. v. Royal Pub. Co.*, 241 Pa. 5, 88 Atl. 316.

[a] **If the injunction be too broad** the appellate court will modify it (*Bobrow v. Manekin*, 59 Pa. Super. 334), or (2) remand cause with instructions to lower court to modify. *A. Y. McDonald & M. Mfg. Co. v. H. Mueller Mfg. Co.*, 183 Fed. 972, 106 C. C. A. 312.

17. *Royal Baking Powder Co. v. Davis*, 26 Fed. 293. To same effect, *Fischer v. Blank*, 138 N. Y. 244, 33 N. E. 1040.

18. *Gay-Ola Co. v. Coca-Cola Co.*, 211 Fed. 942, 128 C. C. A. 440; *A. Reed Cushion Shoe Co. v. Frew*, 162 Fed. 887, 89 C. C. A. 577 (giving a specific example of a proper notice for defendant to use); *Carlsbad v. Schultz*, 78 Fed. 469. See *Howes Co. v. Howes Grain Cleaner Co.*, 24 Misc. 83, 5<sup>o</sup> N. Y. Supp. 468.

[a] **"Courts of equity may require such form of words** to be used in connection with the appropriated name as will completely protect the rightful owner of that name from injury and the public from imposition." *Ludlow Valve Mfg. Co. v. Pittsburgh Mfg. Co.*, 166 Fed. 26, 92 C. C. A. 60.

[b] **Court need not suggest method** by which defendant may use the name. *Dymont v. Lewis*, 144 Iowa 509, 123 N. W. 244, 26 L. R. A. (N. S.) 73.

19. *Sterling Remedy Co. v. Spermine Medical Co.*, 112 Fed. 1000, 50 C. C. A. 657 ("a court of equity does not set as an arbiter to determine in advance upon other and changed labels which the infringer may adopt to avoid the condemnation of the court"); *Williams v. Mitchell*, 106 Fed. 168, 45 C. C. A. 265 ("it will be time enough for the court to determine the question when presented upon issues properly framed and the evidence taken thereunder"); *Hires Co. v. Consumers' Co.*, 100 Fed. 809, 41 C. C. A. 71.

20. *Cohen v. Nagle*, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. (N. S.) 964.

interpreting the injunction is proper,<sup>21</sup> it is said that the court has no authority to consider an application for a construction of its decree.<sup>22</sup>

d. *Enforcement of.*<sup>23</sup>—If the defendant in violation of the injunction continue to infringe he may be proceeded against for contempt.<sup>24</sup>

7. *Accounting.*<sup>25</sup>—In a suit to restrain the use of a trade-mark,<sup>26</sup> or for unfair competition,<sup>27</sup> an accounting of profits may be had. In England the plaintiff elects whether he will take profits or damages,<sup>28</sup> but in the United States it seems the plaintiff may require the

21. *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 77 Fed. 869, 23 C. C. A. 554.

22. *Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co.*, 72 N. J. Eq. 555, 65 Atl. 870, "such construction cannot be given until the question comes regularly before it in proceedings requiring its construction, and application to acts alleged to be done or omitted under it."

23. *Remedies for violation of in junctions generally*, see 13 STANDARD PROC. 284, et seq.

24. *U. S.*—*Waterman Co. v. Standard Drug Co.*, 202 Fed. 167, 120 C. C. A. 455; *Janney v. Pan-Coast V. & M. Co.*, 131 Fed. 143. *Conn.*—*William Rogers Mfg. Co. v. Rogers*, 38 Conn. 121. *N. Y.*—*Porous Plaster Co. v. Seabury*, 48 Hun 620, 1 N. Y. Supp. 134, 16 N. Y. St. 35; *Swift v. Dey*, 4 Rob. 611; *Danziger v. Gottlieb*, 156 App. Div. 779, 141 N. Y. Supp. 739; *Butler-Butler, Inc. v. Marcoglou*, 170 App. Div. 762, 156 N. Y. Supp. 467. *Pa.* *Gillis v. Hall*, 8 Phila. 231; *Witthaus v. Wallace*, 2 Wkly. N. C. 610. *Vt.* *Alfred v. Alfred*, 87 Vt. 542, 90 Atl. 580. *W. Va.*—*Powhatan Coal & C. Co. v. Ritz*, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1225.

See also 13 STANDARD PROC. 285, et seq., and the title "Contempt."

[a] *President of defendant corporation adjudged guilty of contempt.* *Janney v. Pan-Coast V. & M. Co.*, 131 Fed. 143.

25. *Accounting in equity generally*, see 1 STANDARD PROC. 263, et seq.

26. *U. S.*—*Saxlehner v. Eisner & Mendelson Co.*, 138 Fed. 22, 70 C. C. A. 452; *Oakes v. Tonsmierre*, 49 Fed. 447; *Atlantic Milling Co. v. Rowland*,

27 Fed. 24; *Collins Co. v. Oliver Anes & Sons Corp.*, 20 Blatchf. 542, 18 Fed. 561. *Fla.*—*El Modelo Cigar Mfg. Co. v. Gato*, 25 Fla. 886, 7 So. 23, 23 Am. St. Rep. 537, 6 L. R. A. 823. *Ga.* *Hagan & Dodd Co. v. Riggers*, 1 Ga. App. 100, 57 S. E. 970. *Ky.*—*Avery v. Meikle*, 85 Ky. 435, 3 S. W. 609, 7 Am. St. Rep. 604. *Md.*—*Stonebraker v. Stonebraker*, 33 Md. 252. *Mass.* *Nelson v. Winchell & Co.*, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. (N. S.) 1150; *Reading Stove Works v. S. M. Howes Co.*, 201 Mass. 437, 87 N. E. 751, 21 L. R. A. (N. S.) 979. *N. J.* *Clark Thread Co. v. William Clark Co.*, 56 N. J. Eq. 789, 40 Atl. 686. *R. I.* *Buchanan v. Carpenter*, 19 R. I. 337, 36 Atl. 90. *Tenn.*—*Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84, 23 S. W. 165. *Wis.*—*Leidersdorf v. Flint*, 50 Wis. 400, 7 N. W. 252.

27. *U. S.*—*Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. ed. 118; *Worcester Brewing Corp. v. Rueter & Co.*, 157 Fed. 217, 84 C. C. A. 665; *Fairbank Co. v. Windsor*, 118 Fed. 96. *Cal.*—*See Graham v. Plate*, 40 Cal. 593, 6 Am. Rep. 639. *Me.*—*Lynn Shoe Co. v. Auburn-Lynn Shoe Co.*, 103 Me. 334, 69 Atl. 569. *Mass.*—*Regis v. Jaynes*, 191 Mass. 245, 77 N. E. 774. *N. J.*—*L. Martin Co. v. L. Martin & W. Co.*, 75 N. J. Eq. 257, 72 Atl. 294, 21 L. R. A. (N. S.) 526, but cannot recover both profits and damages. *Pa.*—*Van Stan's Stratena Co. v. Van Stan*, 209 Pa. 564, 58 Atl. 1064, 103 Am. St. Rep. 1018. *Eng.* *Ford v. Foster*, L. R. 7 Ch. 611, 41 L. J. Ch. 682, 27 L. T. N. S. 219, 20 W. R. 818.

28. *Lever v. Goodwin*, 36 Ch. Div. 1, 57 L. T. N. S. 583, 36 W. R. 177; *Leather Cloth Co. v. Hirschfeld*, 13 L. T. N. S. 427, 14 Wkly. Rep. 78.



defendant to account for profits and also recover any damages to his business.<sup>29</sup> An accounting can only be awarded as incidental to an injunction, and if the plaintiff be denied an injunction equity will not retain jurisdiction for the accounting.<sup>30</sup> Where the damages or profits are trivial,<sup>31</sup> disproportionate to the expense of taking an account,<sup>32</sup> where no basis for an accounting for damages by reason of unfair competition is established,<sup>33</sup> or no actual damage has been sustained by plaintiff,<sup>34</sup> an accounting will be denied and plaintiff's relief confined to an injunction against future infringements. So, too, where both parties are at fault an accounting may be denied.<sup>35</sup> The account will be taken upon equitable principles,<sup>36</sup> and an account will not be taken where the infringing use has been merely accidental and without actual intent to defraud,<sup>37</sup> or delay by the plaintiff in asserting his claims may bar an accounting.<sup>38</sup> Only those actually conducting the

29. **U. S.**—Walter Baker Co. v. Slack, 130 Fed. 514, 65 C. C. A. 138; Hennessy v. Wilmerding-Loewe Co., 103 Fed. 90; Benkert v. Feder, 34 Fed. 534, 13 Sawy. 229, hold no analogy in this respect between patent and trademark causes. **Ia.**—Beebe v. Tolerton & Stetson Co., 117 Iowa 593, 91 N. W. 905. **Me.**—Lynn Shoe Co. v. Auburn-Lynn Shoe Co., 103 Me. 334, 69 Atl. 569.

*Contra*, L. Martin Co. v. L. Martin & W. Co., 75 N. J. Eq. 257, 72 Atl. 294, 21 L. R. A. (N. S.) 526, holding analogy between patent and trademark causes.

30. Van Raalt v. Schneek, 159 Fed. 248; Clark Thread Co. v. William Clark Co., 55 N. J. Eq. 658, 37 Atl. 599.

31. **U. S.**—Julius Kessler & Co. v. Goldstrom, 177 Fed. 392, 101 C. C. A. 476. **Mass.**—Regis v. Jaynes, 191 Mass. 245, 77 N. E. 774. **N. Y.**—Howes Co. v. Howes Grain Cleaner Co., 24 Misc. 83, 52 N. Y. Supp. 468.

32. Julius Kessler & Co. v. Goldstrom, 177 Fed. 392, 101 C. C. A. 476; Merriam Co. v. Ogilvie, 170 Fed. 167, 95 C. C. A. 423; Saxlehner v. Eisner & Mendelson Co., 88 Fed. 61; Giragossian v. Chutjian, 194 Mass. 504, 80 N. E. 647, 120 Am. St. Rep. 570.

33. G. & C. Merriam Co. v. Ogilvie, 170 Fed. 167, 95 C. C. A. 423; Ludington N. Co. v. Leonard, 127 Fed. 155, 62 C. C. A. 269 ("an attempt to segregate the profits, if any, resulting from the illegitimate use of the word would require an excursion into the realms of conjecture and speculation without hope of any tangible result"); American Specialty Co. v. Collis Co.,

235 Fed. 929, acts complained of were the sending of certain letters, the court in denying an accounting says: "There is no evidence in the case indicating a possibility of tracing out and ascertaining the psychological effect of the letters, and there is no proof that any order was cancelled upon receipt of them, and no proof that any person, contemplating an order, changed his plans, and no proof that the plaintiff would have sold goods which he did not sell if the letters had not been written."

[a] To escape an accounting it must be made clearly and certainly to appear that neither upon the existing record, nor upon any record which complainant can make before the master, could there be any substantial recovery. G. & C. Merriam Co. v. Saalfeld, 198 Fed. 369, 117 C. C. A. 245.

34. Allen v. Walker, 235 Fed. 230; Liebig's Extract & M. Co. v. Walker, 115 Fed. 822; Regis v. Jaynes, 191 Mass. 245, 77 N. E. 774.

35. Merriam Co. v. Ogilvie, 170 Fed. 167, 95 C. C. A. 423.

36. Regis v. Jaynes, 191 Mass. 245, 77 N. E. 774.

37. Regis v. Jaynes, 191 Mass. 245, 77 N. E. 774.

[a] Under Iowa statute bad faith is necessary to recover profits. Beebe v. Tolerton & Stetson Co., 117 Iowa 593, 91 N. W. 905.

38. **U. S.**—Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. ed. 526 (damages for past infringement denied because of delay); McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Jenkins Bros. v. Kelly & Jones Co.,

business will be required to account.<sup>39</sup> While generally the accounting will be had before a master,<sup>40</sup> it may be taken before the court.<sup>41</sup> Under the guise of requiring an account, a party will not be required to disclose his dealings with others so as to injure him in business competition.<sup>42</sup>

**8. Res Adjudicata.**—Where the issues raised in a subsequent suit are different from those disposed of in a former suit a plea of res adjudicata will be overruled.<sup>43</sup> An injunction may be obtained against the officers of a corporation individually though in a previous suit the corporation, its officers, agents or servants have been enjoined,<sup>44</sup> and a decree enjoining the selling agent of the defendant does not estop plaintiff from proceeding against the defendant in a subsequent suit for an injunction and an accounting.<sup>45</sup> An interlocutory decree between the same parties is not conclusive in a subsequent suit.<sup>46</sup>

**9. Costs.**—Generally the complaint on securing an injunction will be given his costs,<sup>47</sup> though where the infringement was unintentional and defendant ceased immediately upon notice, costs may be denied complainant.<sup>48</sup> So costs will be refused where the court denies plaintiff relief, and does not approve the conduct of the defendant,<sup>49</sup> where each party has infringed the rights of the other,<sup>50</sup> or complainant is

212 Fed. 328; *Low v. Fels*, 35 Fed. 361; *Manhattan Medicine Co. v. Wood*, 4 Cliff. 461, 16 Fed. Cas. No. 9,026.

**Ky.**—*Avery v. Meikle*, 85 Ky. 435, 3 S. W. 609, 7 Am. St. Rep. 604. **Mass.** *Nelson v. Winchell & Co.*, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. (N. S.) 1150 (laches held excused); *Regis v. Jaynes*, 191 Mass. 245, 77 N. E. 774. **N. Y.**—*Howes Co. v. Howes Grain Cleaner Co.*, 24 Misc. 83, 52 N. Y. Supp. 468; *Cahn v. Gottschalk*, 2 N. Y. Supp. 13, 14 Daly 542, 16 N. Y. St. 818. **Tenn.**—*Simmons Medicine Co. v. Mansfield Drug Co.*, 93 Tenn. 84, 23 S. W. 165. **Eng.**—*Moet v. Couston*, 33 Beav. 578, 4 N. R. 86, 10 Jur. N. S. 1012, 10 L. T. N. S. 395, 55 Eng. Reprint 493.

**39.** *Hiram Walker & Sons v. Grubman*, 222 Fed. 478, clerks and officers of the corporation doing the business need not account.

**40.** See the cases cited in this section.

**41.** *Haslinghuis v. P. Harrington Sons*, 237 Fed. 301, very few sales having been made.

**42.** *Cushman & Denison Mfg. Co. v. Grammes*, 225 Fed. 883, 234 Fed. 949.

**43.** *Dennison Mfg. Co. v. Scharf Tag, L. & B. Co.*, 121 Fed. 313, 57 C. C. A. 9, here a prior bill for infringement and unfair competition had been dis-

missed on demurrer, it is held that in such case the estoppel extends only to the precise point presented by the pleadings and decided by the ruling upon the demurrer, and where the second bill alleged additional acts of infringement to plea of res adjudicata to whole of such bill would be overruled.

**44.** *Saxlehner v. Eisner*, 147 Fed. 189, 77 C. C. A. 417, the officers could resign and thus dissolve the former injunction against them and plaintiff would have no protection against their personal acts.

**45.** *Clark Thread Co. v. William Clark Co.*, 55 N. J. Eq. 658, 37 Atl. 599, no accounting having been had in the former proceeding.

**46.** *Walter Baker & Co. v. Sanders*, 80 Fed. 889, 26 C. C. A. 220.

**47.** *Sawyer v. Kellogg*, 9 Fed. 601; *Collins Co. v. Oliver Ames & Son Corp.*, 20 Blatchf. 542, 18 Fed. 561; *Lou v. Hart*, 90 N. Y. 457; *Coats v. Holbrook*, 2 Sandf. Ch. (N. Y.) 586.

**48.** *Bass, Ratcliff & Gretton v. Gugenheimer*, 69 Fed. 271; *Coats v. Holbrook*, 2 Sandf. Ch. (N. Y.) 586.

**49.** *McVey v. Brendel*, 144 Pa. 235, 22 Atl. 912, 27 Am. St. Rep. 625, 13 L. R. A. 377.

**50.** *Merriam Co. v. Ogilvie*, 170 Fed. 167, 95 C. C. A. 423.

successful only in an inconsequential part of the litigation.<sup>51</sup> Where both parties are at fault a division of the costs is proper.<sup>52</sup>

**II. CRIMINAL PROSECUTIONS.**—In accordance with the general rule,<sup>53</sup> an indictment or information for an offense under trademark statutes must allege facts showing the existence of the elements of the offense.<sup>54</sup> Several offenses defined in the same act may be joined in several counts,<sup>55</sup> but they should not be charged in the alternative.<sup>56</sup>

**Variance.**—A variance in the signature on a label is immaterial where the signature is no part of the device on the label which is claimed was counterfeited,<sup>57</sup> but ownership of a label must be proved as alleged.<sup>58</sup> It is not material that the proof in support of an allega-

51. *Moxie Co. v. Bagoian*, 197 Fed. 680. See also *Jenkins Bros. v. Kelly & Jones Co.*, 212 Fed. 328 (where plaintiff was denied full costs he only having obtained after extended litigation what defendant offered to submit to before suit); *Cole v. Cole's Many Use Oil Co.*, 147 Fed. 930, where costs incurred after the entry of an interlocutory decree, with consent of defendant, were denied plaintiff, plaintiff receiving no broader relief on final hearing.

52. *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 823; *Amoskeag Mfg. Co. v. Garner*, 54 How. Pr. (N. Y.) 297; *Gaines & Co. v. Leslie*, 25 Misc. 20, 54 N. Y. Supp. 421, on dismissing bill as to one defendant such dismissal will be without costs where the joinder was justified by reason of his apparent connection with the other defendants, he being a former partner of defendants and his name appearing on the infringing label.

53. See 12 STANDARD PROC. 342.

54. U. S.—*United States v. Braun*, 39 Fed. 775, indictment for counterfeiting trade-mark should allege facts showing the existence of a valid trade-mark as well as the fact that registration has been obtained. Ill.—*People v. Stricker*, 258 Ill. 618, 102 N. E. 216 (unlawfulness of sale need not be alleged in terms if the facts show it to be unlawful); *Vincendeau v. People*, 219 Ill. 474, 76 N. E. 675. Ind.—*State v. Barnett*, 159 Ind. 432, 65 N. E. 515; *State v. Wright*, 159 Ind. 394, 65 N. E. 190; *State v. Hagen*, 6 Ind. App. 167, 33 N. E. 223. Mo.—*State v. Thierauf*, 167 Mo. 429, 67 S. W. 292; *State v. Bishop*, 128 Mo. 373, 31 S. W. 9, 49 Am. St. Rep. 569, 29 L. R. A. 200. Pa. *Com. v. Howells*, 18 Pa. Super. 323;

*Com. v. Norton*, 16 Pa. Super. 423. Wash.—*State v. Montgomery*, 57 Wash. 192, 106 Pac. 771.

See generally the title "Indictment and Information."

[a] If defendant has counterfeited in part the label of another the particular part must be specified in the indictment. *State v. Thierauf*, 167 Mo. 429, 67 S. W. 292.

[b] Intent to defraud must be (1) alleged when it is an element of the crime under the statute. *State v. Wright*, 159 Ind. 422, 65 N. E. 289. See *Com. v. Norton*, 16 Pa. Super. 423. (2) But where knowledge or intent is not an ingredient it need not be alleged. *Bulena v. Newman*, 10 Misc. 460, 31 N. Y. Supp. 449, 64 N. Y. St. 26.

[c] Label used need not be set out in haec verba but may be described in general terms. *People v. Stricker*, 258 Ill. 618, 102 N. E. 216. See also *Com. v. Norton*, 16 Pa. Super. 423.

[d] Exclusive ownership of a union label need not be alleged. *State v. Bishop*, 128 Mo. 373, 31 S. W. 9, 49 Am. St. Rep. 569, 29 L. R. A. 200.

[e] The filing of the required affidavit sufficiently appears from an averment that labels were "duly filed for record in the office of the Secretary of State of the State of Illinois, as by law provided." *Vincendeau v. People*, 219 Ill. 474, 76 N. E. 675.

55. *Com. v. Howells*, 18 Pa. Super. 323. See 12 STANDARD PROC. 499, 519.

56. *Brant v. Froehlich*, 49 N. J. L. 336, 8 Atl. 283. See also 12 STANDARD PROC. 334, et seq., 501.

57. *State v. Niesmann*, 101 Mo. App. 507, 74 S. W. 638.

58. *People v. Stricker*, 258 Ill. 618, 102 N. E. 216.



tion of purchase by a specified person, shows that he purchased as agent for another.<sup>59</sup>

[a] Where it is charged that the union label infringed was the registered label of a certain union and the proof is that it is the label of another, the variance is fatal. *People v. Dantuma*, 252 Ill. 561, 96 N. E. 1087, Ann. Cas. 1912D, 370, 39 L. R. A. (N. S.) 1190.

alleged that the label was the property of a specified corporation this allegation including the fact of corporate capacity must be proved. Such capacity, however, may be proved by user. *People v. Stricker*, 258 Ill. 618, 102 N. E. 216. See also 3 ENCY. OF EV. 594, 614.

[b] Corporate Ownership.—If it is 59. *Vincendeau v. People*, 219 Ill. 474, 76 N. E. 675.

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**TRADERS.** — See **Hawkers and Peddlers; Licenses.**

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**TRADE UNIONS.** — See **Labor Unions.**

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**TRANSACTIONS.** — See **Joinder of Actions; Set-Off, Counterclaim and Recoupment.**

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**TRANSCRIPT.** — See **Appeals; Judgments; Justices of the Peace; Statement and Abstract of Case.**

Vol. XXIV

# TRANSFER OF CAUSES

By the Editorial Staff.

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#### CROSS-REFERENCES:

Change of Venue;

Removal of Causes.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. IN GENERAL.**—The power to transfer causes from one court to another,<sup>1</sup> or from one department to another,<sup>2</sup> is conferred and regu-

1. **Colo.**—*Dyett v. Harney*, 53 Colo. 381, 127 Pac. 226. **La.**—*Lafayette Rlty. Co. v. Poer*, 136 La. 472, 67 So. 335. **Mo.**—*State ex rel. Dunham v. Nixon*, 232 Mo. 98, 133 S. W. 336; *Ex parte Webers*, 200 Mo. App. 368, 206 S. W. 244. **N. J.**—*Streeter v. Braman*, 76 N. J. Eq. 371, 74 Atl. 659. **N. Y.** *Mittnacht v. Kellermann*, 105 N. Y. 461, 12 N. E. 28. **Tex.**—*Thallman v. Buckholts St. Bank* (Tex. Civ. App.), 181 S. W. 791.

[a] A county court of limited jurisdiction cannot transfer a cause to a

district court if no statutory provision exists for making such transfer. *Dyett v. Harney*, 53 Colo. 381, 127 Pac. 226.

[b] An appeal to the wrong appellate court, in the absence of a statute permitting a transfer, should be dismissed. *Feingold v. Lefkowitz* (Tex. Civ. App.), 140 S. W. 106.

2. *Holmes v. Straus*, 283 Ill. 621, 119 N. E. 708.

[a] When the amount involved determines the class in which a case belongs, and no provision is made for transfer from one class to another in



lated by statute<sup>3</sup> or rule of court,<sup>4</sup> and must be exercised in accordance with such statutes or rules.<sup>5</sup> Some statutes authorizing transfer are permissive,<sup>6</sup> others mandatory.<sup>7</sup>

**II. PROCEEDINGS TRANSFERABLE.**—Both civil<sup>8</sup> and criminal<sup>9</sup> proceedings are embraced within the acts empowering courts to transfer causes. The language used is generally broad enough to include any proceedings which could come before the court,<sup>10</sup> as will be seen from particular applications set out in the notes.<sup>11</sup>

the Chicago municipal court, a case must be commenced in the proper class and in the event of a mistake it cannot be transferred. *Holmes v. Straus*, 283 Ill. 621, 119 N. E. 708.

3. See the statutes.

4. See the court rules particularly those of the appellate courts.

[a] **The power to make rules of procedure** not inconsistent with any statute or law is generally given to, or is inherent in, the supreme appellate court, and includes rules relating to transfer of causes on appeal. See Cal. Supreme Court Rules xxxi-xxxiii, and *In re Davidson*, 167 Cal. 727, 141 Pac. 216.

[b] **Rule and Statute Must Be Consistent.**—The power to transfer a case cannot be originated by a rule of court, under a general provision permitting rules of procedure, when such rule is inconsistent with others expressly provided by the statute. *Holmes v. Straus*, 283 Ill. 621, 119 N. E. 708.

5. *In re Davidson*, 167 Cal. 727, 141 Pac. 216; *Ex parte Webers*, 200 Mo. App. 368, 206 S. W. 244.

[a] **Case Must Be Within Statute.** Under a statute which provides for a transfer from an appellate to the supreme court of cases improperly in such appellate court from a lower court on appeal or writ of error, an habeas corpus proceeding originally begun in the appellate court cannot be transferred to the supreme court; and where a constitutional question is involved, which the appellate cannot determine, its only course is to quash the writ. *Ex parte Webers*, 200 Mo. App. 368, 206 S. W. 244. See also 275 Mo. 677, 205 S. W. 620.

[b] **A reason not included in the statute** should not be made the basis for a transfer. *James v. St. Charles Hotel Co.*, 142 La. 464, 77 So. 117.

6. Cal.—*People v. Davis*, 147 Cal. 346, 81 Pac. 718. La.—*Landry v. Gonzales*, 142 La. 577, 77 So. 287. N. J.

*Streeter v. Braman*, 76 N. J. Eq. 371, 74 Atl. 659.

[a] **Docket Transfer.**—A motion to transfer a cause from law to equity is addressed to the discretion of the court. See *Gwinn v. Hobbs* (Ind. App.), 118 N. E. 155; *Toothaker v. Pennell*, 106 Me. 188, 76 Atl. 488.

[b] **Discretion as to court to which a transfer may be made**, when a choice exists, generally rests with the court making the transfer. *State ex rel. Wagener v. Cook* (Mo. App.), 185 S. W. 758.

7. *Spengler v. Davy*, 15 Gratt. (56 Va.) 381. See *Jelenko & Bro. v. Coleman*, 22 W. Va. 221.

[a] **Waiver Under Mandatory Act.** While a statute may be mandatory, if the right is not asserted at the proper time, and the court has jurisdiction, the status of the cause may justify the court in using its discretion and refusing a transfer. *Jelenko & Bro. v. Coleman*, 22 W. Va. 221. As to waiver generally, see *infra*, III, E; IV, F.

8. See *infra*, III.

9. See *infra*, IV.

10. See *infra*, this note.

“Pending causes,” “pending suits and actions,” “any pending civil or criminal cause,” or similar language is used in the statutes. See the statutes.

[a] **The word “cause”** as used in the constitutional provision authorizing the transfer of causes from the supreme court to appellate courts and vice versa is broad enough to include everything that could possibly come before the court for decision. *In re Wells*, 174 Cal. 467, 163 Pac. 657.

11. See *infra*, this note.

[a] **An action for damages against a railroad corporation** is transferable. *Chicago, R. I. & P. R. Co. v. Rhodes*, 21 Colo. App. 229, 121 Pac. 769.

[b] **An application to revoke an order admitting to practice**, included in a statute permitting the transfer of

**III. CIVIL CAUSES. — A. COURTS TO AND FROM WHICH A CAUSE MAY BE TRANSFERRED. — 1. From One Federal Court to Another.** The federal statutes provide for the transfer of civil causes under certain designated circumstances. Thus a case, whether at law or in equity, may, upon agreement of the parties or their attorneys, be ordered transferred from one district to another,<sup>12</sup> and cases arising in a newly created district or division, or in a county or territory which has been transferred from one district or division to another, may be ordered transferred from the district or division where they are pending to the one in which they arose.<sup>13</sup> Under certain circumstances, bankruptcy proceedings may be ordered transferred for the convenience of the parties in interest.<sup>14</sup>

“causes.” *In re Wells*, 174 Cal. 467, 163 Pac. 657.

[c] A proceeding to change the name of a corporation, included in the word cause. *In re Los Angeles Trust Co.*, 158 Cal. 603, 112 Pac. 56.

[d] An action on a benefit certificate against a beneficial association. *Caywood v. Supreme Lodge K. & L. H.*, 41 Ind. App. 639, 84 N. E. 782.

[e] Mandamus proceeding against a county official, transferred. *Keech v. Joplin*, 157 Cal. 1, 106 Pac. 222; *People ex rel. Durnall v. Eitel*, 231 Ill. 38, 83 N. E. 86.

[f] Proceeding in certiorari transferred. *Rockbridge Place Co. v. City Council of Oakland (Cal.)*, 172 Pac. 1110.

[g] Involving the Legality of a License Tax.—*State ex rel. Guillot v. Central B. & T. Co.*, 143 La. 1053, 79 So. 857.

[h] Contested Right to a Public Office.—*Landry v. Gonzales*, 142 La. 577, 77 So. 287.

12. See *infra*, this note.

[a] “Any civil cause, at law or in equity, may, on written stipulation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge signed and filed in the case in vacation or on the order of the court duly entered of record in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial.” Fed. Jud. Code §58; 36 U. S. St. at L. 1103; U. S. Comp. St., 1916, §1040.

[b] For provisions applicable to particular states, see Fed. Jud. Code §§70

115; 36 U. S. St. at L. 1105-1130; U. S. Comp. St., 1916, §§1052-1106.

13. *Pronovost v. United States*, 232 U. S. 487, 34 Sup. Ct. 391, 58 L. ed. 696; *Rosecrans v. United States*, 165 U. S. 257, 17 Sup. Ct. 302, 41 L. ed. 708; *Baldwin v. Rice*, 100 App. Div. 241, 44 Misc. 64, 89 N. Y. Supp. 738.

[a] The statute provides in effect that upon the creation of a new district or division, or upon the transfer of any county or territory from one district or division to another, civil actions pending at the time of the creation of any such district or division, or the transfer of any such county or territory, and arising within the district or division so created, or the county or territory so transferred, may be transferred for trial to the district or division so created, or to the district to which the county or territory is so transferred. Fed. Jud. Code §59; 36 U. S. St. at L. 1103; U. S. Comp. St., 1916, §1041.

14. *In re Isaacson*, 161 Fed. 779; *In re Southwestern Bridge & Iron Co.*, 133 Fed. 568; *In re General Metals Co.*, 133 Fed. 84; *In re Sears*, 112 Fed. 58; *In re Waxelbaum*, 98 Fed. 589.

[a] The provision of the statute is: In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by one of such courts which can proceed with the same for the greatest convenience of parties in interest. Fed. Bankruptcy Act §32; 30 U. S. St. at L. 554; U. S. Comp. St., 1916, §9616.

**From Territorial to District Courts.**—Upon admittance of a new state into the union and the establishment of a federal district court therein, the records of the proceedings pending in the highest territorial court at the time of the admission are transferred to the district court of the state,<sup>15</sup> as well as all other cases pending in the trial courts of the territory in which writs of error or appeals could have been taken to the federal supreme court or circuit court of appeals.<sup>16</sup>

**2. From One State Court to Another.**—a. *Between Appellate Courts.*—(I.) *Between Intermediate Appellate Court and Supreme Courts.* Provision is frequently made in constitution and statutes for the transfer of causes from intermediate appellate to supreme courts and vice

[b] **The statute applies (1) to corporations** (*In re United Button Co.*, 137 Fed. 668; *In re Globe Sec. Co.*, 132 Fed. 709); and (2) **partnerships.** *In re Sears*, 112 Fed. 58.

[c] **Parties in interest** include all persons whose pecuniary interests may be directly affected by the bankruptcy proceedings. *In re United Button Co.*, 137 Fed. 668.

[d] **Priority of jurisdiction**, when controlling the transfer, is determined by the date of filing the petitions, not by the date of an adjudication. *In re Tybo Min. & R. Co.*, 132 Fed. 697; *In re Elmira Steel Co.*, 109 Fed. 456.

[e] **A transfer is not warranted by (1) the single fact that a part or all of the bankrupt's property is in the other district** (*In re Tybo Min. & R. Co.*, 132 Fed. 978), nor (2) when it is doubtful whether the greater convenience of the parties would be served. *In re Sears*, 112 Fed. 58.

[f] **Proximity of the bankrupt's place of business and of a majority of his creditors**, while persuasive, is not conclusive as to which court should assume final jurisdiction. *In re United Button Co.*, 137 Fed. 668.

[g] **Voluntary and Involuntary Petitioners.**—The right to have the proceedings transferred exists when some of the petitioners are voluntary and others involuntary, as well as when all are involuntary. *In re Waxelbaum*, 98 Fed. 589.

15. Fed. Jud. Code §62; 36 U. S. St. at L. 1104; U. S. Comp. St., 1916, §1044. See the following: **U. S.**—United States Exp. Co. v. Kountze Bros., 8 Wall. 342, 19 L. ed. 457; *Cotton v. United States*, 9 How. 579, 13 L. ed. 265; *Forsyth v. United States*, 9 How. 571, 13 L. ed. 262; *Benner v. Porter*, 9 How. 235, 13 L. ed. 119; *Washington & I. R.*

*Co. v. Coeur D'Alene R. & N. Co.*, 60 Fed. 981, 9 C. C. A. 303. **Fla.**—*Inerarity v. Curtis*, 4 Fla. 175. **Okla.** *Scott v. Vulcan Iron Wks. Co.*, 31 Okla. 334, 122 Pac. 186.

16. Fed. Jud. Code §64; 36 U. S. St. at L. 1104; U. S. Comp. St., 1916, §1046. See the following: **U. S.**—*Washington & I. R. Co. v. Coeur D'Alene R. & N. Co.*, 160 U. S. 77, 16 Sup. Ct. 231, 40 L. ed. 355; *St. Louis & S. F. R. Co. v. Cundieff*, 171 Fed. 319, 96 C. C. A. 211. **Colo.**—*Wilson v. People*, 3 Colo. 325. **Mich.**—*Scott v. Detroit Y. M. S. Lessee*, 1 Doug. 119. **Minn.**—*Irvine v. Marshall*, 3 Minn. 72. **Mont.**—*In re Dewar's Estate*, 10 Mont. 426, 25 Pac. 1026. **Nev.**—*Hamilton v. Kneeland*, 1 Nev. 40. **N. D.**—*Braithwaite v. Jordan*, 5 N. D. 196, 65 N. W. 701, 31 L. R. A. 238. **Ohio.**—*Talliaferro v. Porter's Admr.*, Wright 610. **Okla.**—*Ex parte Brown*, 20 Okla. 505, 94 Pac. 556. **S. D.** *Smith v. Tosini*, 1 S. D. 632, 48 N. W. 299. **Tex.**—*Western Union Tel. Co. v. Parsley*, 57 Tex. Civ. App. 8, 121 S. W. 226.

[a] **The enabling acts** generally provide for the disposition of pending cases not within the provisions of the federal statute. *Inerarity v. Curtis*, 4 Fla. 175. See also **U. S.**—*Ariz. & N. M. R. Co. v. Clark*, 235 U. S. 669, 35 Sup. Ct. 210, 59 L. ed. 415, L. R. A. 1915C, 834; *Pickett v. United States*, 216 U. S. 456, 30 Sup. Ct. 265, 54 L. ed. 566; *United States v. Alamogordo Lumb. Co.*, 202 Fed. 700, 121 C. C. A. 162; *Phillips v. United States*, 201 Fed. 259, 120 C. C. A. 149; *Bluebird Min. Co. v. Murray*, 45 Fed. 388. **Ariz.** *La Porte v. State*, 14 Ariz. 530, 132 Pac. 563. **Fla.**—*Carter v. Bennett*, 4 Fla. 283. **Nev.**—*Trench v. Strong*, 4 Nev. 87. **N. D.**—*Miller v. Sunde*, 1 N. D. 1, 44 N. W. 301. **Okla.**—*Higgins*



versa.<sup>17</sup> Thus a case taken to an intermediate appellate court may be transferred to the supreme court,<sup>18</sup> where the former court is without jurisdiction,<sup>19</sup> or where there is a disparity between the causes pending in the appellate and the supreme courts,<sup>20</sup> or where a ruling precedent is deemed erroneous.<sup>21</sup> The supreme court may where necessary transfer a case from itself to a lower appellate court.<sup>22</sup>

*v. Brown*, 20 Okla. 355, 94 Pac. 703. **Ore.**—*Strong v. Barnhart*, 5 Ore. 496. **S. D.**—*Dorne v. Richmond S. Min. Co.*, 1 S. D. 20, 44 N. W. 1021.

17. See the constitutions and statutes.

18. **Cal.**—*Rockridge Place Co. v. City Council of Oakland*, 172 Pac. 1110; *In re Wells*, 174 Cal. 467, 163 Pac. 657; *Keech v. Joplin*, 157 Cal. 1, 106 Pac. 222. **Ga.**—*Albritton v. Tygart*, 134 Ga. 485, 68 S. E. 79. **Ill.**—*People ex rel. Durnall v. Eitel*, 231 Ill. 38, 83 N. E. 86. **Ind.**—*Cushman v. Hussey* (Ind.), 118 N. E. 816; *Pittsburgh C. C. & St. L. Ry. Co. v. Peck*, 43 Ind. App. 316, 87 N. E. 153 (see also 172 Ind. 562, 88 N. E. 939); *Caywood v. Supreme Lodge K. & L. H.*, 41 Ind. App. 639, 84 N. E. 782; *Lake Shore & M. S. R. Co. v. Johnson*, 42 Ind. App. 687, 84 N. E. 1104. **Ky.**—*Stone v. Cromie*, 87 Ky. 173, 7 S. W. 920. **La.**—*State ex rel. Guillot v. Central B. & T. Co.*, 143 La. 1053, 79 So. 857; *Landry v. Gonzales*, 142 La. 577, 77 So. 287; *Nat. City Bank of Chicago v. Barringer*, 139 La. 630, 71 So. 894. **Mo.**—*Walker v. Ozark, etc. Co.* (Mo. App.), 179 S. W. 948.

[a] **Cross-appeals to different courts**, as to supreme and appellate, should be united in one court by transfer of the appeal in the lower appellate court to the court of last resort. *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 61 Mo. App. 448; *Reed v. Painter*, 58 Mo. App. 661.

[b] **Where a sufficient number of judges do not concur in the result**, the case may be transferred to the highest court. *Lake Shore & M. S. R. Co. v. Johnson*, 42 Ind. App. 687, 84 N. E. 1104.

19. *People ex rel. Durnall v. Eitel*, 231 Ill. 38, 83 N. E. 86.

[a] **Where a case is erroneously appealed to an inferior appellate court** having no jurisdiction to determine the cause, but which nevertheless renders a decision, from which an appeal is taken to the supreme appellate court, such court may order the judg-

ment of the appellate court avoided, declare the case transferred to itself, and proceed to pass upon it as if it had reached such court in the regular and usual way. *State ex rel. Guillot v. Central B. & T. Co.*, 143 La. 1053, 79 So. 857.

[b] **Jurisdiction of the Appellate Court Is Doubtful.**—*Heman v. Wade*, 63 Mo. App. 363; *Miller Grain & Elev. Co. v. Union Pac. Ry. Co.*, 61 Mo. App. 295; *Gartside v. Gartside*, 42 Mo. App. 513.

[c] **Constitutionality of a statute involved.** **Cal.**—*Keech v. Joplin*, 157 Cal. 1, 106 Pac. 222. **Colo.**—*Chicago, R. I. & P. R. Co. v. Rhodes*, 21 Colo. App. 229, 121 Pac. 769. **Ind.**—*Pittsburgh C. C. & St. L. R. Co. v. Peck*, 172 Ind. 562, 88 N. E. 939; *Board of Comrs. of Clay County v. Knight* (Ind. App.), 84 N. E. 1104. **La.**—*State ex rel. Guillot v. Central B. & T. Co.*, 143 La. 1053, 79 So. 857; *Landry v. Gonzales*, 142 La. 577, 77 So. 287.

20. *Cushman v. Hussey* (Ind.), 118 N. E. 816.

21. *City Nat. Bank v. Goshen Woolen Mills Co.*, 35 Ind. App. 562, 69 N. E. 206; *Caywood v. Supreme Lodge K. & L. H.*, 41 Ind. App. 639, 84 N. E. 782. See also *Pittsburgh C. C. & St. L. R. Co. v. Peck*, 172 Ind. 562, 88 N. E. 939.

22. **Cal.**—*Bottle Min. & M. Co. v. Kern*, 154 Cal. 96, 97 Pac. 25. **Colo.**—*Chicago, R. I. & P. R. Co. v. Rhodes*, 21 Colo. App. 229, 121 Pac. 769. **Ga.**—*Bolton v. Newnan*, 22 Ga. App. 15, 95 S. E. 472; *Smith v. Downing Co.*, 21 Ga. App. 741, 95 S. E. 19. **Ill.**—*Strom v. Postal Tel.-Cable Co.*, 271 Ill. 544, 111 N. E. 555; *Porter v. Armour*, 241 Ill. 145, 89 N. E. 356. **Ind.**—*Pittsburgh C. C. & St. L. R. Co. v. Peck*, 172 Ind. 562, 88 N. E. 939. **Pa.**—*In re Shoemaker*, 175 Pa. 159, 34 Atl. 627.

[a] **Transfer or Dismissal.**—Under a statute permitting the transfer of a cause from a supreme to an appellate court, in the event of the former being without jurisdiction, such court may

(II.) **Between Intermediate Appellate Courts.** — Unless expressly authorized to do so one appellate court cannot transfer a cause pending before it to another appellate court.<sup>23</sup> The supreme court of the state is sometimes given power to equalize the dockets of courts of civil appeals by ordering the transfer of cases from those courts of civil appeals having a greater amount of business upon their dockets to courts of civil appeals having a less amount.<sup>24</sup>

b. *In Trial Courts.* — (I.) **From One Department to Another.** — Where a particular trial court is divided into two or more departments, the statutes or rules of practice usually make provision for the transfer of causes from one of such departments to another.<sup>25</sup> Transfer of causes from equity to law and from law to equity, is treated in a subsequent section.<sup>26</sup>

(II.) **From One Place of Holding Court to Another** — Where the statute authorizes sessions of the court to be held at different places within the county, it may also provide for the transfer of causes from one place of holding court to another.<sup>27</sup>

(III.) **From One Court to Another.** Transfers of causes from one trial court to another are of frequent occurrence and are effected in the manner and under the circumstances designated in the statutes. The facts and conditions may, in the particular jurisdiction, justify a transfer from one municipal court to another,<sup>28</sup> from a superior to a city

either transfer the cause or dismiss the appeal. *Landry v. Gonzales*, 142 La. 577, 77 So. 287.

[b] **Case Erroneously Appealed Directly to Supreme Court.**—When the only ground for a direct appeal to the supreme appellate court is the constitutionality of a statute, and the statute in question has been repeatedly upheld by such court, it may order the case transferred to the lower court. *Strom v. Postal Tel.-Cable Co.*, 271 Ill. 544, 111 N. E. 555.

23. *State ex rel. St. Louis Dressed Beef & Provision Co. v. Nixon*, 232 Mo. 496, 134 S. W. 538.

[a] **No Transfer When Jurisdiction Exclusive.**—A statute, which contravenes a constitutional provision giving courts of appeal exclusive jurisdiction of appeals arising within their respective territorial limits, by authorizing a transfer of appeals from one to another, is void. *State ex rel. St. Louis etc. Co. v. Nixon*, 232 Mo. 496, 134 S. W. 538.

24. *In re Transfer of Causes*, 103 Tex. 127, 124 S. W. 622. See *Keator v. Whittaker* (Tex. Civ. App.), 140 S. W. 120.

25. *In re Los Angeles Trust Co.*, 158

Cal. 603, 112 Pac. 56; *James v. St. Charles Hotel Co.*, 142 La. 464, 77 So. 117.

[a] **In the civil district court a cause may be transferred from one department to another in case of vacancy in the office, recusation, absence, or disability of a judge to whom the case has been allotted or assigned.** *James v. St. Charles Hotel Co.*, 142 La. 464, 77 So. 117.

[b] **A transfer to another department instead of to another county, because of a judge's disqualification, is proper in counties where there is more than one judge and the code provision relating to a change to another county, is applicable only when all the judges of the county are disqualified.** *In re Los Angeles Trust Co.*, 158 Cal. 603, 112 Pac. 56.

26. See *infra*, III, A, 3.

27. *Rauh v. Morris*, 40 Okla. 288, 137 Pac. 1174, to a place of trial of county court nearer defendant's residence.

28. *Bunke v. New York Tel. Co.*, 110 App. Div. 241, 97 N. Y. Supp. 66; *Leverson v. Zimmerman*, 31 Misc. 642, 64 N. Y. Supp. 723.

court,<sup>29</sup> or to a county or district court of concurrent jurisdiction;<sup>30</sup> from a district to a county court;<sup>31</sup> from a county to circuit<sup>32</sup> or superior court;<sup>33</sup> or from a justice's court to a county court.<sup>34</sup>

**3. From Law to Equity and Vice Versa.**—a. *How Made.*—A transfer of a cause from law to equity and from equity to law is generally merely a docket transfer, but a regular transfer from one court to another results when the courts of equity and law are entirely separate tribunals,<sup>35</sup> or when the receiving court exercises a superior equity jurisdiction.<sup>36</sup>

In the federal courts if an action at law should have been brought in equity, the objection may be obviated by amending the pleadings to conform to the proper practice at any stage of the cause.<sup>37</sup>

b. *Necessity and Grounds for Transfer.*—(I.) *From Law to Equity.* A cause pending at law should be transferred to equity when it is of

29. *Noble v. Burney*, 116 Ga. 626, 42 S. E. 1009.

30. *In re Nichol's Will* (Okla.), 166 Pac. 1087.

31. *Jackson v. Lancaster* (Tex. Civ. App.), 199 S. W. 1179; *Armstrong v. Emmet*, 16 Tex. Civ. App. 242, 41 S. W. 87.

[a] Want of jurisdiction in the circuit court will justify the transfer. *Jackson v. Lancaster* (Tex. Civ. App.), 199 S. W. 1179.

32. *Spengler v. Davy*, 15 Gratt. (56 Va.) 381. See *Jelenko & Bro. v. Coleman*, 22 W. Va. 221.

[a] A proceeding pending for more than a year in a county or corporation court without being determined, may be ordered removed to the circuit court. *Spengler v. Davy*, 15 Gratt. (56 Va.) 381. See also *Jelenko & Bro. v. Coleman*, 22 W. Va. 221.

33. Fla.—*Kean v. Murray*, 77 So. 855. Mich.—*Wood v. Adsit*, 105 Mich. 578, 63 N. W. 419. Okla.—*Yarborough v. Richardson*, 38 Okla. 11, 131 Pac. 680.

34. *Keen v. Murray* (Fla.), 77 So. 855.

Transfer from justice court to court of record, see 18 STANDARD PROC. 167.

[a] *Place of Trial After Transfer.* Where a cause is transferred to a county judge he is not required to try it in the district of the justice but may try it at the county seat or place where cases are generally tried by him. *Keen v. Murray* (Fla.), 77 So. 855.

35. See the cases cited throughout this section.

36. *Gurley v. Bushnell* (Ala.), 76 So. 324; *Ashurst v. Ashurst*, 175 Ala. 661, 57 So. 442; *Townsend v. Miles*, 167 Ala. 514, 52 So. 651.

[a] Probate Court to Court Exercising Equity Jurisdiction.—*Bresler v. Bloom*, 147 Ala. 504, 41 So. 1010.

[b] Where the construction of a will is involved in the settlement and administration of an estate, the cause may be transferred from the probate court to a court of equity. *Ashurst v. Ashurst*, 175 Ala. 667, 57 So. 442.

[c] Where a bill showing necessity for a discovery is filed in a probate proceeding, it is sufficient ground for a transfer to equity. *Townsend v. Miles*, 167 Ala. 514, 52 So. 651.

[d] *When Special Equity Not Necessary.*—Anyone entitled to share in the distribution of an estate, at any time before final settlement in the probate court, may have the cause transferred to a court of equity without assigning any special equity therefor. See Ala. Gen. Acts, 1915, p. 738; *Bresler v. Bloom*, 147 Ala. 504, 41 So. 1010; *Greenhood v. Greenhood*, 143 Ala. 440, 39 So. 299; *Baker v. Mitchell*, 109 Ala. 490, 20 So. 40; *Ligon v. Ligon*, 105 Ala. 460, 17 So. 89.

37. U. S. Jud. Code §274a; Act Mar. 3, 1915, c. 90; 38 U. S. St. at L. 956; U. S. Comp. St., 1916, §1211a.

[a] This statute has been construed to mean (1) that the pleading may be amended, not that the cause may be transferred. *Waldo v. Wilson*, 231 Fed. 654, 145 C. C. A. 540. (2) The question is discussed in the briefs in *In re Simons*, 247 U. S. 231, 38 Sup. St. 497, 62 L. ed. 1094, but is not mentioned



such a nature as to be properly cognizable in equity,<sup>38</sup> as, for example, where it involves the giving of relief not obtainable at law,<sup>39</sup> or the settlement of complicated accounts.<sup>40</sup> Matter set up by way of defense may authorize a transfer of the cause to equity.<sup>41</sup> A transfer should be refused when the case is not of equitable cognizance;<sup>42</sup> or is properly brought at law,<sup>43</sup> or when the only ground for the application is the possibility of an equitable issue arising upon a determination of a legal question,<sup>44</sup> and the court, in its discretion, may refuse a transfer, when

in the court's opinion, the decision deciding merely the nature of the action and ordering a remand, not touching upon the power of the court to transfer from law to equity in a proper case. But that the right to transfer an equity case begun as an action at law existed prior to the enactment of this statute seems to be assumed without discussion in *Illinois Surety Co. v. United States*, 212 Fed. 136, 129 U. S. A. 584.

38. *Ark.*—*American Surety Co. v. Vann*, 135 *Ark.* 291, 205 S. W. 646; *St. Louis, I. M. & S. R. Co. v. Ft. Smith etc. R. Co.*, 104 *Ark.* 344, 148 S. W. 531; *Little Rock & Ft. S. R. Co. v. Perry*, 37 *Ark.* 164. *Ia.*—*Gardner v. Kerlin*, 169 N. W. 177; *Iowa Falls St. Bk. v. Brown*, 142 *Iowa* 190, 119 N. W. 81, 134 *Am. St. Rep.* 412. *Ky.*—*Wrather v. Stacy*, 26 *Ky. L. Rep.* 683, 82 S. W. 420. *Me.*—*Toothaker v. Pennell*, 106 *Me.* 188, 76 *Atl.* 488. *Miss.*—*Robertson v. Goodman Dry Gds. Co.*, 115 *Miss.* 210, 76 *So.* 149.

Waiver of right to jury trial by transfer to equity, see 16 STANDARD PROC. 931.

[a] **Constitutionality.**—A statute authorizing the transfer of a cause cognizable in equity but commenced at law is not unconstitutional on the ground of denial of a right of trial by jury, since no such right exists as to an equitable cause. *Wilson v. Carrollton T. W. Co.*, 182 *Ky.* 433, 206 S. W. 618.

[b] **Though an action is properly brought on the law side of the court** (1) and transferred to a court of equity, it is not improper to hear the case in equity and determine it in accordance with the principles of law involved (*Ogden v. Ogden*, 60 *Ark.* 70, 28 S. W. 796, 46 *Am. St. Rep.* 151), providing (2) the transfer is made with the consent of the parties or without objection. *Ark.*—*North American Trust Co.*

*v. Chappell*, 70 *Ark.* 507, 69 S. W. 546; *Roberts v. Jacks*, 31 *Ark.* 597, 25 *Am. Rep.* 584. *Ia.*—*Cole v. Cole*, 139 *Iowa* 609, 117 N. W. 988; *Beroud v. Lyons*, 85 *Iowa* 482, 52 N. W. 486. *Ky.* *Rubel v. Avritt*, 20 *Ky. L. Rep.* 764, 47 S. W. 460.

[c] **In a condemnation proceeding**, brought at law under the statute relating to eminent domain, where only the amount of damages can be determined, if the issue as to the right to exercise the power of eminent domain be involved, the cause must be transferred to equity for a determination of that issue. *St. Louis, I. M. & S. R. Co. v. Ft. Smith etc. R. Co.*, 104 *Ark.* 344, 148 S. W. 531.

39. *Lockridge v. Johnson*, 108 *Ark.* 147, 157 S. W. 405.

40. *Wilson v. Carrollton T. W. Co.*, 182 *Ky.* 433, 206 S. W. 618.

41. *Ark.*—*American Soda F. Co. v. Futrall*, 73 *Ark.* 464, 84 S. W. 505. *Ia.* *Elk Point, Ind. Consol. S. Dist. v. Bennett Bank*, 168 N. W. 292. *Ky.*—*Burnett v. Frazier*, 19 *Ky. L. Rep.* 299, 40 S. W. 697; *Kendall v. Webber*, 13 *Ky. Op.* 206.

[a] **The mere assertion of an equitable defense without setting up affirmative grounds for equitable interference will not justify a transfer.** *Richards v. Howell*, 129 *Ark.* 390, 196 S. W. 483.

[b] **That the truth of a plea setting up an equitable defense must be established to entitle a party to a transfer to the equity side of the court**, see *Blemaster v. Rocky*, 200 *Ill. App.* 320.

42. *Ark.*—*Jones v. Lewis*, 89 *Ark.* 368, 117 S. W. 561. *Ia.*—*Darst v. Foote*, 166 N. W. 685; *Faville v. Lloyd*, 140 *Iowa* 501, 118 N. W. 871. *Ky.*—*John King Co. v. Louisville etc. R. Co.*, 131 *Ky.* 46, 114 S. W. 308.

43. *Louisville & N. R. Co. v. Carter*, 23 *Ky. L. Rep.* 2017, 66 S. W. 508.

44. *Blodgett v. Miller*, 33 *Ky. L. Rep.* 682, 110 S. W. 864.

a court of law has jurisdiction equally with equity of the issues raised, and the rights of the parties can be adequately determined at law;<sup>45</sup> or where the application for transfer comes too late.<sup>46</sup>

(II.) **From Equity to Law.**—If a suit be commenced in equity, either in a state or federal court, which should have been brought as an action at law, the cause should be transferred forthwith to the law side of the court.<sup>47</sup>

Such a transfer is proper when equity has no jurisdiction,<sup>48</sup> or when

45. See Ark.—*Harris v. Rimmel*, 83 Ark. 1, 102 S. W. 716. Ind.—*Gwinn v. Hobbs* (Ind. App.), 118 N. E. 155. Ia. *Frick v. Kabaker*, 116 Iowa 494, 90 N. W. 498; *Richards v. Monroe*, 85 Iowa 359, 52 N. W. 339, 39 Am. St. Rep. 301.

[a] **When Trial at Law Mandatory.** When an equitable issue may be properly tried in a law court, for example, duress pleaded in reply to a defense of release in an action for breach of contract, it is reversible error to deny a party the right to try the issue in such court. *Sixty-First St. Bldg. Co. v. Eltoma Rlty. Co.*, 172 N. Y. Supp. 260.

46. *Toothaker v. Pennell*, 106 Me. 188, 76 Atl. 488.

[a] **Transfer after verdict may**, in the court's discretion, be denied. *Toothaker v. Pennell*, 106 Me. 188, 76 Atl. 488.

47. U. S.—*Parkerson v. Borst*, 251 Fed. 242, 163 C. C. A. 398; *Fay v. Hill*, 249 Fed. 415, 161 C. C. A. 389; *John A. Roebling's Sons Co. v. Kinnicutt*, 248 Fed. 596; *Goldschmidt Thermit Co. v. Primos Chem. Co.*, 225 Fed. 769; *Triumph Elec. Co. v. Thullen*, 225 Fed. 293, 297; *Destructor Co. v. Atlanta*, 219 Fed. 996; Fed. Eq. Rule 22. Ark. *Chandler v. Lazarus*, 55 Ark. 312, 18 S. W. 181. Ia.—*In re Estate of Douglas*, 140 Iowa 603, 117 N. W. 982; *Robinson v. Luther*, 134 Iowa 463, 109 N. W. 775. See *Harvey v. Kirton*, 182 Iowa 973, 164 N. W. 888. Ky.—*Kentucky Mut. S. F. Co. v. Turner*, 89 Ky. 665, 13 S. W. 104. Mass.—*Reynolds v. Mo., K. & T. R. Co.*, 228 Mass. 584, 117 N. E. 913. N. Y.—*Ransome C. Machine Co. v. McDonald*, 207 N. Y. 383, 101 N. E. 175; *Gilbert v. Bunnell*, 92 App. Div. 284, 86 N. Y. Supp. 1123. Pa. *Kramer v. Slattery*, 260 Pa. 234, 103 Atl. 610; *Nanheim v. Smith*, 253 Pa. 380, 98 Atl. 602.

[a] **Where there is a misjoinder of parties**, and a transfer to the law side of the court would oblige the court to transform the cause into several sep-

arate actions, the bill may properly be dismissed. *Clinton Min. & Mineral Co. v. Cochran*, 247 Fed. 449, 159 C. C. A. 503.

[b] "The spirit and intendment is that the question by what tribunal the case should be decided is to be determined when the question can be decided in the full light of all the information obtainable. Plaintiff is to have accorded to it, its right to equitable relief in form and method of procedure, and the defendant is to be given full protection in the assertion of its right in a proper case to have it submitted to a jury. The question is one to be decided on its merits with no more regard to mere form of procedure than is required, and, whenever it appears that a case brought in equity should have been brought at law, full power is given to make the transfer." *Goldschmidt Thermit Co. v. Primos Chem. Co.*, 225 Fed. 769, 775.

[c] **When by amendment a suit in equity is converted into an action at law**, a transfer should be made. *Harrod v. Armstrong*, 177 Ky. 317, 197 S. W. 816.

[d] **Where the pleadings raise no issue to be tried**, the court will not transfer the cause. *Keystone Commercial Co. v. Maysville*, 154 Ky. 239, 157 S. W. 25; *Green v. Knights of Joseph Bldg. & L. Assn.*, 25 Pa. Dist. 800.

48. *Parkerson v. Borst*, 251 Fed. 242, 163 C. C. A. 398; *Linden Inv. Co. v. Honstain Bros. Co.*, 221 Fed. 178, 136 C. C. A. 121.

[a] **If an inspection of the pleading shows that the cause is equitable** (1) a transfer should be refused. *Dickinson v. Stevenson*, 142 Iowa 567, 120 N. W. 324; *Gigray v. Mumper*, 141 Iowa 396, 118 N. W. 393. (2) But in such case a transfer is not reversible error if the rights of the parties may be and are properly determinable at law. See

an issue of fact is raised which gives rise to the right of a trial by jury and the same is not waived.<sup>49</sup> Where the suit is essentially equitable it will not be transferred merely because an incidental issue is of a legal nature which can be determined in equity,<sup>50</sup> and when a party has no rights at law which equity cannot also give him, a transfer is within the court's discretion.<sup>51</sup>

**B. PROCEEDINGS TO EFFECT TRANSFER.—1. In General.**—The proceeding to transfer a cause, whether the transfer desired be from court to court, or from one department to another, or merely on the docket, should be in compliance with the statute,<sup>52</sup> or rules of court,<sup>53</sup> on which it is based.

**2. Jurisdiction to Order.**—Which court may direct a transfer is always designated by the rule or statute authorizing a transfer.<sup>54</sup> As a general rule the power rests in the court in which the cause is pending,<sup>55</sup> but in certain cases the transfer may be ordered by another court.<sup>56</sup>

**3. At Whose Instance.**—**Court on Its Own Motion.**—When the right to have a cause transferred is not limited to the parties, the court may act of its own motion.<sup>57</sup>

*Irwin v. Deming*, 142 Iowa 299, 120 N. W. 645.

[b] **Adequate Legal Remedy.**—When there is a complete and adequate remedy at law, the proper procedure is to transfer the case to a law court or the law side of the docket. *Parkerson v. Borst*, 251 Fed. 242, 163 C. C. A. 398; *Fay v. Hill*, 249 Fed. 415, 161 C. C. A. 389.

**49. Ky.**—*Taylor v. Townsend*, 177 Ky. 804, 198 S. W. 221. **N. Y.**—*Geo. A. Ohl & Co. v. Standard Steel Sections*, 179 App. Div. 637, 167 N. Y. Supp. 184. **N. C.**—*Crews v. Crews*, 175 N. C. 168, 95 S. E. 149.

[a] **When local procedure makes such a course necessary**, an equitable action, within the court's discretion, may be transferred to the law docket whenever a jury trial of a purely equitable issue is desired. *Early v. Early*, 182 Ky. 757, 207 S. W. 466.

**50. Wright v. Barnard, 233 Fed. 329. See also *Equity Rule 23*, and *Maurel v. Smith*, 220 Fed. 195.**

**51. Saunders v. Wells, 135 Iowa 11, 112 N. W. 205.**

**52. Ala.**—*Ex parte Burton*, 100 Ala. 391, 14 So. 651. **La.**—*Krantz v. Noonan*, 4 Orleans App. (La.) 264. **Me.**—*Powers v. Mitchell*, 75 Me. 364. **N. J.**—*Collins v. Keller*, 58 N. J. L. 429, 34 Atl. 753. **Ore.**—*Connor v. Clark*, 30

*Ore.* 382, 48 Pac. 364. **Wis.**—*Brown v. Streng*, 32 Wis. 59.

**53. Finlen v. Heinze, 32 Mont. 354, 80 Pac. 918.**

**54.** See the statutes.

**55. In re Russell's Est., 148 Cal. 768, 84 Pac. 155; *Woodville v. Jenks*, 94 Miss. 210, 48 So. 620. See also *Strom v. Postal Tel.-Cable Co.*, 271 Ill. 544, 111 N. E. 555; *Gwinn v. Hobbs* (Ind. App.), 118 N. E. 155.**

**56.** See *infra*, this section.

[a] **The supreme appellate court** may sometimes (1) direct the transfer of cases from one inferior appellate court to another (*In re Transfer of Causes*, 103 Tex. 127, 124 S. W. 622), or (2) to itself (*Rockridge Place Co. v. City Council of Oakland* [Cal.], 172 Pac. 1110), or (3) to a circuit court. *State v. Gibbes*, 109 S. C. 135, 95 S. E. 346.

[b] **Equity** may in some jurisdictions direct a cause transferred from a probate court to itself. *Gurley v. Bushnell* (Ala.), 76 So. 324; *Ashurst v. Ashurst*, 175 Ala. 667, 57 So. 442.

**57. Cal.**—*Rockridge Place Co. v. City Council of Oakland*, 172 Pac. 1110. **Ill.**—*Strom v. Postal Tel.-Cable Co.*, 271 Ill. 544, 111 N. E. 555. **Ind.**—*Pittsburg, C. C. & St. L. R. Co. v. Peck*, 172 Ind. 562, 88 N. E. 939. **Ky.**—*Wilson v. Carrollton T. W. Co.*, 182 Ky. 433, 206 S. W. 618.



**Parties.** — The parties themselves may, in a proper case, stipulate or agree to have the cause transferred,<sup>58</sup> and either party has the right to make application for a transfer when the grounds designated by the statute are general.<sup>59</sup> But in particular cases, where the statute specifies a cause for removal on which the defendant may act, the right belongs to the defendant,<sup>60</sup> and where there are several defendants all must join in the application.<sup>61</sup>

**Third Persons.** — In some cases, one who is interested but not a party to the original proceeding, may apply to have the cause transferred.<sup>62</sup>

**4. Application.**<sup>63</sup> — a. *Necessity for.* — Unless the cause is trans-

[a] **Court May Act on Its Discretion.**—*Harmon v. Thompson*, 119 Ky. 528, 84 S. W. 569.

[b] **Docket Transfer.**—(1) On choice of the wrong forum. **Ark.**—*Catchings v. Harcrow*, 49 Ark. 20, 3 S. W. 884. **Ky.**—*Kentucky Mut. S. F. Co. v. Turner*, 89 Ky. 665, 13 S. W. 104. **Minn.**—*Shipley v. Beldue*, 93 Minn. 414, 101 N. W. 952. (2) On a plea of an equitable defense. **Ark.**—*Hammond v. Harper*, 39 Ark. 248. **Ia.**—*Johnston v. Robuck*, 104 Iowa 523, 73 N. W. 1062. **Ky.**—*Peak v. Grover's Exrs.*, 14 Ky. L. Rep. 206. (3) To try a particular issue. **Ia.**—*Boggs v. Douglass*, 105 Iowa 344, 75 N. W. 185. **Ky.**—*Cumberland Tel. & Tel. Co. v. Cartwright Creek Tel. Co.*, 128 Ky. 395, 108 S. W. 875. **N. Y.**—*West End Trust & S. D. Co. v. Johnson*, 29 App. Div. 629, 51 N. Y. Supp. 1080.

58. Fed. Jud. Code §58, 36 U. S. St. at L., §1103, U. S. Comp. St., 1916, §1040. See the following: **Ala.**—*Ex parte Rice*, 102 Ala. 671, 15 So. 450. **Cal.**—See *Keech v. Joplin*, 157 Cal. 1, 106 Pac. 222. **Conn.**—*Danbury Sav. Bank v. Downs*, 74 Conn. 87, 49 Atl. 913. **Mo.**—*Bosard v. Powell*, 79 Mo. App. 184.

[a] **Providing the court to which the transfer is sought to be made has jurisdiction of the subject matter of the action.** *Rodman v. Davis*, 53 N. C. 134.

59. See the following: **Ind.**—*Gwinn v. Hobbs* (Ind. App.), 118 N. E. 155. **Ia.**—*Elk Point, Ind. Consol. S. Dist. v. Bennett Bank*, 168 N. W. 292; *Darst v. Foote*, 166 N. W. 685. **Ky.**—*Wilson v. Carrollton T. W. Co.*, 182 Ky. 433, 206 S. W. 618; *Salyer v. Arnett*, 23 Ky. L. Rep. 321, 62 S. W. 1031. **Md.**—*Schaible v. Home Ins. Co.*, 105 Atl. 165. **Mass.**—*Reynolds v. Mo., K. & T. R. Co.*, 223

**Mass.** 584, 117 N. E. 913. **N. J.**—*Pritchard v. Howell*, 87 N. J. Eq. 252, 99 Atl. 845. **Tex.**—*Armstrong v. Emmet*, 16 Tex. Civ. App. 242, 41 S. W. 87.

[a] **Docket Transfer.**—Either party may act to transfer a cause from law to equity and vice versa. **Ark.**—*Little Rock & Ft. S. R. Co. v. Perry*, 37 Ark. 164; *Phelps v. Jackson*, 27 Ark. 585. **Ia.**—*Elk Point, etc., Dist. v. Bennett Bank*, 168 N. W. 292. See *Darst v. Foote*, 166 N. W. 685; *Gigray v. Mumper*, 141 Iowa 396, 118 N. W. 393. **Ky.**—*Kentucky Mut. S. F. Co. v. Turner*, 89 Ky. 665, 13 S. W. 104.

60. *McLain v. Fowler*, 92 Me. 269, 42 Atl. 411. See *Rauh v. Morris*, 40 Okla. 288, 137 Pac. 1174.

[a] **Defendant's Convenience.** Where sessions of a county court are held at different places in a county, any action pending in such court may be transferred on the defendant's application to the place nearest his residence. *Rauh v. Morris*, 40 Okla. 288, 137 Pac. 1174.

61. **Pa.**—*Puritan Coal Min. Co. v. Pa. R. Co.*, 237 Pa. 420, 85 Atl. 426, Ann. Cas. 1914B, 37. **S. C.**—*Hardaway v. Southern R. Co.*, 90 S. C. 475, 73 S. E. 1020, Ann. Cas. 1913D, 266. **Tex.**—*Pecos & N. T. Ry. Co. v. Porter* (Tex. Civ. App.), 156 S. W. 267. **Wash.**—*Chas. H. Lilly Co. v. Northern Pac. R. Co.*, 64 Wash. 589, 117 Pac. 401. **W. Va.**—*Robinson v. Baltimore & O. R. Co.*, 64 W. Va. 406, 63 S. E. 323.

62. *Rockridge Place Co. v. City Council of Oakland* (Cal.), 172 Pac. 1110.

63. Who may make application, see *supra*, III, B, 3.

Effect of application, see *infra*, III, C.

ferred by the court on its own motion,<sup>64</sup> the party seeking a transfer must make proper application therefor.<sup>65</sup>

b. *Time To Make.*—Application for transfer must be made within the time prescribed by statutory provisions,<sup>66</sup> and must be seasonable, i. e., at some stage of the case when the ground relied upon is applicable,<sup>67</sup> a rule which would generally require the application to be made as soon as the pleadings have been filed and before trial of the case.<sup>68</sup> The court may properly deny the application for transfer when it is not made in time,<sup>69</sup> unless the moving party can show that a delay was not caused by his fault, or was in fact merely an apparent delay, having been made as soon as possible under circumstances of the

64. *Bowles v. Troll*, 172 Mo. App. 102, 154 S. W. 871.

65. *Fischer v. Brooklyn Hts. R. Co.*, 84 N. Y. Supp. 254.

66. See *California Nat. Bank v. Los Angeles Iron etc. Co.*, 2 Cal. App. 659, 84 Pac. 466, 468.

[a] Within thirty days of the return day or ten days after an issue of fact is joined in a case remanded for a new trial. *Rowell v. Ross*, 91 Conn. 702, 101 Atl. 333.

67. U. S.—*Parkerson v. Borst*, 251 Fed. 242, 163 C. C. A. 398. Me.—*Toothaker v. Pennell*, 106 Me. 188, 76 Atl. 488. Md.—*Schaible v. Home Ins. Co.*, 105 Atl. 165. S. C.—*Taylor v. Williamson*, McMul. Eq. 348.

68. *Parkerson v. Borst*, 251 Fed. 242, 163 C. C. A. 398.

[a] Upon Filing of the Answer. *Moore v. Union*, 28 Iowa 425; *McHenry v. Sypher*, 12 Iowa 585; *Koehenrath v. Christman*, 180 Ky. 799, 203 S. W. 738; *Salzer v. Arnett*, 23 Ky. L. Rep. 321, 62 S. W. 1031. See also *Schaible v. Home Ins. Co. (Md.)*, 105 Atl. 165.

[b] When Issue Is Joined.—*Universal Cutter Co. v. Emden*, 107 N. Y. Supp. 669; *Fischer v. Brooklyn Hts. R. Co.*, 84 N. Y. Supp. 254.

[c] After a continuance is applied for but before it is granted. *Leverson v. Zimmerman*, 31 Misc. 642, 64 N. Y. Supp. 723.

[d] An application to transfer from law to equity or vice versa should be made at the earliest possible moment, when the bill presents a subject-matter of which both courts of law and courts of equity may take jurisdiction. *Reynes v. Dupont*, 130 U. S. 354, 395, 9 Sup. Ct. 486, 32 L. ed. 934; *Parker-*

*son v. Borst*, 251 Fed. 242, 163 C. C. A. 398.

69. *Chenault v. Eastern Ky. Tim. & L. Co.*, 119 Ky. 170, 83 S. W. 552; *Manders' Committee v. Eastern State Hospital*, 27 Ky. L. Rep. 254, 84 S. W. 761; *Northern Cent. Ry. Co. v. Rutledge*, 41 Md. 372.

[a] After Setting Cause for Trial. *Groden v. Jacobson*, 129 App. Div. 508, 114 N. Y. Supp. 183; *Tubbs v. Embree*, 89 Hun 475, 35 N. Y. Supp. 320, 69 N. Y. St. 720.

[b] After Impaneling the Jury. *Gray Tie Co. v. Clark*, 30 Ky. L. Rep. 409, 98 S. W. 1000.

[c] After Trial Has Started. *Smith v. Stack*, 89 Ark. 143, 115 S. W. 1145; *Duis v. Fisher*, 23 Ky. L. Rep. 1425, 65 S. W. 337; *Com. v. Tate*, 17 Ky. L. Rep. 1045, 33 S. W. 405.

[d] After Verdict.—*Toothaker v. Pennell*, 106 Me. 188, 76 Atl. 488; *Jelenko & Bro. v. Coleman*, 22 W. Va. 221.

[e] After Argument On Appeal. *Smissaert v. Prudential Ins. Co.*, 27 Colo. 339, 61 Pac. 598.

[f] After Final Decision On Appeal.—*Hewlett v. Beede (Cal.)*, 83 Pac. 1089, 2 Cal. App. 561, 83 Pac. 1086; *Hess v. Gansz*, 90 Mo. App. 439.

[g] After One Trial of the Case. *Hartford Ins. Co. v. Haas*, 87 Ky. 531, 9 S. W. 720, 2 L. R. A. 64; *Jacob v. Thompson*, 80 App. Div. 526, 80 N. Y. Supp. 1028.

[h] After an amendment that eliminates the grounds on which the motion for a transfer is based. *Bunke v. New York Tel. Co.*, 110 App. Div. 241, 97 N. Y. Supp. 66, *e. g.*, reducing amount of demand to an amount within the court's limit.

case.<sup>70</sup> But when there is no real ground for equity retaining jurisdiction an application for a transfer to law may be made at any stage of the proceeding.<sup>71</sup>

c. *Form and Sufficiency.* — The application is usually made by motion or petition,<sup>72</sup> showing that the cause is one which may be transferred,<sup>73</sup> and also the grounds on which the removal is sought.<sup>74</sup>

5. *Notice of Application.* — Reasonable notice of the application for transfer is generally required to be given to the adverse party,<sup>75</sup> but under some statutes providing for a transfer when a case has been pending for a certain period of time the motion may be made and granted without notice.<sup>76</sup>

6. *Undertaking or Bond.* — Under some statutes a bond is required of the party moving for a transfer,<sup>77</sup> and such bond or undertaking may be executed before the order fixing its amount is made, the precise amount being fixed later by the court.<sup>78</sup>

7. *Order for Transfer.* — a. *In General.* — Except where a transfer is effected by operation of law,<sup>79</sup> an order of court authorizing the transfer is necessary.<sup>80</sup>

b. *Vacating or Setting Aside.* — After the jurisdiction of the court to which a case is transferred attaches, the order of transfer cannot be vacated and set aside by the court which made it,<sup>81</sup> but such order may

70. *Pegram v. New York Elec. R. Co.*, 14 N. Y. Supp. 769, 39 N. Y. St. 349. 27 Jones & S. 570.

71. *Parkerson v. Borst*, 251 Fed. 242, 163 C. C. A. 398; *Goldschmidt Thermit Co. v. Primos Chem. Co.*, 225 Fed. 769.

72. *Fay v. Hill*, 249 Fed. 415, 161 C. C. A. 389. See *Gardner v. Kerlin (Iowa)*, 169 N. W. 177.

[a] A petition to transfer a case to equity because an equitable defense has been pleaded is not a cross-bill or answer to such defense. *Peebles v. Bank of Pollard (Ala.)*, 78 So. 872.

73. *Hogsett v. Columbia etc. Co.*, 15 Pa. Super. 474.

[a] The nature of the action, should be set forth. *Peebles v. Bank of Pollard (Ala.)*, 78 So. 872.

74. *Wood v. Adsit*, 105 Mich. 378, 63 N. W. 419.

75. *Rauh v. Morris*, 40 Okla. 288, 137 Pac. 1174.

76. *Spengler v. Davy*, 15 Gratt. (56 Va.) 381.

77. *Bunke v. New York Tel. Co.*, 110 App. Div. 241, 97 N. Y. Supp. 66; *Meisen v. Rothfeld*, 89 App. Div. 447, 85 N. Y. Supp. 923; *Leverson v. Zim-*

*merman*, 31 Misc. 642, 64 N. Y. Supp. 723.

78. *Leverson v. Zimmerman*, 31 Misc. 642, 64 N. Y. Supp. 723.

[a] Particularly where it is for the largest amount mentioned in the statute. *Leverson v. Zimmerman*, 31 Misc. 642, 64 N. Y. Supp. 723.

79. *People v. Hoch*, 150 N. Y. 291, 44 N. E. 976.

80. *Keen v. Murray (Fla.)*, 77 So. 855; *Wilson v. Carrollton T. W. Co.*, 182 Ky. 433, 206 S. W. 618.

[a] In the absence of such order a transfer cannot be effected. Fed. Jud. Code §58, 36 U. S. St. at L. 1103, 1 U. S. Comp. St., 1916, §1040. See the following: *Ark.*—*Ayers v. Anderson-Tully Co.*, 89 Ark. 160, 116 S. W. 199. *Ga.* *Noble v. Burney*, 116 Ga. 626, 42 S. E. 1009. *R. I.*—*Vrooman v. Arnold*, 29 R. I. 478, 72 Atl. 561. *Tex.*—*Armstrong v. Emmet*, 16 Tex. Civ. App. 242, 41 S. W. 87.

[b] The nature of the disqualification, should be stated in an order transferring a cause because of the judge's disqualification. *Keen v. Murray (Fla.)*, 77 So. 855.

81. *McClaskey v. Barr*, 54 Fed. 781; *In re Nichols' Will (Okla.)*, 166 Pac. 1087.



be revoked by a court of general jurisdiction at any time as long as its jurisdiction attaches to the cause or issue transferred.<sup>82</sup>

**8. Certification of Record.**—All the papers and documents making up the file of the case, together with a certified transcript of the record pertaining thereto, under the seal of the court, when required by the statute authorizing the transfer, must be delivered to the clerk of the court to which the transfer is made.<sup>83</sup> The clerk of the court from which the transfer is ordered should act promptly in certifying the record,<sup>84</sup> but if he delays, his failure to act within a required time is merely an irregularity which cannot affect the jurisdiction of the court to which the transfer is made.<sup>85</sup>

**C. EFFECT OF APPLICATION AND TRANSFER.**—**1. Effect of Application.**—Under certain statutes the filing of an application for transfer of a case, with the required undertaking, arrests or halts the jurisdiction and the court has no power to act or make any order in the case until the undertaking is approved or disapproved and the motion disposed of.<sup>86</sup>

**2. Effect of Order of Transfer.**—The entry of the order of transfer operates to deprive the court making it of jurisdiction over the cause,<sup>87</sup> and to empower the court to which it is transferred to proceed with the case as if it had been originally instituted therein.<sup>88</sup> Where a transfer from equity to law is effected by an amendment of the plead-

82. *Pritchard v. Howell*, 87 N. J. Eq. 252, 99 Atl. 845.

83. Fed. Jud. Code §58; 26 U. S. St. at L. 1103; U. S. Comp. St., 1916, §1040.

[a] The petition is not necessarily a part of the record to be transferred. *Harreld v. Howard*, 80 Ky. 51.

84. *Wilbur v. Best*, 22 R. I. 550, 48 Atl. 824.

85. *Wilbur v. Best*, 22 R. I. 550, 48 Atl. 824.

86. *Meisen v. Rothfeld*, 89 App. Div. 447, 85 N. Y. Supp. 923; *Levenson v. Zimmerman*, 31 Misc. 642, 64 N. Y. Supp. 723; *Tuttle v. Galligan*, 23 Misc. 457, 51 N. Y. Supp. 359.

87. *Iowa Loan Co. v. Wilson*, 145 Iowa 381, 124 N. W. 201; *In re Nichols' Will* (Okla.), 166 Pac. 1087.

[a] Any attempted subsequent action by the first tribunal is coram non iudice. *Ala.—Ex parte City Bank & Trust Co.*, 76 So. 372. *Ga.—Adams v. Jervis*, 19 Ga. App. 627, 91 S. E. 1003. *Okla.—In re Nichols' Will*, 166 Pac. 1087. *Tex.—Franco-Tex. Land Co. v. Howe*, 3 Tex. Civ. App. 315, 22 S. W. 766.

88. *Ala.—Ex parte Rice*, 102 Ala. 671, 15 So. 450. *Cal.—Rockridge Place Co. v. City Council of Oakland*, 172

*Pac.* 1110; *Keech v. Joplin*, 157 Cal. 1, 106 Pac. 222. *Ga.—Denham v. Kirkpatrick*, 64 Ga. 71; *Smith v. Downing Co.*, 21 Ga. App. 741, 95 S. E. 19. *Ind.—Cushman v. Hussey*, 118 N. E. 816; *Pittsburg C. C. & St. L. R. Co. v. Peck*, 172 Ind. 562, 88 N. E. 939; *Kraus v. Lehman*, 170 Ind. 408, 83 N. E. 714. 84 N. E. 769. *Ia.—Iowa Loan Co. v. Wilson*, 145 Iowa 381, 124 N. W. 201. *Ky.—Schroll v. Speed*, 14 Bush 186. *Md.—Phelps v. Stewart*, 17 Md. 231. *Mass.—Browne v. Browne*, 215 Mass. 76, 102 N. E. 329. *Miss.—Foote-Patrick Co. v. Caladonia Ins. Co.*, 113 Miss. 419, 74 So. 292. *Mo.—State ex rel. Wilson v. Burney*, 193 Mo. App. 326, 186 S. W. 23. *Mont.—Gassert v. Bogk*, 7 Mont. 585, 19 Pac. 281, 1 L. R. A. 240. *Tenn.—Elkins v. Sams*, 3 Hayw. 44. *Tex.—Padgett v. Pratt & Son* (Tex. Civ. App.), 180 S. W. 317. *Wash.—State ex rel. Moore v. Superior Court*, 70 Wash. 362, 126 Pac. 926.

[a] A transfer to try a particular issue may limit the jurisdiction of the receiving court to a trial of such issue, e. g., title. *Reed v. Reed*, 113 Me. 522, 95 Atl. 211.

[b] Power to re-examine a ruling on a motion to dismiss made by the lower appellate court, exists in the

ings, the same court retaining jurisdiction of the case, the transfer does not make the action a new one,<sup>90</sup> and issues which have already been settled on the equity side of the court cannot be reopened as a matter of right when the case is transferred to the law side.<sup>90</sup>

In relation to the pleadings the case retains the same status after transfer as it had before,<sup>91</sup> unless amended,<sup>92</sup> or further pleas are permitted.<sup>93</sup> After a transfer from equity to law,<sup>94</sup> or from law to equity,<sup>95</sup> such amendments of the pleadings as are essential should be made.

**D. RETRANSFER. — 1. In General.** — The proper course where a cause has been erroneously transferred to another court is to order it retransferred,<sup>96</sup> but to warrant such retransfer error or irregularity in the first transfer must appear.<sup>97</sup> On a retransfer any decision or order of the court in such case made prior to the transfer is the law of the case.<sup>98</sup>

**2. Mandamus To Compel.**<sup>99</sup> — Mandamus will issue in a proper case to compel the court to retransfer a cause.<sup>1</sup>

higher court to which the case has been transferred. *Cushman v. Hussey* (Ind.), 118 N. E. 816.

89. *Reynolds v. Mo., K. & T. R. Co.*, 228 Mass. 584, 117 N. E. 913.

90. *Reynolds v. Mo., K. & T. R. Co.*, 228 Mass. 584, 117 N. E. 913.

91. *Halloran v. Coney Isl. J. Club*, 81 N. Y. Supp. 143.

92. *Vail v. Blumenthal*, 89 N. Y. Supp. 287.

93. *Wildes v. Draper*, 24 R. I. 262, 52 Atl. 1086.

94. See Fed. Equity Rule 22, 198 Fed. xxiv, 115 C. C. A. xxiv; *Parkerson v. Borst*, 251 Fed. 242, 163 C. C. A. 398.

95. *Peebles v. Bank of Pollard* (Ala.), 78 So. 872.

96. *Cal.*—*In re Davidson*, 167 Cal. 727, 141 Pac. 216; *Keech v. Joplin*, 157 Cal. 1, 106 Pac. 222. *Colo.*—*Curry v. Equitable Surety Co.*, 26 Colo. App. 472, 145 Pac. 53; *Colorado City v. Worley*, 23 Colo. App. 456, 130 Pac. 826. *Ind.*—*Pittsburg C. C. & St. L. R. Co. v. Peck*, 172 Ind. 19, 87 N. E. 644. *Ky.* *Salzer v. Arnett*, 23 Ky. L. Rep. 321, 62 S. W. 1031. *La.*—*Sanders Bapt. Ch. v. Dennis*, 125 La. 822, 51 So. 911. *Md.* *Berry v. Safe Deposit etc. Co.*, 93 Md. 240, 48 Atl. 502. *Mo.*—*Bowles v. Troll*, 262 Mo. 377, 171 S. W. 326; *State v. Cowan*, 152 Mo. App. 622, 133 S. W. 344; *Briscoe v. Longmire*, 148 Mo. App. 594, 128 S. W. 521; *Hilton v. St. Louis*, 63 Mo. App. 179. *N. Y.*—*Vollkommer v. Columbia P. B. Co.*, 105 App. Div. 57, 93 N. Y. Supp. 771. *W. Va.*—*Jel-*

*enko & Bro. v. Coleman*, 22 W. Va. 221.

[a] A cause erroneously transferred from law to equity to the prejudice of a party (1) should be retransferred (*In re Simons*, 247 U. S. 231, 38 Sup. Ct. 497, 62 L. ed. 1094), but (2) a retransfer to the law side will not be made when an equitable defense, which goes to the entire cause of action, is decided in favor of the defendant. *Wimmer v. Ficklin*, 14 Bush (Ky.) 193.

[b] If after transfer by the highest to a lower appellate court a question is raised which is outside the jurisdiction of such court to determine it may retransfer the cause to the higher court. See *Chicago, R. I. & P. R. Co. v. Rhodes*, 21 Colo. App. 229, 121 Pac. 769; *Pittsburg C. C. & St. L. R. Co. v. Peck*, 172 Ind. 562, 88 N. E. 939.

97. *Gulf, C. & S. F. Ry. Co. v. Smith*, 92 Tex. 12, 38 S. W. 750; *Hawes v. Foote*, 64 Tex. 22.

[a] The transcript need not show that the transfer was made according to law. *Boyden v. Williams*, 84 N. C. 608.

98. *Bradley v. Milwaukee M. Ins. Co.*, 90 Mo. App. 349.

[a] As to what extent prior orders of the trial court are the law of the case during the trial, see the title "Law of the Case."

99. See generally the title "Mandamus."

1. *In re Simons*, 247 U. S. 231, 38 Sup. Ct. 497, 62 L. ed. 1094.

**E. WAIVER.**—1. **Of the Right To Transfer.**—The right to have a cause transferred will be deemed waived where it is not asserted at all,<sup>2</sup> or is not asserted at the proper time.<sup>3</sup> Such waiver may be indicated by consent of the parties,<sup>4</sup> or by proceeding with the cause in a manner inconsistent with an intention to assert the right.<sup>5</sup>

2. **Of Defects or Irregularities.**—Mere errors and irregularities in transferring a cause are waived where no objection is made thereto,<sup>6</sup> or where there is unreasonable delay in raising the objection.<sup>7</sup> Thus a waiver arises by acquiescing in the receiving court's jurisdiction by

[a] Where a cause is wrongfully transferred from law to equity thus depriving the party to his constitutional right to a trial by jury, and no other adequate remedy exists, mandamus will lie to compel a retransfer. *In re Simons*, 247 U. S. 231, 38 Sup. Ct. 497, 62 L. ed. 1094.

2. *Brinn v. Rinderman*, 38 Misc. 792, 78 N. Y. Supp. 921.

[a] **Equity to Law.**—Where the court has jurisdiction to enter a final judgment, and no motion to transfer the cause is made, the right to have it transferred is waived. **U. S.**—*Fay v. Hill*, 249 Fed. 415, 161 C. C. A. 389. **Ia.**—*Illinois State Bank v. Boysen*, 168 N. W. 786; *Reiger v. Turley*, 151 Iowa 491, 131 N. W. 866; *Matthews v. Luers Drug Co.*, 110 Iowa 231, 81 N. W. 464. **Ky.**—*Kochenrath v. Christman*, 180 Ky. 799, 203 S. W. 738.

3. **Ala.**—*Ex parte Rhodes*, 43 Ala. 373. **Colo.**—*Smissaert v. Prudential Ins. Co.*, 27 Colo. 339, 61 Pac. 598. **Me.**—*Toothaker v. Pennell*, 106 Me. 188, 76 Atl. 488. **N. Y.**—*Halperin v. Schermerhorn*, 8 Misc. 336, 28 N. Y. Supp. 562, 59 N. Y. St. 240.

4. *See Geo. A. Ohl & Co. v. Standard Steel Sections*, 179 App. Div. 637, 167 N. Y. Supp. 184.

5. *Hinrichs v. Interurban St. R. Co.*, 43 Misc. 654, 88 N. Y. Supp. 193; *Enright v. Franklin Pub. Co.*, 24 Misc. 180, 52 N. Y. Supp. 704, 28 Civ. Proc. 32.

[a] **By Failing To Object to the Jurisdiction.**—*Blake v. Scott*, 92 Ark. 46, 121 S. W. 1054, 123 S. W. 1181; *Kindel v. Le Bert*, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234.

[b] **By Going to Trial.**—*Toothaker v. Pennell*, 106 Me. 188, 76 Atl. 488; *Geo. A. Ohl & Co. v. Standard Steel Sections*, 179 App. Div. 637, 167 N. Y. Supp. 184.

[c] **By Permitting a Default Judgment.**—*Kahn v. Mercantile T. M. Ins. Co.*, 228 Mo. 585, 128 S. W. 995, 137 Am. St. Rep. 665. *Compare Leverson v. Zimmerman*, 31 Misc. 642, 64 N. Y. Supp. 723.

6. **Ark.**—*Blake v. Scott*, 92 Ark. 46, 121 S. W. 1054, 123 S. W. 1181; *Cogswell v. McKeogh*, 46 Ark. 524; *Brewer & Son v. Winston*, 46 Ark. 163. **Ia.**—*Parshall v. Moody*, 24 Iowa 314. **Ky.**—*Hollingsworth v. Avey*, 182 Ky. 334, 206 S. W. 493. **Mo.**—*Raymuth R. E. & B. Co. v. Robinson*, 199 Mo. App. 515, 204 S. W. 276; *Mississippi Valley Fuel Co. v. Bean*, 152 Mo. App. 703, 133 S. W. 112. **Neb.**—*Thomas v. Thomas*,<sup>1</sup> Est., 64 Neb. 581, 90 N. W. 630.

[a] When the adverse party participates at the hearing upon the application for a transfer, without objection for failure to give the required notice, he cannot afterward base an objection on that ground. *Rauh v. Morris*, 40 Okla. 288, 137 Pac. 1174.

[b] When a cause is transferred from a law court to a court of equity jurisdiction on the ground that the pleadings show a cause which is wholly equitable, and no exception is taken to the order, a party cannot afterward object to such transfer. *Gardner v. Kerlin* (Iowa), 169 N. W. 177.

[c] **Defects in Petition to Transfer.** (1) If the statute is not followed in all particulars and the respondent answers without objecting to the petition any irregularity therein will be deemed waived. *Gurley v. Bushnell* (Ala.), 76 So. 324. (2) An objection to the petition must be made before a decision is rendered thereon. *Kraus v. Lehman*, 170 Ind. 408, 83 N. E. 714, 84 N. E. 769.

7. *Armstrong v. Emmet*, 16 Tex. Civ. App. 242, 41 S. W. 87.



filing briefs or pleadings in the cause after transfer,<sup>8</sup> by going to trial,<sup>9</sup> or any other action inconsistent with an intention to insist upon the irregularity.<sup>10</sup>

**IV. CRIMINAL CAUSES.**—A. IN GENERAL.—In criminal cases, as in civil cases,<sup>11</sup> a transfer from one court to another is, as a general rule, not permissible in the absence of statutory authority,<sup>12</sup> but in various jurisdictions authority to transfer in certain cases to and from designated courts is given by statute.<sup>13</sup> The statute, being regarded as remedial, are liberally construed.<sup>14</sup>

B. TO AND FROM WHAT COURTS.—1. In Federal Courts.—The federal statutes provide that in federal district courts of districts divided by law into two or more divisions, a criminal case may, on the defendant's application, be transferred for trial from one division to another,<sup>15</sup> and in districts of only one division, the court may of its

8. *Guarantee Interior F. Co. v. St. Louis Am. League B. Co.*, 152 Mo. App. 601, 133 S. W. 849; *Duke v. Caluwaert*, 40 Misc. 623, 83 N. Y. Supp. 10.

9. *Kindel v. Le Bert*, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234; *Lesser v. Adolph*, 46 Misc. 265, 91 N. Y. Supp. 705.

[a] But going to trial after saving a proper objection and exception is not a waiver. *Shehan v. Stewart*, 117 Iowa 207, 90 N. W. 614; *Johnston v. Robuck*, 104 Iowa 523, 73 N. W. 1062.

10. *Vogel v. Banks*, 60 App. Div. 459, 70 N. Y. Supp. 1010; *Parker v. Hamilton*, 49 Okla. 693, 154 Pac. 65.

[a] By Consenting to the Transfer. *Hooven, O. & R. Co. v. Featherstone's Sons*, 111 Fed. 81, 49 C. C. A. 229; *Shehan v. Stewart*, 117 Iowa 207, 90 N. W. 614.

11. See *supra*, III, A.

12. *State v. Wilson*, 129 La. 330, 56 So. 296. See *Smith v. State*, 12 Ohio C. C. 458.

13. U. S.—*United States v. Sutherland*, 214 Fed. 320. Mich.—*People v. Hurst*, 41 Mich. 328, 1 N. W. 1027. N. J.—*State v. Bowman*, 82 N. J. L. 210, 81 Atl. 561. N. Y.—*People v. Carolin*, 115 N. Y. 658, 21 N. E. 1059. Pa.—*Com. v. Delameter*, 145 Pa. 210, 22 Atl. 1098.

See the statutes and the cases cited throughout this title.

[a] By Implication.—When a new county is created and exclusive jurisdiction is conferred upon its courts of all pending cases which arose within its territory, but no order transferring such cases is directed to be made, the

power to make the transfer must be implied. *Appeal of Lay*, 150 Ky. 448, 150 S. W. 529.

[b] Constitutionality.—Where one court is vested by the constitution with jurisdiction of a cause, a law which seeks to make the transfer of such cause to another court mandatory is unconstitutional and void. *Williams v. State*, 11 Ga. App. 240, 75 S. E. 141.

[c] The king's bench in England has long possessed the power to transfer criminal causes from other courts and to try the issues in banc or at nisi prius; and since the 14 Henry VI., c. 1, the judges at nisi prius, after a verdict of guilty, may either pass sentence and award execution, or return the case to the king's bench for judgment to be given there. *Com. v. Simpson*, 2 Grant (Pa.) 438.

14. *State v. Mott*, 86 N. C. 621.

15. Fed. Jud. Code §53, 36 U. S. St. at L. 1101, 1 U. S. Comp. St., 1916, §1035.

[a] For provisions applicable to particular states, see Fed. Jud. Code §§70-115; 36 U. S. St. at L. 1105-1130; 2 U. S. Comp. St., 1916, §§1052-1106.

[b] The purpose of the statute is to facilitate the disposition of criminal cases, especially minor cases, in which defendants are unable to give bail and might be compelled, where court is held in a certain district but once a year, to remain in jail a long time before trial. *United States v. Sutherland*, 214 Fed. 320.

[c] This provision applies only to districts which are subdivided by statute into divisions. *United States v. Sutherland*, 214 Fed. 320.

own motion, transfer the case from one place of holding trial to another.<sup>16</sup> When a district or division is newly created, or changed, prosecutions for crimes or offenses committed prior thereto are continued without interruption, unless the court, on the defendant's application, orders the case transferred to the new district or division.<sup>17</sup>

**2. In State Courts.**—The state courts to and from which criminal causes may be transferred are indicated by the statutes,<sup>18</sup> a transfer for jurisdictional reasons being, as a rule, to a court having exclusive jurisdiction of the offense,<sup>19</sup> as when an indictment or presentment for a misdemeanor is transferred from a superior to an inferior court,<sup>20</sup> or when, on appeal to the highest appellate court the errors assigned relate to questions reviewable only in a lower court of appeals.<sup>21</sup> Transfers to expedite the trial,<sup>22</sup> or because of the disqualification of the judge,<sup>23</sup> are made to courts of concurrent jurisdiction.

**C. WHAT CAUSES TRANSFERRED.**—The statutes authorizing the transfer of criminal causes vary in their phraseology and limitations, some applying to all cases; others to all criminal cases, causes, pending causes, felonies, misdemeanors, indictments and presentments, etc.<sup>24</sup>

[d] **A rule of court creating departments** in a district for the purpose of holding trials at different places, does not, by reason of an accident of phraseology in calling these departments "divisions," bring such district within the statute. *United States v. Sutherland*, 214 Fed. 320.

16. *United States v. Sutherland*, 214 Fed. 320.

[a] **Independent of Statutory Authority.**—*Barrett v. United States*, 169 U. S. 218, 231, 18 Sup. Ct. 327, 42 L. ed. 723; *Rosecrans v. United States*, 165 U. S. 257, 17 Sup. Ct. 302, 41 L. ed. 708; *United States v. Sutherland*, 214 Fed. 320.

17. Fed. Jud. Code §59, 36 U. S. St. at L. 1103, 1 U. S. Comp. St., 1916, §1041.

18. See the statutes.

[a] **District Court to County Court.** *Warner v. State*, 8 Okla. Crim. 497, 129 Pac. 76; *Wychoff v. State*, 6 Okla. Crim. 122, 116 Pac. 355; *Antonelli v. State*, 3 Okla. Crim. 585, 107 Pac. 953; *Harper v. State* (Tex. Crim.), 207 S. W. 96; *Herenz v. State* (Tex. Crim.), 199 S. W. 618.

[b] **District Court to Superior Court.**—*Ex parte Copeland*, 5 Okla. Crim. 551, 115 Pac. 627.

[c] **County Court to Superior Court.** *State v. Burnett*, 173 N. C. 750, 91 S. E. 597.

[d] **County Court to Municipal**

**Court.**—*Miller v. People*, 230 Ill. 65, 82 N. E. 521.

[e] **County or City Court to Supreme Court.**—*People v. De Puy*, 115 App. Div. 564, 101 N. Y. Supp. 81.

19. See *Williams v. State*, 11 Ga. App. 240, 75 S. E. 141.

[a] **Exclusive jurisdiction of police courts** over offenses defined by city ordinances, and the right to assess a fine in excess of the amount which a justice of the peace may levy, precludes a transfer from such police court to any justice of the peace. *State ex rel. Kiggins v. Woolson*, 98 Wash. 505, 167 Pac. 1088.

20. *Sampson v. Harris*, 147 Ga. 426, 94 S. E. 558.

[a] **Transfer of Indictment.**—When an indictment for a misdemeanor is returned to a court not having jurisdiction to try the cause, it should be transferred to a court having jurisdiction. *Warner v. State*, 8 Okla. Crim. 497, 129 Pac. 76; *Petitti v. State*, 3 Okla. Crim. 587, 107 Pac. 954; *Antonelli v. State*, 3 Okla. Crim. 580, 107 Pac. 951; *Harper v. State* (Tex. Crim.), 207 S. W. 96; *Herenz v. State* (Tex. Crim.), 199 S. W. 618.

21. *Harris v. State*, 147 Ga. 489, 94 S. E. 572.

22. *State ex rel. Judah v. Fort*, 210 Mo. 512, 109 S. W. 737.

23. *State v. Johnson*, 104 N. C. 780, 10 S. E. 257.

24. See the statutes and *infra*, this section.

A statute, authorizing the transfer of misdemeanors, cannot be applied to felonies;<sup>25</sup> but when the statute is general in its terms, specifying no particular class of offenses, it applies alike to felonies and misdemeanors.<sup>26</sup>

D. GROUNDS. — Unless a transfer is effected by operation of law,<sup>27</sup> it must be based on one or more of the statutory grounds,<sup>28</sup> such as lack of jurisdiction,<sup>29</sup> or the disqualification of the judge,<sup>30</sup> or an overcrowded docket,<sup>31</sup> or to expedite the trial of criminals in jail,<sup>32</sup> or to obtain the opinion of a higher court on novel, important, and difficult questions involved.<sup>33</sup>

E. PROCEEDINGS TO EFFECT TRANSFER. — 1. In General. — The method of proceeding to effect a transfer of a criminal cause is generally prescribed in the statutes,<sup>34</sup> and substantial compliance therewith

[a] A statute referring to all cases includes criminal cases. *Com. v. Simpson*, 2 Grant (Pa.) 438, 443.

[b] The word "cause" is defined as being any suit or action, or any question, civil or criminal, contested before a court or justice. *Ex parte Copeland*, 5 Okla. Crim. 551, 115 Pac. 627. See also the title "Suits and Actions."

[c] "Pending causes" includes cases which have been commenced by filing in court an indictment, information, or complaint, but in which process has not been served upon the defendant. *Bryant v. State*, 158 Ala. 26, 48 So. 543.

[d] Authority to transfer indictments does not include informations. *Kester v. State*, 6 Okla. Crim. 741, 116 Pac. 356; *Wychoff v. State*, 6 Okla. Crim. 122, 116 Pac. 355.

[e] As to One or All Defendants. Under a statute providing for a transfer in order to have a speedy trial of an accused unable to furnish bail, when several defendants are jointly indicted and all but one give bail the case may be transferred as to such defendant without including the others. *State v. Mott*, 86 N. C. 621.

25. *Fossett v. State*, 11 Tex. App. 40.

26. *Gearhart v. Com.*, 33 Ky. L. Rep. 989, 112 S. W. 572.

27. *State v. Edwards*, 73 W. Va. 46, 79 S. E. 1005.

[a] As when a court is (1) abolished (*State v. Edwards*, 73 W. Va. 46, 79 S. E. 1005), or (2) created. See Ala.—*Green v. State*, 168 Ala. 104, 153 So. 284; *Mitchell v. State*, 168 Ala. 102, 53 So. 285; *Bryant v. State*, 158 Ala.

26, 48 So. 543. Ky.—*Appeal of Lay*, 150 Ky. 448, 150 S. W. 529; *Com. v. Meadors*, 149 Ky. 769, 149 S. W. 1005, Ann. Cas. 1914B, 345. La.—*State v. Harper*, 28 La. Ann. 35. Pa.—*Dyott v. Com.*, 5 Whart. 67. Tex.—*Hildreth v. State*, 19 Tex. App. 195. Va.—*Ewing's Case*, 5 Gratt. (46 Va.) 701.

28. See *Appeal of Lay*, 150 Ky. 448, 150 S. W. 529.

[a] Magistrate a Witness.—That a justice is a material witness for the defendant is not a good ground for transferring the cause to another justice for a preliminary examination. *People v. Duncan*, 97 Mich. 632, 57 N. W. 191.

[b] Convenience is not a good ground for a transfer when not given by the statute, and a criminal case must be remanded which is transferred to a newly created court of a new county merely because the defendant and witnesses reside in the new county, and also because the docket of the newly created court is not crowded. *Appeal of Lay*, 150 Ky. 448, 150 S. W. 529.

29. *Harper v. State* (Tex. Crim.), 207 S. W. 96; *Herenz v. State* (Tex. Crim.), 199 S. W. 618.

30. Ind.—*Goldsby v. State*, 18 Ind. 147. N. C.—*State v. Johnson*, 104 N. C. 780, 10 S. E. 257. Tenn.—*Kendrick v. State*, Cooke 474.

31. *State ex rel. Judah v. Fort*, 210 Mo. 512, 109 S. W. 737.

32. *State v. Mott*, 86 N. C. 621.

33. *People v. Scannell*, 35 Misc. 558, 72 N. Y. Supp. 25; *People v. Clark*, 15 N. Y. Supp. 79.

34. Md.—*Biscoe v. State*, 68 Md. 294, 12 Atl. 25. N. C.—*State v. Mott*,



is necessary.<sup>35</sup> Mere irregularities in the transfer which in no way affect the substantial rights of the accused do not prevent the receiving court from acquiring jurisdiction.<sup>36</sup>

**2. Jurisdiction to Order.**— Ordinarily the statutes give the power of transfer to the court, or judges thereof,<sup>37</sup> and under such statutes a transfer can take place only when specially allowed by such court, or the judges thereof, and cannot be made by the state's attorney, nor on his authority.<sup>38</sup>

**3. At Whose Instance.**— The court may in certain cases transfer the cause on its own motion.<sup>39</sup> As a general rule statutes providing for the transfer of criminal cases are enacted for the benefit of the accused and are generally invoked by him,<sup>40</sup> but in some cases the state is equally benefited and entitled, in consequence, to apply for a transfer.<sup>41</sup> The consent of the accused may be necessary to a transfer on application of the prosecution.<sup>42</sup>

**4. Time of Application.**— The application for transfer of the cause should be seasonably made,<sup>43</sup> otherwise the court may in its discretion deny it, unless the delay is excused.<sup>44</sup>

**5. Notice of Application.**— When the state is given the privilege of transferring a criminal case from one court to another, and notice to the defendant is not provided for by the statute, it may be done without notice.<sup>45</sup>

86 N. C. 621. *Ohio*.—*State v. Turner*, 1 Wright 20.

35. *Hendrix v. State*, 4 Okla. Crim. 611, 113 Pac. 244; *Taylor v. State*, 5 Okla. Crim. 183, 114 Pac. 628; *State v. Clifton*, 2 Okla. Crim. 189, 100 Pac. 1124; *Richards v. State*, 63 Tex. Crim. 176, 140 S. W. 459; *Ellis v. State*, 59 Tex. Crim. 626, 130 S. W. 170; *Koenig v. State*, 33 Tex. Crim. 367, 26 S. W. 835, 47 Am. St. Rep. 35.

36. *People v. Myers*, 2 Hun (N. Y.) 6; *Roller v. State*, 43 Tex. Crim. 433, 66 S. W. 777.

[a] **Entry of order**, by the clerk of the transferring court, informal. *People v. Myers*, 2 Hun (N. Y.) 6.

[b] **Receipt for Transcript.**—A statute which requires a receipt for the transcript to be entered upon the record of the transferring court is sufficiently complied with when the record otherwise shows the actual delivery of the transcript to the receiving court. *State v. Mott*, 86 N. C. 621.

37. *Com. v. Simpson*, 2 Grant (Pa.) 438, 443.

38. *Com. v. Simpson*, 2 Grant (Pa.) 438, 443.

39. *Sampson v. Harris*, 147 Ga. 426,

94 S. E. 558; *Williams v. State*, 11 Ga. App. 240, 75 S. E. 141.

40. See *State v. Mott*, 86 N. C. 621.

41. See *State v. Mott*, 86 N. C. 621.

42. *People v. Kalbfleisch Co.*, 174 App. Div. 108, 160 N. Y. Supp. 996.

[a] **Sanitary Code Violation.**—The prosecution may transfer a case with the consent of the defendant in an action for a violation of the sanitary code when a transfer is desired from a city magistrate to a court of special sessions. *People v. Kalbfleisch Co.*, 174 App. Div. 108, 160 N. Y. Supp. 996.

43. *Whitehead v. Com.*, 19 Gratt. (60 Va.) 640.

[a] **Before Pleading.**—As a general rule an application for a transfer should be made by the defendant before pleading. *State v. N. J. Jockey Club*, 52 N. J. L. 493, 19 Atl. 976; *Nicholas v. Com.*, 91 Va. 741, 21 S. E. 364.

[b] **After a motion for continuance**, it may be too late to apply for transfer. See *Gilligan v. Com.*, 99 Va. 816, 37 S. E. 962.

44. See *Com. v. Lydick*, 6 Pa. Dist. 282.

45. *People v. Carolin*, 115 N. Y. 658, 21 N. E. 1059.

**6. Order of Transfer.** — a. *Necessity for.* — As a general rule an order of court is necessary to effect a transfer,<sup>46</sup> although in certain cases an order may be unnecessary,<sup>47</sup> as where a statute, without requiring an order of transfer, directs that certain indictments returnable to one court shall be tried in another.<sup>48</sup> But in such a case, when the statute expressly requires an order, such order, once made, has been held sufficient for all future cases and need not be repeated.<sup>49</sup>

b. *When Order May Be Made.* — The order may be made in term time or vacation, unless a particular time is designated by the statute,<sup>50</sup> and when a motion for transferring a case is unavoidably delayed until the trial has commenced, the order granting a transfer may be made *nunc pro tunc* as of the time of pleading.<sup>51</sup>

c. *Form and Sufficiency.* — The order must name the court to which the transfer is made,<sup>52</sup> or otherwise show a transfer made to the proper court.<sup>53</sup> It must also show what particular case was transferred,<sup>54</sup> but need not designate the offence charged.<sup>55</sup> It should be based upon the indictment transferred,<sup>56</sup> and the court to which a transfer is made is without jurisdiction where the order of transfer is entitled as against the defendant, while the transcript shows an indictment against an-

46. Ala.—*Williams v. State*, 171 Ala. 56, 54 So. 535. Mo.—*State v. Barrett*, 54 Mo. 457; *State v. Burns*, 54 Mo. 274. N. J.—*Cruiser v. State*, 18 N. J. L. 206. N. Y.—*People v. Kalbfleisch Co.*, 174 App. Div. 108, 160 N. Y. Supp. 996. Okla.—*Wilson v. State*, 5 Okla. Crim. 367, 114 Pac. 1126. Tex.—*Harper v. State* (Tex. Crim.), 207 S. W. 96; *Bird v. State*, 49 Tex. Crim. 205, 91 S. W. 791; *Johnson v. State* (Tex. Crim.), 79 S. W. 27; *Austin v. State*, 38 Tex. Crim. 8, 40 S. W. 724.

[a] *Presumption as to Order.* "When the clerk of the circuit court delivers indictments, papers, and copies of the record to the judge of the city court, it will be presumed always, in the absence of proof to the contrary, that an order directing the transfer of all indictments has been made as required by law, and that the clerk acts in obedience to such order." *Williams v. State*, 171 Ala. 56, 60, 54 So. 535.

47. See *People v. Myers*, 2 Hun (N. Y.) 6, 26.

48. *People ex rel. Hasbrouck v. General Sessions*, 3 Barb. (N. Y.) 144. Compare *Harper v. State* (Tex. Crim.), 207 S. W. 96.

[a] Where the transfer is made to a court which is without power to receive an indictment, an order of transfer is essential in order to show how it

acquired jurisdiction of the case. *Harper v. State* (Tex. Crim.), 207 S. W. 96.

49. *Williams v. State*, 171 Ala. 56, 54 So. 535; *Sampson v. Harris*, 147 Ga. 426, 94 S. E. 558.

[a] Even when the transfer is by operation of a law creating a new court an order by the transferring court is necessary. *Williams v. State*, 171 Ala. 56, 54 So. 535.

50. *Sampson v. Harris*, 147 Ga. 426, 94 S. E. 558; *Dismuke v. State*, 105 Ga. 589, 31 S. E. 561; *Williams v. State*, 37 Tex. Crim. 238, 39 S. W. 664.

51. *Com. v. Lydick*, 6 Pa. Dist. 282.

52. *Biscoe v. State*, 68 Md. 294, 12 Atl. 25.

53. *Ellis v. State*, 59 Tex. Crim. 626, 130 S. W. 170; *Dittforth v. State*, 46 Tex. Crim. 424, 80 S. W. 628.

54. *Hyatt v. State*, 61 Tex. Crim. 421, 135 S. W. 142.

[a] A reference to the case by its number has been held sufficient. *Cantwell v. State*, 47 Tex. Crim. 521, 85 S. W. 18; *Bell v. State* (Tex. Crim.), 85 S. W. 805; *Mitchell v. State*, 46 Tex. Crim. 427, 80 S. W. 629.

55. *Massie v. State*, 52 Tex. Crim. 548, 107 S. W. 846; *Malloy v. State*, 35 Tex. Crim. 389, 33 S. W. 1082; *Koenig v. State*, 33 Tex. Crim. 367, 26 S. W. 835, 47 Am. St. Rep. 35.

56. *Herenz v. State* (Tex. Crim.), 199 S. W. 618.

other person.<sup>57</sup> Such order should be entered on the minutes of both courts,<sup>58</sup> but this provision is directory and not a condition precedent to the court's acquiring jurisdiction.<sup>59</sup>

**7. Transcript or Record.**—A copy of the record and of all papers of the case must be sent to or filed in the receiving court,<sup>60</sup> and such transcript should contain an accurate and complete history of the case from its inception to the time of its transfer,<sup>61</sup> the order of transfer being properly included, but not necessarily so unless required by the statute.<sup>62</sup> Likewise, when required, it should be certified<sup>63</sup> and sealed<sup>64</sup> before leaving the court making the transfer,<sup>65</sup> and actually delivered to the receiving court<sup>66</sup> by the clerk of the transferring court.<sup>67</sup>

**8. Costs.**—Costs of transferring a criminal cause are generally charged against the party on whose application the transfer is made,<sup>68</sup> and in the case of a transfer by operation of law to a court in a newly created county the costs should be paid by the county from which the removal is made.<sup>69</sup>

57. *Herenz v. State* (Tex. Crim.), 199 S. W. 618.

58. *Sampson v. Harris*, 147 Ga. 426, 94 S. E. 558.

59. *Sampson v. Harris*, 147 Ga. 426, 94 S. E. 558; *Coleman v. State*, 94 Ga. 85, 21 S. E. 124.

60. *Williams v. State*, 171 Ala. 56, 54 So. 535.

61. *Ala.*—See *Andrews v. State*, 159 Ala. 14, 48 So. 858. *N. J.*—See *State v. Woods*, 66 N. J. L. 458, 49 Atl. 716. *Okla.*—*Hendrix v. State*, 4 Okla. Crim. 611, 113 Pac. 244; *Yaltz v. State*, 3 Okla. Crim. 20, 103 Pac. 1104. *Tex.* *Harris v. State*, 57 Tex. Crim. 84, 121 S. W. 1116; *Austin v. State*, 38 Tex. Crim. 8, 40 S. W. 724. *Va.*—*Mitchell v. Com.*, 89 Va. 826, 17 S. E. 480.

[a] **Accuracy of Transcript.**—Where the defendant is charged with rudely displaying a pistol in a public place, a transcript which charges the defendant with carrying a pistol is fatally defective. *Cobb v. State*, 51 Tex. Crim. 464, 102 S. W. 1151.

62. *General Bonding & Cas. Ins. Co. v. State*, 73 Tex. Crim. 649, 165 S. W. 615.

[a] **Nunc pro tunc.**—(1) An order of transfer not included in the record may be filed nunc pro tunc. *Warner v. State*, 8 Okla. Crim. 497, 129 Pac. 76. (2) At any time objection is made, even in answer to a motion in arrest of judgment. *Cummings v. State*, 37 Tex. Crim. 436, 35 S. W. 979.

63. *Hendrix v. State*, 4 Okla. Crim. 611, 113 Pac. 244.

[a] **Under some statutes** certification of the record is not necessary. *Williams v. State*, 171 Ala. 56, 54 So. 535.

[b] **From One Department to Another.**—Certification is not necessary when a transfer is made within a court, as from one department or division to another. *State v. Lehman*, 182 Mo. 424, 81 S. W. 1118, 103 Am. St. Rep. 670, 66 L. R. A. 490.

64. *U. S.*—Fed. Jud. Code §53; 36 U. S. St. at L. 1101; 1 U. S. Comp. St., 1916, §1035. *Ohio.*—*State v. Turner*, 1 Wright 20. *Okla.*—*Hendrix v. State*, 4 Okla. Crim. 611, 113 Pac. 244. *Tex.* *Cobb v. State*, 51 Tex. Crim. 464, 102 S. W. 1151.

[a] **Seal Not Necessary When Transfer in Same District.**—*Washmood v. United States*, 10 Okla. Crim. 254, 136 Pac. 184.

65. *Cobb v. State*, 51 Tex. Crim. 464, 102 S. W. 1151.

66. *Yaltz v. State*, 3 Okla. Crim. 20, 103 Pac. 1104.

67. *Hendrix v. State*, 4 Okla. Crim. 611, 113 Pac. 244. See *Mitchell v. State*, 46 Tex. Crim. 427, 80 S. W. 629.

68. *Appeal of Lay*, 150 Ky. 448, 150 S. W. 529.

69. *Appeal of Lay*, 150 Ky. 448, 150 S. W. 529.



**F. WAIVER.**—The right to transfer a criminal cause may be waived<sup>70</sup> by failure to assert it at the proper time;<sup>71</sup> and defects in a transfer which are merely irregularities, and do not affect the court's jurisdiction of the offense, are waived by failure to make a proper objection.<sup>72</sup>

**G. RETRANSFER.**—A case improperly transferred may be remanded,<sup>73</sup> or the order of transfer may be set aside on reasonable notice by the court which made it and which has jurisdiction of the case.<sup>74</sup>

**Mandamus.**—When a court, erroneously believing jurisdiction of a case rests in another court, transfers the cause, it may be compelled by mandamus to vacate the order of transfer and proceed with the case.<sup>75</sup>

**H. EFFECT OF TRANSFER.**—When a transfer of a criminal cause is properly made the jurisdiction of the transferring court ceases,<sup>76</sup> and the court to which the cause is transferred is vested with jurisdiction to try and determine the case.<sup>77</sup>

**Liability of Sureties.**—The sureties on a defendant's bail bond are bound for his appearance in the court to which the case has been duly transferred.<sup>78</sup>

**I. PROCEEDINGS SUBSEQUENT TO TRANSFER.**—Upon transfer a new indictment is not necessary,<sup>79</sup> but the transcript of the case, as filed in

70. *Long v. State*, 165 Ala. 101, 51 So. 636.

71. *Long v. State*, 165 Ala. 101, 51 So. 636.

72. *Okla.*—*Warner v. State*, 8 Okla. Crim. 497, 129 Pac. 76; *Eakins v. State*, 7 Okla. Crim. 351, 123 Pac. 1035. *Pa. Com. v. Simpson*, 2 Grant 438. *Tex.* *Servener v. State*, 44 Tex. Crim. 232, 70 S. W. 214.

[a] Thus under a statute which merely requires the docketing of the case in the receiving court, the fact that the indictment was not filed in that court is waived by failing to object to the irregularity. *Short v. State* (Tex. Crim.), 29 S. W. 1072.

73. *Appeal of Lay*, 150 Ky. 448, 150 S. W. 529; *State v. Sykes*, 104 N. C. 700, 10 S. E. 158.

74. *Appeal of Lay*, 150 Ky. 448, 150 S. W. 529.

75. *State v. Laughlin*, 75 Mo. 358.

76. *Williams v. State*, 171 Ala. 56, 54 So. 535.

[a] **Transfer Must Be Complete.** The jurisdiction of the transferring court ceases and that of the receiving court attaches only when everything re-

quired to be done by the statute in compliance with the order of transfer has been performed. *Williams v. State*, 171 Ala. 56, 54 So. 535.

[b] **Delivery of the transcript to**, and its entry upon the docket of, the receiving court, must have been made. *State v. Mott*, 86 N. C. 621.

[c] **Where a court, having jurisdiction of a cause, attempts to transfer it to a court without jurisdiction, the order is void and the indictment remains pending in the original court.** *State v. Laughlin*, 75 Mo. 358, 367.

77. *Ala.*—*Williams v. State*, 171 Ala. 56, 54 So. 535; *Green v. State*, 59 Ala. 68. *Fla.*—*Keen v. Murray*, 77 So. 855. *Ga.*—*Cook v. State*, 10 Ga. App. 580, 73 S. E. 861. *N. C.*—*State v. Mott*, 86 N. C. 621. *Okla.*—*State v. Clifton*, 2 Okla. Crim. 189, 100 Pac. 1124. *Va.* *Gilligan v. Com.*, 99 Va. 816, 27 S. E. 962; *Howell v. Com.*, 86 Va. 817, 11 S. E. 238.

78. *Sampson v. Harris*, 147 Ga. 426, 94 S. E. 558; *Williams v. McDaniel*, 77 Ga. 4.

79. *State v. Watson*, 56 Conn. 188, 14 Atl. 797; *Hendrix v. State*, 4 Okla. Crim. 611, 113 Pac. 244.

the receiving court. is spread upon the record of such court,<sup>80</sup> A transfer having been made and the jurisdiction of the receiving court complete, the case should proceed as if originally begun there.<sup>81</sup>

80. *Williams v. State*, 171 Ala. 56, 54 So. 535. | 81. *Koenig v. State*, 33 Tex. Crim. 367, 26 S. W. 835, 47 Am. St. Rep. 35.

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**TRANSITORY ACTIONS.** — See **Jurisdiction; Venue.**

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**TRAVERSE.** — See **Denials.**

**Vol. XXIV**

# TREASON

By the Editorial Staff.

- I. PRELIMINARY MATTERS, 915
- II. JURISDICTION AND VENUE, 915
- III. INDICTMENT, 916

## CROSS-REFERENCES:

Accessories and Accomplices;	Navy and Army;
Courts Martial;	War.
Indictment and Information;	

As to matters of evidence, see the "ENCY. OF EV.," title "Treason." For forms, see 9 STANDARD PROC. 1210.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. PRELIMINARY MATTERS.**—A preliminary charge of treason should be accompanied by an affidavit,—supported by proof showing probable cause,—alleging all the elements of the offense.<sup>1</sup> The accused is entitled to a copy of the jury panel and the indictment,<sup>2</sup> and to release upon furnishing satisfactory bail.<sup>3</sup>

**II. JURISDICTION AND VENUE.**<sup>4</sup>—The federal,<sup>5</sup> and not the state<sup>6</sup> courts have jurisdiction of the crime of treason against the United States, but for treason solely against a state the state courts have jurisdiction.<sup>7</sup> The venue of the offense of treason against the

1. See *United States v. Greiner*, 4 Phila. 396, 26 Fed. Cas. No. 15,262; *United States v. Burr*, 2 Wheeler Crim. Cas. 573, 25 Fed. Cas. No. 14,692; *United States v. Bollman*, 1 Cranch C. C. 373, 24 Fed. Cas. No. 14,622; and 12 STANDARD PROC. 132.

2. See *United States v. Wood*, 3 Wash. C. C. 440, 28 Fed. Cas. No. 16,756; *United States v. Insurgents*, Whart. St. Tr. 102, 2 Dall. 335, 26 Fed. Cas. No. 15,443; 16 STANDARD PROC. 1006; and the title "Service of Process and Papers."

3. *Davis' Case*, 7 Fed. Cas. No. 3,621a. See generally the title "Recognizances and Bail."

4. See generally the titles "Jurisdiction;" "Venue."

5. *In re Charge to Grand Jury*, 2 Spr. 285, 30 Fed. Cas. No. 18,277.

[a] **Merger of Treason Against State and Union.**—The federal district courts have jurisdiction of an offense of treason begun against a state but which becomes converted or changed into an act of treason against the Uni-

ted States, such as the forcible overthrow of the state government and then the withdrawal of the state from the union, this being treason against the United States. *In re Charge to Grand Jury*, 1 Story 614, 30 Fed. Cas. No. 18,275.

[b] **Offering resistance to federal troops**, duly sent by the President into a state to protect such state from domestic violence, is treason against the United States and within the jurisdiction of the federal courts. *In re Charge to Grand Jury*, 1 Story 614, 30 Fed. Cas. No. 18,275.

6. *People v. Lynch*, 11 Johns. (N. Y.) 549.

7. *Kempe's Lessee v. Kennedy*, 5 Cranch 173, 3 L. ed. 70, *affirming*, Pet. C. C. 30, 14 Fed. Cas. No. 7,686; *The Homestead Case*, 1 Pa. Dist. 785.

[a] **Treason Against State.**—Thus if the object of an assembly of persons is to overturn, with force, the government or constitution of a state, or to prevent the due exercise of its sovereign powers, or to resist the ex-



United States may be laid in any district where the overt act is committed.<sup>8</sup>

**III. INDICTMENT.**<sup>9</sup> — The overt acts must be specially laid in an indictment for treason,<sup>10</sup> and it is not sufficient to allege generally that the accused had levied war against the United States.<sup>11</sup> But when written or oral words are laid as the overt act, it is sufficient to state their substance.<sup>12</sup>

**Trial.**<sup>13</sup> — While in contemplation of the law all who participate in the crime of treason are principals,<sup>14</sup> the conviction of one who has committed an act of treason, unless otherwise provided by statute,<sup>15</sup> must precede the trial of one who has merely advised or procured it.<sup>16</sup> As to the province of court and jury,<sup>17</sup> instructions,<sup>18</sup> verdict,<sup>19</sup>

exercise of any one or more of its general laws, but without any intention whatever of intermeddling with the relations of that state with the national government or to displace the national laws or sovereignty therein, every overt act done with force toward the execution of such a treasonable purpose is treason against the state only, of which the state courts have jurisdiction. *In re Charge to Grand Jury*, 1 Story 614, 30 Fed. Cas. No. 18,275.

8. *In re Charge to Grand Jury*, 2 Spr. 285, 30 Fed. Cas. No. 18,277; *United States v. Hanway*, 26 Fed. Cas. No. 15,299; *United States v. Greiner*, 4 Phila. 396, 26 Fed. Cas. No. 15,262; *United States v. Burr*, 25 Fed. Cas. No. 14,693, 14,694a.

9. See generally the title "Indictment and Information."

For form of indictment, see 9 STANDARD PROC. 1210.

10. *United States v. Gooding*, 12 Wheat. 460, 6 L. ed. 693. See also *Respublica v. Carlisle*, 1 Dall. (U. S.) 35, 1 L. ed. 26; *United States v. Robinson*, 259 Fed. 685.

[a] **Charging Overt Act.**—An indictment for treason in levying war against the United States, charging defendant with being present at the place of the treasonable assemblage charged as the overt act, cannot be sustained if defendant was not with the assemblage at any time before it reached such place; if he did not join it there; if his personal cooperation in the general plan was to be afforded elsewhere, at a great distance, in a different state; and if the overt acts of treason to be performed by him

were to be distinct overt acts. *United States v. Burr*, 25 Fed. Cas. No. 14,693.

11. *United States v. Burr*, 4 Cranch (U. S.) 470, 2 L. ed. 684, *affirmed*, 25 Fed. Cas. No. 14,693.

12. *Rex v. Francia*, 6 St. Tr. 58, 73; *Rex v. Preston*, 4 St. Tr. 409; *Rex v. Watson*, 2 Stark. 116, 3 E. C. L. 341.

[a] That the defendant sent intelligence to the enemy has been held sufficient, in a case where information was conveyed by means of a letter, without setting out the letter or its contents. *Respublica v. Carlisle*, 1 Dall. (U. S.) 35, 1 L. ed. 26.

[b] Sufficiency of indictment for publication of seditious or treasonable sentiments in a newspaper, see *United States v. Werner*, 247 Fed. 708, and the title "War."

13. See the title "Trial."

14. *United States v. Greathouse*, 4 Sawy. 457, 26 Fed. Cas. No. 15,254. See 1 STANDARD PROC. 132.

15. See the statutes.

16. *United States v. Burr*, 25 Fed. Cas. No. 14,693.

As to time of trial of an accessory generally, see 1 STANDARD PROC. 152, et seq.

17. See the title "Province of Judge and Jury" and *United States v. Hanway*, 26 Fed. Cas. No. 15,299.

[a] **Levying of war** is a fact to be decided by the jury. *Sparf v. United States*, 156 U. S. 51, 15 Sup. Ct. 273, 715, 39 L. ed. 343.

[b] The existence of a treasonable purpose is a question of fact. *Reg. v. Davitt*, 11 Cox C. C. 676.

18. See the title "Instructions."

19. See the title "Verdict."

and sentence,<sup>20</sup> trials for treason follow the general rules elsewhere treated.

<p>[a] <b>Directed Verdict.</b>—Where one is indicted for treason and it develops on the trial of the case that the defendant did not commit the crime, but that another person of the same name is liable, a peremptory instruction to</p>	<p>the jury to return a verdict of not guilty is proper. <i>United States v. Porter</i>, 2 Dall. (U. S.) 345, 1 L. ed. 409, 27 Fed. Cas. No. 16,073. 20. See the title "<b>Sentence and Judgment.</b>"</p>
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**TREATIES.** — See **United States.**

**Vol. XXIV**

# TRESPASS

By the Editorial Staff.

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### CROSS-REFERENCES:

Animals;	Mesne Profits;
Assault and Battery;	Railroads;
Case (The Action of Trespass on the);	Seduction;
False Imprisonment;	Sheriffs, Constables and Marshals;
Highways, Streets and Bridges;	Title;
Injuries to Persons and Property;	Trespassing Animals;
Forcible Entry and Detainer;	Trespass To Try Title;
Lands and Land Transfers;	Trover and Conversion;
Malicious Mischief;	Use and Occupation.

Action in assumpsit as bar to action of trespass, see 5 STANDARD PROC. 115.

Action for rent, amendment to an action of trespass, see 18 STANDARD PROC. 491.

Distress against a trespasser, see 18 STANDARD PROC. 522.

Joinder of actions of trespass, see 14 STANDARD PROC. 662, 696.

Survival of causes of action for trespass, see 12 STANDARD PROC. 977, and the title, "Survival."

Splitting causes of action for trespass, see the title, "Successive Suits."

Suit by corporation in trespass quare clausum, see 5 STANDARD PROC. 562.

Trespass against corporations, see 5 STANDARD PROC. 570.

Trespass against officer and party authorizing seizure by attachment of property, see 3 STANDARD PROC. 649, and also the title, "Sheriffs, Constables, and Marshals."

For further references and cross-references, see the index to this work and the cross-references throughout this title.

**I. REMEDIES GENERALLY.** — The remedy of a person injured by a trespass may, under proper circumstances, be either at law or in equity.<sup>1</sup> At law, he may maintain an action of trespass,<sup>2</sup> or under certain circumstances he may bring an action of trover, or replevin,<sup>3</sup> or trespass on the case.<sup>4</sup> It is a general rule, that a trespass cannot be waived and assumpsit brought on an implied promise.<sup>5</sup> This may be done in certain cases, however,<sup>6</sup> as where chattels had and received by a wrong, are sold either for money or other property, or where their form is changed.<sup>7</sup>

The fact that the trespass may amount to a crime does not bar the civil remedy under the modern practice.<sup>8</sup>

**II. THE ACTION OF TRESPASS.** — A. **GENERALLY.** — The action of trespass is a remedy for a tort committed with force, the immediate and direct consequence of which is injury.<sup>9</sup> Trespass lies

1. See *infra*, II and IV.

2. See *infra*, II.

3. See the titles "Replevin;" "Trover and Conversion."

4. See the title "Case, The Action of Trespass on the."

5. **Kan.**—Tightmeyer v. Mongold, 20 Kan. 90, where damage is caused by cattle without the owner's participation, no promise can be implied. **Mich.**—Lockwood v. Thunder Bay River Boom Co., 42 Mich. 536, 4 N. W. 292. **Minn.**—Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488. **Nev.**—Carson River L. Co. v. Bassett, 2 Nev. 249.

[a] No implied promise to pay rent can be raised against one who takes possession of and holds lands by force and under a claim of right, nor can a promise to pay money be raised against one who commits an assault and battery. Carson River L. Co. v. Bassett, 2 Nev. 249.

6. See generally the title "Choice and Election of Remedies."

[a] Where Lessee Holds Over.—See National Oil Ref. Co. v. Bush, 88 Pa. 335, and the title "Landlord and Tenant."

[b] Where a person enters land under an agreement to purchase and then violates his agreement, trespass or an action for use and occupation lies. Woodbury v. Woodbury, 47 N. H. 11, 90 Am. Dec. 555; Clough v. Horsford, 6 N. H. 231. See the title "Use and Occupation."

Where property is severed from the realty. See the titles "Logs and Logging;" "Mines and Minerals."

[c] Under statute, a person occupying realty wrongfully and not under a lease, may be sued in trespass, or in an action for use and occupation. Baldwin v. Bohl, 23 S. D. 395, 122 N. W. 247.

7. **Mass.**—Jones v. Hoar, 5 Pick. 285. **Miss.**—Evans v. Miller, 58 Miss. 120, 38 Am. Rep. 313. **Nev.**—Carson River L. Co. v. Bassett, 2 Nev. 249. **Vt.**—Stearns v. Dillingham, 22 Vt. 624, 54 Am. Dec. 88.

See generally the titles "Assumpsit;" "Trover and Conversion."

[a] But where property is retained in its original shape, assumpsit will not lie. Lockwood v. Thunder Bay River Boom Co., 42 Mich. 536, 4 N. W. 292 (otherwise under statute); Woodbury v. Woodbury, 47 N. H. 11, 90 Am. Dec. 555.

8. Nash v. Primm, 1 Mo. 178.

[a] Otherwise at Common Law. Nash v. Primm, 1 Mo. 178, query as to whether rule applies to modern practice.

9. **Ala.**—Taylor v. Smith, 104 Ala. 537, 16 So. 629; Pruitt v. Ellington, 59 Ala. 454. **Conn.**—Gates v. Miles, 3 Conn. 64. **Mass.**—Barnes v. Hurd, 11 Mass. 57. **N. J.**—Dale Mfg. Co. v. Grant, 34 N. J. L. 138. **N. Y.**—Guille v. Swan, 19 Johns. 381, 10 Am. Dec. 234. **N. C.**—Kelly v. Lett, 35 N. C. 50. **Ohio.**—Case v. Mark, 2 Ohio 169. **Eng.**—Scott v. Shepherd, 3 Wils. K. B. 403, 95 Eng. Reprint 1124; 1 Chitt. Pl. 186.

[a] "The terms 'immediate' and 'consequential' should . . . be understood, not in reference to the time



for injury to the person, for injury to personal property, and for injury to real property; the species being known respectively as trespass vi et armis,<sup>10</sup> trespass vi et armis de bonis asportatis, or commonly trespass de bonis asportatis,<sup>11</sup> and trespass quare clausum fregit.<sup>12</sup>

The action of trespass will not lie if the injury is consequential whether it results from the negligent or wilful act of the defendant;<sup>13</sup> or if the wrong complained of is a nonfeasance;<sup>14</sup> or if the matter affected is intangible,<sup>15</sup> or the right affected is incorporeal.<sup>16</sup> But when the injury which forms the gist of the action is both immediate and forcible or wilful, trespass is the only remedy.<sup>17</sup> When an injury is the direct and immediate and inevitable result of negligence, trespass will lie according to most authorities,<sup>18</sup> and according to some,

which the act occupies, or the space through which it passes, or the place from which it is begun, or the intention with which it is done, or the instrument or agent employed, or the lawfulness or unlawfulness of the act; but in reference to the progress and termination of the act, to its being done on the one hand, and its having been done on the other. If the injury is inflicted by the act at any moment of its progress, from the commencement to the termination thereof, then the injury is direct or immediate; but if it arises after the act has been completed, though occasioned by the act, then it is consequential or collateral, or, more exactly, a collateral consequence." *Jordan v. Wyatt*, 4 Gratt. (45 Va.) 151, 154.

[b] Not merely actual force, but force implied by law also is embraced. *Jordan v. Wyatt*, 4 Gratt. (45 Va.) 151, 47 Am. Dec. 720.

[c] "The injury is always direct when a wrong act is done and the consequence is such as might reasonably follow; as, if a man strike a horse upon which another is sitting, by which he is thrown and injured, the action is trespass . . . because it is an event which may reasonably follow, and in direct connection with the act done." *Johnson v. Perry*, 2 Humph. (Tenn.) 569.

[d] When the act itself is complained of, trespass vi et armis is the proper action. But case is proper when the consequences are complained of. *Kelly v. Lett*, 35 N. C. 50.

Where a servant is commanded to do an unlawful act, trespass lies. See 4 STANDARD PROC. 627.

Trespass per quod for enticing away

an apprentice. See 2 STANDARD PROC. 585.

When property is invaded by persons who might obtain it by condemnation proceedings, trespass may be brought. See 8 STANDARD PROC. 348.

Where provisions as to estrays are disregarded, trespass may be brought. See 8 STANDARD PROC. 721.

Wrongful distraint as a ground for trespass, see 18 STANDARD PROC. 535.

Trespass lies against justice of the peace for false imprisonment and wrongful attachment. See 18 STANDARD PROC. 389.

10. See the titles "Assault and Battery;" "False Imprisonment."

For assault and battery by an intoxicated person, see 14 STANDARD PROC. 475.

For injury to wife, daughter, child, servant, trespass lies, see 4 STANDARD PROC. 628.

11. *Becker v. Smith*, 59 Pa. 469. See *infra*, II, B.

12. See *infra*, II, C.

[a] Trespass quare clausum fregit is a form of trespass vi et armis. *Illinois Cent. R. R. Co. v. Hatter*, 207 Ill. 88, 69 N. E. 751.

13. See 5 STANDARD PROC. 100; 4 STANDARD PROC. 614 and 635.

14. See 1 Chitt. Pl. 187. See the title "Negligence."

15. 1 Chitt. Pl. 187.

16. 1 Chitt. Pl. 187.

Trespass not appropriate remedy for disturbance of an easement, see 7 STANDARD PROC. 957.

17. *N. J.*—*Dale Mfg. Co. v. Grant*, 34 N. J. L. 138. *N. Y.*—*Wilson v. Smith*, 10 Wend. 324. *N. C.*—*Kelly v. Lett*, 35 N. C. 50. *Vt.*—*Waterman v. Hall*, 17 Vt. 128, 42 Am. Dec. 484.

18. See 4 STANDARD PROC. 634, and

trespass is the only remedy,<sup>19</sup> though others hold that case will lie also at the election of the party.<sup>20</sup>

The intention of the wrongdoer is generally immaterial in this action,<sup>21</sup> except as affecting the right to punitive damages.<sup>22</sup>

B. TRESPASS DE BONIS ASPORTATIS.—For any tortious taking of a chattel out of possession of another, actual or constructive, trespass de bonis asportatis lies.<sup>23</sup>

C. TRESPASS QUARE CLAUSUM FREGIT.—Trespass quare clausum fregit is an action for breaking the close of another and forcibly and unlawfully entering upon another's land.<sup>24</sup> It is a possessory action,<sup>25</sup>

the following cases: Ala.—Alabama Midland Ry. Co. v. Martin, 100 Ala. 511, 14 So. 401, using words "gross carelessness" instead of word "negligence"; Bay Shore R. Co. v. Harris, 67 Ala. 6. N. Y.—Percival v. Hickey, 18 Johns. 257, 9 Am. Dec. 210. Vt. Howard v. Tyler, 46 Vt. 683. Va. Jordan v. Wyatt, 4 Gratt. (45 Va.) 151, 47 Am. Dec. 720, where a brush fire escaped to another's land.

[a] For shooting a gun and frightening a horse, trespass may be brought if the defendant had noticed the horse and it was close enough so there might be a reasonable apprehension of frightening it. But if the horse was out of defendant's sight and the apprehension of frightening it did not exist, the injury is not immediate. Cole v. Fisher, 11 Mass. 137.

19. Gates v. Miles, 3 Conn. 64 (holding that Chitty states the rule incorrectly and *distinguishing* Ogle v. Barnes, 8 T. R. 188, 101 Eng. Reprint 1338; Case v. Mark, 2 Ohio 169. See also 4 STANDARD PROC. 635.

[a] Where negligence in driving a carriage or navigating a ship causes an immediate injury, the remedy must be trespass. Conn.—Gates v. Miles, 3 Conn. 64. N. J.—Waldron v. Hopper, 1 N. J. L. 339. Ohio.—Case v. Mark, 2 Ohio 169. But see next note following.

20. N. Y.—Wilson v. Smith, 10 Wend. 324 (citing Chitty); Blin v. Campbell, 14 Johns. 432, citing Chitty. Vt.—Howard v. Tyler, 46 Vt. 683, injury resulting from driving a wagon against plaintiff's carriage. Va.—Jordan v. Wyatt, 4 Gratt. (45 Va.) 151, 47 Am. Dec. 720.

See 4 STANDARD PROC. 634.

21. Conn.—Gates v. Miles, 3 Conn. 64. Mo.—Dyer v. Tyrrell, 142 Mo. App. 467, 127 S. W. 114. Vt.—Waterman v. Hall, 17 Vt. 128, 42 Am. Dec. 484. Va.—Chesapeake & O. Ry. Co. v. Greaver, 110 Va. 350, 66 S. E. 59. Eng. See 1 Chitt. Pl. 187.

22. Milltown Lumb. Co. v. Carter, 5 Ga. App. 344, 63 S. E. 270.

23. Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780; Ely v. Ehle, 3 N. Y. 506; Kissam v. Roberts, 6 Bosw. (N. Y.) 154, 163. See also the titles "Replevin;" "Trover and Conversion;" "Detinue."

[a] Where officer wrongfully takes goods under color of legal process, trespass is a proper remedy. Codman v. Freeman, 3 Cush. (Mass.) 306; Glover v. Austin, 6 Pick. (Mass.) 209. See the title "Officers."

24. Ala.—Southern Ry. Co. v. Hayes, 183 Ala. 465, 62 So. 874. Del.—Morris v. Hazel, 1 Boyce 324, 77 Atl. 766. N. J.—Sprague Nat. Bank v. Erie R. Co., 62 N. J. L. 474, 41 Atl. 681. N. C. Gardner v. Blades Lumb. Co., 144 N. C. 110, 56 S. E. 695.

[a] Only for breaking and entering real estate can the action be brought. Burleigh v. Ford, 59 N. H. 536.

[b] No real damage need be suffered to authorize the action. Bragg v. Laraway, 65 Vt. 673, 27 Atl. 492.

For removal or destruction of a fence, trespass quare clausum lies. See 18 STANDARD PROC. 674. But not for breach of an agreement to keep fence in repair. See 18 STANDARD PROC. 672.

Trespass quare clausum for removal of timber, see 19 STANDARD PROC. 19.

25. Kan.—Wilkins v. Lee, 73 Kan. 321, 85 Pac. 140. Me.—Kimball v. Hilton, 92 Me. 214, 220, 42 Atl. 394. N. C.—Waters v. Dennis Simmons Lumb. Co., 154 N. C. 232, 70 S. E. 284.

the gist of which is the disturbance of possession actual or constructive, or the wrongful entry;<sup>26</sup> and therefore to maintain it, the plaintiff must have been in actual or constructive possession of the premises at the time of the trespass thereon.<sup>27</sup>

**Title.** — Trespass quare clausum fregit is not an action for the trial of title to lands,<sup>28</sup> but the right of title to the property may be put in issue by the pleadings.<sup>29</sup>

**For a removal of part of the realty,**<sup>30</sup> in addition to the other remedies available,<sup>31</sup> either trespass quare clausum or trespass de bonis asportatis may be brought.

#### D. TRESPASS FOR MESNE PROFITS.<sup>32</sup> — An action in form trespass

**26. Ala.**—Louisville & N. R. Co. v. Higginbotham, 153 Ala. 334, 44 So. 872. **Ill.**—Western Book & Stationery Co. v. Jeone, 78 Ill. App. 668. **Kan.** Wilkins v. Lee, 73 Kan. 321, 85 Pac. 140. **Ky.**—Kentucky Stave Co. v. Page, 125 S. W. 170. **Me.**—Linn Woolen Co. v. Brown, 110 Me. 88, 85 Atl. 404; Hunnewell v. Hobart, 42 Me. 565. **Mass.**—Beers v. McGinnis, 191 Mass. 279, 77 N. E. 768. **Minn.**—Booth v. Sherwood, 12 Minn. 426. **N. H.**—Foote v. Merrill, 54 N. H. 490, 20 Am. Rep. 151; Jewell v. Mahood, 44 N. H. 474, 84 Am. Dec. 90. **N. Y.**—Hill v. Bartholomew, 71 Hun 453, 24 N. Y. Supp. 944, 54 N. Y. St. 400; Cowenhoven v. Brooklyn, 38 Barb. 9. **Wis.**—Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. 62; Stoltz v. Kretschmar, 24 Wis. 283.

[a] Other acts relate to the damages merely, and are mere matters of aggravation. Pico v. Colimas, 32 Cal. 578; Keaton v. Snider, 14 Ind. App. 66, 42 N. E. 372.

[b] Where a person has authority from a party to enter premises and exceeds his authority, trespass quare clausum does not lie. Hunnewell v. Hobart, 42 Me. 565; Jewell v. Mahood, 44 N. H. 474, 84 Am. Dec. 90.

27. See *infra*, II, H.

**28. U. S.**—Johnson v. C. & N. W. Sand & Gravel Co., 86 Fed. 269, 30 C. C. A. 35. **Ga.**—Osmond v. Flournoy, 34 Ga. 509. **Mass.**—Brigham v. Winchester, 6 Mete. 460. **R. I.**—Faulkner v. Rocket, 33 R. I. 152, 80 Atl. 380.

See *infra*, II, H.

**29. Ill.**—Weidner v. Lund, 105 Ill. App. 454. **Md.**—West v. Pusey, 113 Md. 569, 77 Atl. 973; New Windsor v. Stocksedale, 95 Md. 196, 52 Atl. 596.

**Minn.**—Booth v. Sherwood, 12 Minn. 426. **N. H.**—Palmer v. Tuttle, 39 N. H. 486. **W. Va.**—Greathouse v. Sapp, 26 W. Va. 87. **Wis.**—Reilly v. Howe, 101 Wis. 108, 76 N. W. 1114; Lyon v. Fairbank, 79 Wis. 455, 48 N. W. 492, 24 Am. St. Rep. 732.

[a] The proof of title is a mere incident to the real issue, the right to damages. Hannibal & St. J. R. Co. v. Mahoney, 42 Mo. 467.

**30. McGonigle v. Atchison**, 33 Kan. 726, 737, 7 Pac. 550, removal of sand. See the titles, "Logs and Logging;" "Mines and Minerals."

[a] For removal of timber, the owner of land may bring trespass de bonis. **U. S.**—Trustees of Dartmouth College v. International Paper Co., 132 Fed. 92. **Conn.**—Eldridge v. Gorman, 77 Conn. 699, 60 Atl. 643. **Ga.**—Milltown Lumb. Co. v. Carter, 5 Ga. App. 344, 63 S. E. 270.

As to remedy by trespass quare clausum and trover, see 19 STANDARD PROC. 19.

[b] Where the severance and removal is one continuous uninterrupted transaction, trespass quare clausum only lies. American Union Tel. Co. v. Middleton, 80 N. Y. 408, removal of telegraph poles from highway.

[c] Whether the sand is severed from the real estate and carried away by one act only or by two or more—does not affect the right to bring trespass de bonis. McGonigle v. Atchison, 33 Kan. 726, 737, 7 Pac. 550.

**31.** See the titles, "Logs and Logging;" "Mines and Minerals;" "Replevin;" and "Trover and Conversion."

**32.** See the title "Mesne Profits."



quare clausum fregit may be brought to recover mesne profits.<sup>33</sup> This action may be brought after a determination of a party's right of possession to the premises,<sup>34</sup> and after reentry,<sup>35</sup> or after a regaining of possession by re-entry without such a determination.<sup>36</sup>

E. NATURE OF ACTION GENERALLY.—The action of trespass is a personal,<sup>37</sup> as well as a civil<sup>38</sup> action, in form *ex delicto*,<sup>39</sup> in which damages alone are sought.<sup>40</sup> It is distinct from the actions of trover,<sup>41</sup>

33. *Young v. Downey*, 145 Mo. 261, 46 S. W. 962; *Thompson v. Bower*, 60 Barb. (N. Y.) 463.

[a] **History and Nature of.**—Originally, at common law, rents and profits were recovered in ejectment as damages. But when the pleadings became fictitious and the damages nominal, the courts allowed the application of the common law action of trespass *vi et armis*. The trespass is not more insisted upon than the ejectment. The former lay against a tenant holding over on his being ousted as well as against one who entered under a contract for a deed and refused to perform. While possession prior to the suit is always held to be necessary, an actual recovery of it by ejectment is not. It is enough if it be surrendered or obtained by a re-entry. In evading the requirement of injury to the plaintiff's possession so as to make the remedy adequate to all cases, the courts held that when the owner re-enters, his entry relates back to the time when his right accrued and converts the disseizin of the defendant into a trespass. *Phillips v. Stewart*, 87 Mo. App. 486.

[b] **Trespass for mesne profits differs from an action for use and occupation** in this, that the latter is founded upon a promise express or implied, while the former springs from a trespass, an entry *vi et armis*, upon the premises and a tortious holding. *Young v. Downey*, 145 Mo. 261, 46 S. W. 962. See also *Schradsky v. Stimson*, 76 Fed. 730, 22 C. C. A. 515; *Thompson v. Bower*, 60 Barb. (N. Y.) 463.

34. *Western Book & Stat. Co. v. Jevne*, 78 Ill. App. 668. See 19 STANDARD PROC. 774.

[a] **A judgment in ejectment is not necessary as a basis for the action.** The right of possession of the plaintiff and not necessarily his title to the premises is all that need be determined as a preliminary basis of the action.

A judgment of forcible detainer is sufficient for this purpose. *Western Book & Stat. Co. v. Jevne*, 78 Ill. App. 668, affirmed in 179 Ill. 71, 53 N. E. 565.

35. Ill.—*Chicago & W. I. R. Co. v. Slee*, 33 Ill. App. 420. Mo.—*Young v. Downey*, 145 Mo. 261, 268, 46 S. W. 962. N. H.—*Winkley v. Hill*, 6 N. H. 391, referring to common law. But a reentry is not required in New Hampshire.

36. *Western Book & Stat. Co. v. Jevne*, 179 Ill. 71, 53 N. E. 565; *Phillips v. Stewart*, 87 Mo. App. 486. See *Huncheon v. Long*, 25 Ind. App. 530, 58 N. E. 563.

37. Minn.—*Little v. Chicago, St. P. M. & O. Ry. Co.*, 65 Minn. 48, 67 N. W. 846, 60 Am. St. Rep. 421, 33 L. R. A. 423. Mo.—*Hannibal & St. J. R. Co. v. Mahoney*, 42 Mo. 467. N. C.—*Waters v. Dennis Simmons Lumb. Co.*, 154 N. C. 232, 70 S. E. 284.

[a] **Trespass Quare Clausum.**—*Cox v. Railway Co.*, 55 Ark. 454, 18 S. W. 630; *Allin v. Connecticut River Lumber Co.*, 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416.

38. *Osmond v. Flournoy*, 34 Ga. 509.

39. Ga.—*Malone & Grant Co. v. Hammond*, 6 Ga. App. 114, 64 S. E. 666. Md.—*Lapp v. Stanton*, 116 Md. 197, 81 Atl. 675, Ann. Cas. 1913C, 755. N. Y. *Hill v. Bartholomew*, 71 Hun 453, 24 N. Y. Supp. 944, 54 N. Y. St. 400.

40. U. S.—*Trustees of Dartmouth College v. International Paper Co.*, 132 Fed. 92. Del.—*Pritchard's Admr. v. Culver*, 2 Harr. 129. Minn.—*Little v. Chicago, St. P. M. & O. Ry. Co.*, 65 Minn. 48, 67 N. W. 846, 60 Am. St. Rep. 421, 33 L. R. A. 423. N. H.—*Pickering v. Pickering*, 11 N. H. 141. W. Va.—*Greathouse v. Sapp*, 26 W. Va. 87.

[a] **Trespass Is an Action "Sounding in Damages."**—*Trustees of Dartmouth College v. International Paper Co.*, 132 Fed. 92.

41. U. S.—*Montgomery Water Power Co. v. Chapman & Co.*, 126 Fed. 68,

replevin,<sup>42</sup> trespass on the case,<sup>43</sup> forcible entry and detainer,<sup>44</sup> ejectment,<sup>45</sup> and waste,<sup>46</sup> and from real actions generally.<sup>47</sup>

**F. CONDITIONS PRECEDENT.**—Any conditions precedent must be performed.<sup>48</sup> A previous demand is not necessary to an action of

72, 61 C. C. A. 124. **Ia.**—*Bever v. Swecker*, 138 Iowa 721, 116 N. W. 704. **N. Y.**—*Burnham v. Pidcock*, 33 Misc. 65, 66 N. Y. Supp. 806 (*affirmed* 58 App. Div. 273, 68 N. Y. Supp. 1007); *May v. Georger*, 21 Misc. 622, 47 N. Y. Supp. 1057; *Kissam v. Roberts*, 6 Bosw. 154. **R. I.**—*Hunt v. Pratt*, 7 R. I. 283. **Eng.**—*Cooper v. Chitty*, 1 Burr. 20, 35, 97 Eng. Reprint 166, 174.

**[a] Trespass and Trover Compared.**

(1) Trespass is a remedy for a wrong committed by the direct force of the malfeasor, and includes, at common law, not only redress to the plaintiff but punishment of the defendant, and the defendant was imprisoned until he paid the fine. Trover is a remedy for a tort not committed with force. The judgment in the latter was a miseria cordia and the defendant was amerced. *Hunt v. Pratt*, 7 R. I. 283. (2) The action of trover is consistent with the idea that the defendant came into the possession of the goods without wrong, and that he converted them to his own use. But trespass de bonis is for a tortious or unlawful taking of a chattel out of possession of another. *Kissam v. Roberts*, 6 Bosw. (N. Y.) 154. (3) A mere seizure or unlawful handling may amount to trespass, while conversion is usually characterized by a usurpation of ownership. *Montgomery Water Power Co. v. Chapman & Co.*, 126 Fed. 68, 78, 61 C. C. A. 124.

**[b]** A judgment in trespass does not transfer title to the subject-matter involved; but it is otherwise in trover. *May v. Georger*, 21 Misc. 622, 47 N. Y. Supp. 1057.

**[c]** Where a defendant causes goods in the possession of an officer to be levied on wrongfully, the owner's remedy is not trespass, but trover. *Hunt v. Pratt*, 7 R. I. 283.

42. *Broadwater v. Darne*, 10 Mo. 277, bare possession without right will not support replevin.

43. *Painter v. Baker*, 16 Ill. 103; *Kelly v. Lett*, 35 N. C. 50. See 4 STANDARD PROC. 614, and *supra*, this section.

**[a] But an option of declaring in trespass or case** (1) sometimes exists. **Colo.**—*Letson v. Brown*, 11 Colo. App. 11, 52 Pac. 287. **N. C.**—*Kelly v. Lett*, 35 N. C. 50. **Vt.**—*Waterman v. Hall*, 17 Vt. 128, 42 Am. Dec. 484. See 4 STANDARD PROC. 634. (2) Where injury is directly inflicted by a forcible act; as where a blow is given to a person, trespass is the only remedy. But if a forcible injury is effected by means flowing from the act of the defendant, but not operating by the very force or impulse of that act, either trespass or case may be maintained, in the first case treating those means as attached to and forming part of defendant's act, and in the second, treating the injury as consequential. Thus either trespass or case would have been appropriate in the lighted squib case. *Waterman v. Hall*, 17 Vt. 128, 42 Am. Dec. 484. And see *supra*, II, A.

44. See **Ala.**—*Southern Ry. Co. v. Hayes*, 183 Ala. 465, 62 So. 874. **Mass.** *Low v. Elwell*, 121 Mass. 309, 23 Am. Rep. 272. **N. J.**—*Thiel v. Bull's Ferry Land Co.*, 58 N. J. L. 212, 33 Atl. 281, and the title, "**Forcible Entry and Detainer.**"

45. See 7 STANDARD PROC. 984.

**[a]** As a substitute for ejectment, trespass quare clausum cannot be employed. *Watters v. Ezell*, 188 Ala. 385, 66 So. 443; *Lee v. Raiford*, 171 Ala. 124, 54 So. 543; *Kinney v. Ferguson*, 101 Mich. 178, 59 N. W. 401.

46. *Van Deusen v. Young*, 29 Barb. (N. Y.) 9.

47. *Kimball v. Hilton*, 92 Me. 214, 42 Atl. 394, in a real action the issue is seizin or title but in trespass quare clausum it is rightful possession.

48. See generally "**Suits and Actions.**"

**[a]** Money paid for a contract to remove part of the realty within a limited time need not be returned before an action can be brought for a trespass in attempting to exercise the right after the time limited, even though the right was not exercised during the life of the contract. *Bunch v.*

trespass de bonis asportatis where the taking is tortious.<sup>49</sup> Unless statute requires notice be given of trespasses committed by authority of a municipality as a preliminary to suit, none need be given.<sup>50</sup>

G. JURISDICTION AND VENUE.<sup>51</sup>—Actions for damages for trespass are within the jurisdiction of courts of general jurisdiction,<sup>52</sup> and of justices of the peace, provided, in the latter case, title is not drawn in issue.<sup>53</sup>

According to the common law and the decisions following it, the action of trespass to realty is local,<sup>54</sup> and must be brought not only in the state where the land lies,<sup>55</sup> but must be brought or tried in the county where the land or some part thereof is situated also,<sup>56</sup> unless

Elizabeth City Lumber Co., 134 N. C. 116, 46 S. E. 24. See *Monds v. Elizabeth City Lumber Co.*, 131 N. C. 20, 42 S. E. 334, holding payments to the plaintiff's grantor by the trespasser under a void contract for timber need not be returned by the plaintiff as a condition precedent to suit.

49. *Boise v. Knox*, 10 Metc. (Mass.) 40.

50. *Hathaway v. Osborne*, 25 R. I. 249, 55 Atl. 700, construing statute as not requiring notice. See the title "Municipal Corporations."

51. See generally the titles "Jurisdiction;" "Venue."

52. *Hirsch v. Rand*, 39 Cal. 315.

[a] The fact that the defendant is a United States officer does not deprive the state court of jurisdiction. *Hirsch v. Rand*, 39 Cal. 315.

53. See 17 STANDARD PROC. 957. See *Wood v. Essex*, 38 R. I. 21, 94 Atl. 666.

54. U. S.—*Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. ed. 913; *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 15 How. 233, 14 L. ed. 674; *Kentucky Coal Lands Co. v. Mineral Dev. Co.*, 191 Fed. 899. Ind.—*Du Breuil v. Pennsylvania R. Co.*, 130 Ind. 137, 29 N. E. 909. Kan.—*Brown v. Irwin*, 47 Kan. 50, 27 Pac. 184. Me.—*Gordon v. Merry*, 65 Me. 168; *Sawyer v. Goodwin*, 34 Me. 419. Md.—*Baltimore City v. Merediths F. & J. Tp. Co.*, 104 Md. 351, 65 Atl. 35. Mass.—*Allin v. Connecticut River Lumb. Co.*, 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416. N. Y.—*American Union Tel. Co. v. Middleton*, 80 N. Y. 408; *Howe v. Willson*, 1 Denio 181. N. D.—*Farmer v. Dakin*, 28 N. D. 452, 149 N. W. 354. Eng.—*Doulson v. Matthews*, 4 T. R. 503, 2 Rev. Rep. 448, 100 Eng. Reprint 1143.

See 17 STANDARD PROC. 778. But see *Little v. Chicago, St. P. M. & O. Ry. Co.*, 65 Minn. 48, 67 N. W. 846, 60 Am. St. Rep. 421, 33 L. R. A. 423; *Hannibal & St. J. R. Co. v. Mahoney*, 42 Mo. 467 (the action is strictly personal and may be brought anywhere), and 17 STANDARD PROC. 779, note 98.

55. U. S.—*Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. ed. 913; *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 15 How. 233, 14 L. ed. 674. Cal.—*Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 82 Pac. 70. D. C.—*Columbia Nat. Sand Dredg. Co. v. Morton*, 28 App. Cas. 310, 7 L. R. A. N. S. 114. Kan.—*Brown v. Irwin*, 47 Kan. 50, 27 Pac. 184. Mass.—*Allin v. Connecticut River Lumber Co.*, 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416. Miss.—*Oliver v. Loye*, 59 Miss. 320. Ohio.—*Pittsburgh, C. C. & St. L. R. Co. v. Jackson*, 83 Ohio St. 13, 93 N. E. 260, 21 Ann. Cas. 1313 note; *Thayer v. Brooks*, 17 Ohio 489, 49 Am. Dec. 474. Tex.—*Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349, *limiting Armendiaz v. Stillman*, 54 Tex. 623.

[a] Residence of parties is immaterial. *Gordon v. Merry*, 65 Me. 168.

[b] Where the close is partly without the state, injuries done without the state may be proven under the *alibi* *enormia*. *Gorman v. Marsteller*, 2 Cranch C. C. 311, 10 Fed. Cas. No. 5,629.

56. U. S.—*Gorman v. Marsteller*, 2 Cranch C. C. 311, 10 Fed. Cas. No. 5,629. Ark.—*Cox v. Railway Co.*, 55 Ark. 454, 18 S. W. 630, action must be "brought" in the county where the land is situated. Cal.—*Gomez v. Reed*, 174 Pac. 658 (the action may be commenced in any county in the state,



statute provides otherwise.<sup>57</sup> But trespass to the person,<sup>58</sup> and to personalty,<sup>59</sup> are transitory actions. Where the petition sets up a

but must be "tried" in the county where the land lies, if a motion for change of venue is made); *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 82 Pac. 70. **Ind.**—*Du Breuil v. Pennsylvania R. Co.*, 130 Ind. 137, 29 N. E. 909 (action must be "brought" in county where land lies); *Prichard v. Campbell*, 5 Ind. 494; *Keaton v. Snider*, 14 Ind. App. 66, 42 N. E. 372. **Md.**—*Baltimore City v. Meredith's F. & J. Tp. Co.*, 104 Md. 351, 65 Atl. 35 (unless defendant removes from the county or cannot be found therein); *Tyson v. Shueey*, 5 Md. 540, 554. **Mass.**—*Allin v. Connecticut River Lumber Co.*, 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416. **Mich.**—*Bradley Watkins Co. v. Kalamazoo Circ. Judge*, 144 Mich. 142, 107 N. W. 875. **Neb.**—*Dryden v. Peru Bottom D. Dist.*, 99 Neb. 837, 158 N. W. 54. **N. Y.**—*Nassau Hotel Co. v. Barnett*, 164 App. Div. 203, 149 N. Y. Supp. 645; *Rothlein v. Hewitt*, 29 Misc. 664, 61 N. Y. Supp. 97; *Freeman v. Thomson*, 50 Hun 340, 3 N. Y. Supp. 93, 16 Civ. Proc. 186, 20 N. Y. St. 194. **N. C.**—*Interstate Cooperage Co. v. Eureka Lumber Co.*, 151 N. C. 455, 66 S. E. 434. **R. I.**—*Wood v. Essex*, 38 R. I. 21, 94 Atl. 666. **S. C.**—*Henderson v. Bennett*, 58 S. C. 30, 36 S. E. 2.

[a] Although the Defendant Resides in Another County.—*Henderson v. Bennett*, 58 S. C. 30, 36 S. E. 2.

[b] Injury to Crops.—An action charging defendant with permitting cattle to enter plaintiff's land and destroying his crops is trespass to real estate and is local, the injury to crops being matter in aggravation. *Keaton v. Snider*, 14 Ind. App. 66, 42 N. E. 372.

[c] Where the land lies in two counties, and the injury is located exclusively in one county on the tract of land claimed by the defendant, the venue is in the latter county. *Interstate Cooperage Co. v. Eureka Lumber Co.*, 151 N. C. 455, 66 S. E. 434, the lands were claimed by the plaintiff under one deed.

57. See the statutes and *Baltimore City v. Meredith's F. & J. Tp. Co.*, 104 Md. 351, 65 Atl. 35.

[a] In the county where the defendant resides or (1) may be summoned,

the action must be brought. *Osmond v. Flournoy*, 34 Ga. 509; *Duncan v. Yordy*, 27 Kan. 348. (2) If there be joint wrongdoers, both may be sued in the county of the residence of either. *Baker v. Davis*, 127 Ga. 649, 57 S. E. 62; *Wall v. Mercer*, 119 Ga. 346, 46 S. E. 420; *Williams v. Inman*, 1 Ga. App. 321, 57 S. E. 1009; *Fairchild v. Wilson* (Tex. Civ. App.), 168 S. W. 409.

[b] The statute of New York authorizes actions in that state for damages for injuries to real estate without the state. Code Civ. Proc., §982a. See *Sentenis v. Ladew*, 140 N. Y. 463, 35 N. E. 650, 37 Am. St. Rep. 569, not referring to statute. But see *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703; *American Union Tel. Co. v. Middleton*, 80 N. Y. 408; *Ernst v. Rutherford & B. S. Gas Co.*, 38 App. Div. 388, 56 N. Y. Supp. 403.

[c] In Texas, (1) when the foundation of a suit is some trespass, it may be brought in the county where the trespass was committed or where the defendant has his domicile. See *Lasater v. Waits*, 95 Tex. 553, 68 S. W. 500; *Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349. (2) Trespass as used in the statute means any intentional wrong or injury to the person or property of another. *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618; *Ward v. Odem* (Tex. Civ. App.), 153 S. W. 634. (3) But acts of omission are not embraced. *Connor v. Saunders*, 81 Tex. 633, 17 S. W. 236; *Ricker v. Shoemaker*, 81 Tex. 22, 16 S. W. 645; *Winslow v. Gentry* (Tex. Civ. App.), 154 S. W. 260.

58. **U. S.**—*McKenna v. Fisk*, 1 How. 241, 11 L. ed. 117. **La.**—*Williams v. Pope Mfg. Co.*, 52 La. Ann. 1417, 27 So. 851, 50 L. R. A. 816. **Tex.**—*Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349.

But see *Chapman v. Wilber*, 6 Hill (N. Y.) 475. See the titles, "Assault and Battery;" "False Imprisonment."

59. **U. S.**—*Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. ed. 913; *McKenna v. Fisk*, 1 How. 241, 11 L. ed. 117. **Cal.**—*Ophir Silver Min. Co. v. Superior Court*, 147

single cause of action in which the trespass upon land is the principal thing and the trespass upon personalty is incidental only, the entire cause of action is local.<sup>60</sup>

An action of trespass against a United States marshal for wrongful taking of property under process of the federal court is within the jurisdiction of a state court.<sup>61</sup>

H. PARTIES. — 1. **Interest Sufficient To Sustain Action.** — a. *In General.* — Since the gist of an action of trespass for injury to real or personal property is the disturbance of possession,<sup>62</sup> the action can be maintained only by the person who was in possession of the premises or property either actually or constructively<sup>63</sup> at the time of the trespass.<sup>64</sup>

b. *Trespass to Personal Property.* — (I.) **Generally.** — To maintain an action for trespass to personal property, the plaintiff must have had the actual possession of the thing which is the subject of the trespass,<sup>65</sup> or a general or special property therein and a right to im-

Cal. 467, 82 Pac. 70. **Kan.**—McGonigle v. Atchison, 33 Kan. 726, 738, 7 Pac. 550. **N. Y.**—Howe v. Willson, 1 Denio 181; Brice v. Vanderheyden, 9 Wend. 472. **Tex.**—Morris v. Missouri Pac. Ry. Co., 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349.

60. **U. S.**—Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. ed. 913. **D. C.**—See Columbia National Sand Dredg. Co. v. Morton, 28 App. Cas. 310, 7 L. R. A. (N. S.) 114. **N. Y.**—Howe v. Willson, 1 Denio 181.

61. Buck v. Colbath, 7 Minn. 310, 82 Am. Dec. 91.

62. Lake Shore Bldg. Co. v. Chicago, 207 Ill. App. 244; Chandler v. Walker, 21 N. H. 282, 53 Am. Dec. 202.

63. **Ala.**—Boswell v. Carlisle Jones & Co., 70 Ala. 244. **Conn.**—Avery v. Spicer, 90 Conn. 576, 98 Atl. 135. **Ill.**—Galt v. Chicago & N. W. Ry. Co., 157 Ill. 125, 41 N. E. 643; Dean v. Comstock, 32 Ill. 173, 178; Callagan v. American Trust & Sav. Bank, 196 Ill. App. 102. **Me.**—Butler v. Taylor, 86 Me. 17, 29 Atl. 923. **Mass.**—Woodruff v. Halsey, 8 Pick. 333, 19 Am. Dec. 329. **Mo.**—Brown v. Hartzell, 87 Mo. 564. **N. Y.**—Phillips v. De Groat, 2 Lans. 192. **N. C.**—Gordner v. Blades Lumber Co., 144 N. C. 110, 56 S. E. 695; Myrick v. Bishop, 8 N. C. 485. **Ore.**—Boyer v. Anduiza, 90 Ore. 163, 175 Pac. 853. **Pa.**—Crops v. Dunham, 69 Pa. 456. **S. C.**—Nicholson v. Villepigue, 97 S. C. 130, 81 S. E. 494.

[a] "The action [of trespass] must be brought by the party whose possession has been disturbed or invaded." Galt v. Chicago & N. W. Ry. Co., 157 Ill. 125, 133, 41 N. E. 643.

Action by owner of mining claim, see 19 STANDARD PROC. 805.

Trespass by owner of fee in highway, see 11 STANDARD PROC. 125.

Trespass by mortgagor, see 5 STANDARD PROC. 52.

After sale of property by lien holder, owner cannot maintain trespass against purchaser, see 18 STANDARD PROC. 1016.

64. **Ala.**—Lee v. Raiford, 171 Ala. 124, 54 So. 543; Boswell v. Carlisle Jones & Co., 70 Ala. 244. **Conn.**—Sutton v. Lockwood, 40 Conn. 318. **Ind.**—Ingram v. Jeffersonville N. A. & S. R. T. Co. (Ind. App.), 116 N. E. 12. **Ky.**—Lexington & O. R. Co. v. Kidd, 7 Dana 245, 247; McClain v. Todd's Heirs, 5 J. J. Marsh. 335, 22 Am. Dec. 37. **N. C.**—Gordner v. Blades Lumber Co., 144 N. C. 110, 56 S. E. 695.

[a] Possession at the commencement of the action is insufficient. Sutton v. Lockwood, 40 Conn. 318.

65. **U. S.**—Ker v. Bryan, 163 Fed. 233, 90 C. C. A. 179. **Ala.**—White v. Brantley, 37 Ala. 430. **Pa.**—Becker v. Smith, 59 Pa. 469.

[a] The gist of trespass to personalty is the disturbance of plaintiff's possession. Swank v. Elwert, 55 Ore. 487, 105 Pac. 901.

[b] When goods are held by an officer under a writ of attachment, the owner cannot maintain trespass against

mediate possession<sup>66</sup> at the time of the trespass,<sup>67</sup> or, in other words, he must have either actual or constructive possession.<sup>68</sup> The circumstance may be such, it seems, that either of two persons may bring the action, one suing by virtue of his actual possession, the other by virtue of his constructive possession.<sup>69</sup>

(II.) **Actual Possession.** — As against a wrongdoer it is not necessary in an action of trespass that the plaintiff in possession of the property at the time of the trespass should have the legal title to the goods and chattels,<sup>70</sup> or that his possession be rightful as against the true owner.<sup>71</sup> Bare possession suffices as against a mere trespasser.<sup>72</sup> But as against the true owner with the right to immediate possession, bare possession is not sufficient to sustain the action. In such case, proof of ownership in the defendant and right to possession constitutes a perfect defense.<sup>73</sup> If, however, the plaintiff has a special property in the thing which is the subject of the trespass, and a right to possession, he may maintain an action of trespass, even against the general owner, general property in such case being no excuse or justification for a trespass.<sup>74</sup> In such case, the owner's right to possession

one attaching the property under a subsequent writ. *Hunt v. Pratt*, 7 R. L. 283.

66. **U. S.**—*Wilson v. Haley Live-Stock Co.*, 153 U. S. 39, 14 Sup. Ct. 763, 38 L. ed. 627; *Ker v. Bryan*, 163 Fed. 233, 90 C. C. A. 179. **Ala.**—*Vines v. Vines*, 145 Ala. 679, 40 So. 84; *Dunlap v. Steele*, 80 Ala. 424. **Ark.**—*Moore v. Winter*, 67 Ark. 189, 53 S. W. 1057. **Mass.**—*Winship v. Neale*, 10 Gray 382. **Vt.**—*Hurd v. Fleming*, 34 Vt. 169.

67. See *supra*, II, H, 1, a.

68. **Del.**—*Truitt v. Warrington*, 3 Boyce 357, 84 Atl. 9. **Ill.**—*Gauche v. Mayer*, 27 Ill. 134. **N. Y.**—*Root v. Chandler*, 10 Wend. 110, 25 Am. Dec. 546 (trespass de bonis asportatis); *Putnam v. Wagley*, 8 Johns. 432, 5 Am. Dec. 346; *Neff v. Thompson*, 8 Barb. 213. **Pa.**—*Becker v. Smith*, 59 Pa. 469.

See *Roberts v. Wentworth*, 5 Cush. (Mass.) 192; *Codman v. Freeman*, 3 Cush. (Mass.) 306.

[a] **The plaintiff** (1) must have the rightful possession of the goods or a general right of property in them, and a constructive possession. *Becker v. Smith*, 59 Pa. 469. (2) In *Roberts v. Wentworth*, 5 Cush. (Mass.) 192, 193 an instruction that to recover in trespass the plaintiff must show he had title to the property was held not to be erroneous. "A party may have a title to property although he is not

the absolute owner. If he has the actual or constructive possession of property or the right of possession, he has a title thereto, although another party may be the owner."

69. See *infra*, II, H, 1, b, (III).

70. *Terry v. Williams*, 148 Ala. 468, 41 So. 804; *Carter v. Fulgham*, 134 Ala. 238.

71. *Northern Pac. R. Co. v. Lewis*, 51 Fed. 658, 2 C. C. A. 446.

[a] **Illustration.**—A person in possession of lumber taken from public land may maintain trespass against a wrongdoer, although the lumber still belongs to the United States. *Northern Pac. R. Co. v. Lewis*, 51 Fed. 658, 2 C. C. A. 446.

72. **Ala.**—*Terry v. Williams*, 148 Ala. 468, 41 So. 804; *Carter v. Fulgham*, 134 Ala. 238, 32 So. 684. **Ind.**—*Dederick v. Brandt*, 16 Ind. App. 264, 44 N. E. 1010. **N. Y.**—*Hoyt v. Gelston*, 13 Johns. 141.

73. *Hoyt v. Gelston*, 13 Johns. (N. Y.) 141.

74. *Lunsford v. Deitrich*, 86 Ala. 250, 5 So. 461, 11 Am. St. Rep. 37; *Cowing v. Snow*, 11 Mass. 415.

[a] **A custodian of property for a person who has a lien thereon** may bring trespass de bonis asportatis against the general owner who wrongfully takes it away. *Cowing v. Snow*, 11 Mass. 415.



is in reversion, and he has not sufficient possession to support an action of trespass against strangers injuring the property in the possession of the person having a special property therein. The owner must protect his rights by some other remedy.<sup>76</sup>

In accordance with these rules, a bailee,<sup>76</sup> an agister,<sup>77</sup> an auctioneer,<sup>78</sup> an agent,<sup>79</sup> or a pledgee,<sup>80</sup> in possession of chattels may maintain an action of trespass against persons who wrongfully injure them or take them away. The finder of an article may maintain trespass against any person but the real owner.<sup>81</sup> So also an officer who has levied on chattels may maintain trespass.<sup>82</sup> Perhaps a mere servant cannot be said to have such actual possession as to sustain trespass, as his possession is that of the master.<sup>83</sup> But a bailor cannot maintain trespass during the continuance of the bailment,<sup>84</sup> unless he has a right to immediate possession.<sup>85</sup> Nor can one who makes a

75. Ala.—Dunlap v. Steele, 80 Ala. 424. Ill.—Gauche v. Mayer, 27 Ill. 134. Mass.—Walcot v. Pomeroy, 2 Pick. 121. N. H.—Gay v. Smith, 38 N. H. 171. N. Y.—Neff v. Thompson, 8 Barb. 213. Vt.—Hurd v. Fleming, 34 Vt. 169.

See the title, "Case (The Action of Trespass on the)."

76. U. S.—The Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. ed. 993; Chicago v. Pennsylvania Co., 119 Fed. 497, 57 C. C. A. 509; Hardman v. Brett, 37 Fed. 803, 2 L. R. A. 173. Ala. Hare v. Fuller, 7 Ala. 717. Ill.—Gauche v. Mayer, 27 Ill. 134. Ky.—Lexington & O. R. Co. v. Kidd, 7 Dana 245, 247.

See 21 STANDARD PROC. 344.

[a] A bailee of stock running at large in the range has such a possession as will support an action of trespass. Hare v. Fuller, 7 Ala. 717.

[b] Recovery and Effect Thereof. (1) In an action by a bailee against a stranger, he may recover the value of the property as he is answerable over to the bailor. U. S.—United States v. Atlantic Coast Line R. Co., 206 Fed. 190, 202; Chicago v. Pennsylvania Co., 119 Fed. 497, 504, 57 C. C. A. 509. Ala. Hare v. Fuller, 7 Ala. 717. Conn. White v. Webb, 15 Conn. 302. N. J. Luse v. Jones, 39 N. J. L. 707. (2) Any excess damages over the amount of his injury he holds in trust for the bailor. Hasbrouck v. Lounsbury, 26 N. Y. 598; Eastern Const. Co. v. National Trust Co., [1914] App. Cas. (Eng.) 197, 210. (3) The recovery in such case bars a subsequent action by the bailor, for otherwise the trespasser

would be liable to make a second satisfaction for the same injury. Ala. Hare v. Fuller, 7 Ala. 717. N. J.—Luse v. Jones, 39 N. J. L. 707. N. Y.—Hasbrouck v. Lounsbury, 26 N. Y. 598.

[c] A bailor may be held liable in trespass by taking goods from the possession of the bailee. Lunsford v. Deitrich, 86 Ala. 250, 5 So. 461, 11 Am. St. Rep. 37.

[d] In a suit by a bailee against the general owner, he can recover only the value of his special property. White v. Webb, 15 Conn. 302.

77. See 1 STANDARD PROC. 978.

78. Williams v. Millington, 1 H. Black. 81, 126 Eng. Reprint 49.

79. Robinson v. Webb, 11 Bush (Ky.) 464.

Actions by agent generally, see the title, "Principal and Agent."

80. Soule v. White, 14 Me. 436.

Remedies of pledgee generally, see the title, "Pledges."

81. Hoyt v. Gelston, 13 Johns. (N. Y.) 141.

82. Huntley v. Bacon, 15 Conn. 267. See the title, "Sheriffs, Constables, and Marshals."

Trespass by attaching officer, see 5 STANDARD PROC. 587.

83. Swift v. Moseley, 10 Vt. 208, 33 Am. Dec. 197. See *infra*, II, H, 1, b, (III).

84. U. S.—United States v. Atlantic Coast Line R. Co., 206 Fed. 190, 202. Ky.—Lexington & O. R. Co. v. Kidd, 7 Dana 245, 247. Vt.—Swift v. Moseley, 10 Vt. 208, 33 Am. Dec. 197.

See 21 STANDARD PROC. 343

85. See *infra*, II, H, 1, b, (III).

conditional sale of personal property, by which the possession is to remain in the purchaser until the time for payment, maintain an action of trespass against one taking it before that time.<sup>86</sup>

(III.) **Constructive Possession.**—When the owner of a chattel has a right to an immediate and actual possession, his right gives him a constructive possession sufficient to sustain trespass.<sup>87</sup> He may have such constructive possession when the chattel is in possession of no one,<sup>88</sup> or when the goods are in the wrongful possession of a trespasser,<sup>89</sup> or when the goods are in the care and custody of a servant,<sup>90</sup> or agent,<sup>91</sup> or when the goods are in the hands of a bailee or factor and the owner is entitled to immediate possession.<sup>92</sup> In determining whether a plaintiff, by reason of his being the real owner of the goods has such a constructive possession as to enable him to maintain trespass, it is necessary to inquire whether there is any bar to his taking actual possession.<sup>93</sup> If the bailee has a right exclusively to use the thing for a given time, the inference of constructive posses-

86. *Hurd v. Fleming*, 34 Vt. 169. See the title "Sales."

87. *Mass.*—*Woodruff v. Halsey*, 8 Pick. 333, 19 Am. Dec. 329. *Pa.*—*Becker v. Smith*, 59 Pa. 469. *Vt.*—*Wayward Rubber Co. v. Dunclee*, 30 Vt. 29; *Shloss v. Cooper*, 27 Vt. 623; *Brown v. Scott*, 7 Vt. 57. See *Soper v. Sumner*, 5 Vt. 274, 277, holding the owner is deemed to be in actual possession.

[a] If the plaintiff has not actual possession, "he must have a constructive possession, by reason of the right or title to the thing being actually vested in him, such title or right, drawing after it, a constructive possession." *Gauche v. Mayer*, 27 Ill. 134, 135.

[b] If a vendor places a chattel in a house under an agreement that the owner will purchase it if satisfactory, the vendor has sufficient possession to maintain trespass until the trial is made. *Phelps v. Willard*, 16 Pick. (Mass.) 29. Where there was a sale of a large machine of great weight.

88. *De Bruhl v. Parker*, 2 Brev. (S. C.) 406.

[a] Thus where goods are stored in a vacant house, the owner may maintain trespass for a tortious taking of the goods. *De Bruhl v. Parker*, 2 Brev. (S. C.) 406.

89. *Ker v. Bryan*, 163 Fed. 233, 90 C. C. A. 179.

[a] The wrongful possession of property by a trespasser does not oust the possession of the rightful owner so as to divest the latter of his right

to maintain an action against a person other than the original wrongdoer who makes a subsequent wrongful entry. *Ker v. Bryan*, 163 Fed. 233, 90 C. C. A. 179.

[b] Although a chattel is in the wrongful possession of a marshal because of the invalidity of the process under which he acted, the owner may maintain an action of trespass against a subsequent trespasser. *Ker v. Bryan*, 163 Fed. 233, 90 C. C. A. 179.

90. *Ala.*—*Maddox v. State*, 122 Ala. 110, 26 So. 305. *N. H.*—*Robertson v. George*, 7 N. H. 306. *Pa.*—*Becker v. Smith*, 59 Pa. 469. *Vt.*—See *Swift v. Moseley*, 10 Vt. 208, 33 Am. Dec. 197.

[a] **The Possession of the Servant or Agent Is the Possession of the Owner.**—*Robertson v. George*, 7 N. H. 306.

91. *Field v. Lang*, 89 Me. 454, 36 Atl. 984; *Craig v. Gilbreth*, 47 Me. 416.

Actions by principal generally, see the title "Principal and Agent."

92. *Ill.*—*Gauche v. Mayer*, 27 Ill. 134. *Mass.*—*Stevens v. Briggs*, 5 Pick. 177. *Vt.*—*Strong v. Adams*, 30 Vt. 221, 73 Am. Dec. 305.

[a] Thus, a consignor of goods, consigned to be sold on commissions may maintain trespass *de bonis asportatis* against a trespasser, if the consignee becomes insolvent, and has no claim on the goods for commissions. *Hayward Rubber Co. v. Dunclee*, 30 Vt. 29; *Shloss v. Cooper*, 27 Vt. 623.

93. *Gauche v. Mayer*, 27 Ill. 134.

sion is rebutted, and the general owner cannot maintain trespass before the expiration of the bailee's term, as his possession is in reversion only.<sup>94</sup> But a claim of the bailee for storage, commissions, or a lien upon the goods does not preclude an action of trespass de bonis by the owner, as the claim or lien may be waived by the bailee or cancelled at once by payment, and the defendant who is a stranger to the goods will not be heard to urge that the bailee has a claim or lien.<sup>95</sup>

In accordance with these rules, a bailor may maintain an action of trespass when the act of the bailee ipso facto terminates his right to possession and revives the right of the owner to immediate possession,<sup>96</sup> or where the bailment is gratuitous.<sup>97</sup> Perhaps the action may be brought by either party in the latter case.<sup>98</sup> So also an action of trespass may be maintained by an owner of goods who has parted with his possession to a carrier.<sup>99</sup> A sale of a chattel without delivery gives the vendee a constructive possession sufficient to maintain trespass.<sup>1</sup> With respect to mortgages of personalty, the general rule, in the absence of a contrary stipulation or reservation, is that the mortgagee has a right to immediate possession,—constructive pos-

94. *Ill.*—*Gauche v. Mayer*, 27 *Ill.* 134. *Mass.*—*Walcot v. Pomeroy*, 2 *Pick.* 121. *N. Y.*—*Neff v. Thompson*, 8 *Barb.* 213.

95. *Ill.*—*Gauche v. Mayer*, 27 *Ill.* 134. *Mass.*—*Holly v. Huggeford*, 8 *Pick.* 73, 19 *Am. Dec.* 303. *N. Y.*—*Neff v. Thompson*, 8 *Barb.* 213.

But see *Wilson v. Martin*, 40 *N. H.* 88.

*Compare Hayward Rubber Co. v. Duncklee*, 30 *Vt.* 29; *Shloss v. Cooper*, 27 *Vt.* 623, in which the court in holding that trespass would lie stated that the possessor of the goods had no claim on them for commissions.

[a] **Reason of Rule.**—The lien of a factor does not dispossess the owner, until the right is exerted by the factor. It is a privilege which he may avail himself of or not, as he pleases. It continues only while the factor has the possession, and therefore if he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost, and the owner may trace and recover them, or he may sue in trespass if they are forcibly taken, for his constructive possession continued notwithstanding the lien. *Holly v. Huggeford*, 8 *Pick.* (Mass.) 73, 75, 19 *Am. Dec.* 303.

96. *Swift v. Moseley*, 10 *Vt.* 208, 33 *Am. Dec.* 197.

[a] Where the thing is put to a different use from that for which it was bailed, with the consent of the bailee, the bailor may maintain trespass or trover. *Swift v. Moseley*, 10 *Vt.* 208, 33 *Am. Dec.* 197.

[b] Where the bailee sells the property. *Swift v. Moseley*, 10 *Vt.* 208, 33 *Am. Dec.* 197; *Enos v. Cole*, 53 *Wis.* 235, 10 *N. W.* 377.

97. *Root v. Chandler*, 10 *Wend.* (N. Y.) 110, 25 *Am. Dec.* 546; *Soper v. Sumner*, 5 *Vt.* 274.

[a] The reason of the rule is that when the absolute owner of a chattel is entitled to possession, he is in contemplation of law considered as in actual possession. *Soper v. Sumner*, 5 *Vt.* 274.

[b] Where a son buys stock and tools for use of an indigent father, the son is the owner in constructive possession and may maintain trespass for the wrongful taking thereof. *Brown v. Scott*, 7 *Vt.* 57.

98. *Brownell v. Manchester*, 1 *Pick.* (Mass.) 232; *Strong v. Adams*, 30 *Vt.* 221, 73 *Am. Dec.* 305.

99. *Williams v. Lewis*, 3 *Day* (Conn.) 498.

1. *Parsons v. Dickinson*, 11 *Pick.* (Mass.) 352.



session,—though the property be in the actual possession of the mortgagor.<sup>2</sup> If, however, the mortgage authorizes the retention of possession by the mortgagor, the mortgagee cannot maintain trespass.<sup>3</sup> For the same reason a pledgor cannot maintain trespass.<sup>4</sup>

c. *Trespass to Real Property.*—(I.) **Generally.**—To support trespass *quare clausum fregit*, the plaintiff must have been in actual or constructive possession of the premises at the time of the trespass thereon.<sup>5</sup> He must either have actual possession, or the immediate right to it, flowing from the right of property.<sup>6</sup> If he has neither, he cannot maintain this action, even though he is the general owner of the premises trespassed upon.<sup>7</sup> As a general rule, it may be stated that if the premises trespassed upon are actually occupied, an action of trespass must be brought by the person in possession.<sup>8</sup>

2. *Dunlap v. Steele*, 80 Ala. 424; *Boswell v. Carlisle Jones & Co.*, 70 Ala. 244; *Breckett v. Bullard*, 12 Mete. (Mass.) 308.

**Trespass by mortgagee**, see 5 STANDARD PROC. 58, 66.

3. *Dunlap v. Steele*, 80 Ala. 424.

**His remedy is case**, see 5 STANDARD PROC. 58, note 50.

4. *Gay v. Smith*, 38 N. H. 171.

5. **Ala.**—*Walker v. Tillis*, 188 Ala. 313, 66 So. 54, L. R. A. 1915A, 654. **Cal.**—*Felton v. Justice*, 51 Cal. 529. **Del.**—*Truitt v. Osler*, 4 Boyce 555, 90 Atl. 467; *David v. State*, 4 Boyce 464, 89 Atl. 214. **Ill.**—*Callagan v. American T. & S. Bank*, 196 Ill. App. 102. **Kan.**—*Wilkins v. Lee*, 73 Kan. 321, 85 Pac. 140. **Ky.**—*Hillman v. Hurley*, 82 Ky. 626. **Minn.**—*Moon v. Avery*, 42 Minn. 405, 44 N. W. 257. **Mo.**—*Linn Woolen Co. v. Brown*, 110 Me. 88, 85 Atl. 404; *Hobart-Lee Tie Co. v. Stone*, 135 Mo. App. 438, 117 S. W. 604. **N. H.**—*Perry v. Carr*, 44 N. H. 118; *Winkley v. Hill*, 6 N. H. 391. **N. Y.**—*Carter v. Pitcher*, 87 Hun 580, 34 N. Y. Supp. 549, 68 N. Y. St. 661. **Okla.**—*Casey v. Mason*, 8 Okla. 665, 59 Pac. 252. **Pa.**—*Griffin v. Delaware & Hudson Co.*, 257 Pa. 432, 101 Atl. 750. **S. C.**—*Nicholson v. Villepigue*, 97 S. C. 130, 81 S. E. 494. **Wis.**—*Knapp v. Alexander-E. L. Co.*, 145 Wis. 528, 130 N. W. 504; *Gunsolus v. Lormer*, 54 Wis. 630, 12 N. W. 62.

[a] **The right of action is in the person** having the right of possession. *Phillips v. De Groat*, 2 Lans. (N. Y.) 192.

[b] **A lienor, not in possession of**

land, cannot maintain trespass. *Lewis v. Carsaw*, 15 Pa. 31.

**As to constructive possession**, see *infra*, II, H, 1, c, (III).

6. *McGrew v. Foster*, 113 Pa. 642, 6 Atl. 346, trespass *quare clausum fregit*. See also *Akers v. Iberia Cypress Co.*, 131 La. 833, 60 So. 363.

7. **Ala.**—*Boswell v. Carlisle Jones & Co.*, 70 Ala. 244. **Me.**—*Butler v. Taylor*, 86 Me. 17, 29 Atl. 923. **N. Y.**—*Campbell v. Arnold*, 1 Johns. 511. **Vt.**—*Bourne v. Merritt*, 22 Vt. 429.

[a] **If the general owner has parted with possession**, conferring on another the exclusive right of present enjoyment, retaining in himself only the right to take or resume possession at some future time, or on the happening of some contingency or event in the future, his right of possession is in reversion, and he cannot maintain trespass for an injury to the property while the particular right of possession is continuing. *Boswell v. Carlisle, Jones & Co.*, 70 Ala. 244.

**His remedy is case**, see the title "Case (The Action of Trespass on the)."

[b] **An abutting owner cannot maintain trespass** against a railroad company which lays tracks upon the abutting and contiguous street. A contention that the possession in the plaintiff, subordinate to the possession of the public, is sufficient to sustain the action is not tenable. *Galt v. Chicago & N. W. Ry. Co.*, 157 Ill. 125, 41 N. E. 643.

8. *Dean v. Comstock*, 32 Ill. 173, 178; *Gunsolus v. Lormer*, 54 Wis. 630, 12 N. W. 62.

If they are vacant and unoccupied the party having the legal title has the right of immediate possession and must bring the action.<sup>9</sup>

(II.) **Actual Possession.** — It is well settled that peaceable possession of land is sufficient to maintain an action of trespass quare clausum fregit against a wrongdoer, or against all the world except the person having the right of possession,<sup>10</sup> without regard to whether the plaintiff had title to the land at the time of the trespass,<sup>11</sup> or whether or not the plaintiff's title is defeasible.<sup>12</sup> A wrongdoer or intruder cannot show a want of title in a plaintiff in actual possession,<sup>13</sup> even in mitigation of damages,<sup>14</sup> unless he connects himself with it.<sup>15</sup> Or as the rule is frequently stated, as against a wrongdoer, any possession is a legal possession.<sup>16</sup>

As against a wrongdoer, or every one whose right is not superior to the plaintiff's, it is not necessary that the plaintiff's possession be rightful. In such case, a tortious possession will support the action. The defendant is not allowed to justify his own wrong by showing the plaintiff's wrong, unless he connects himself with the true title.<sup>17</sup>

As against the true owner, or other person having the right to immediate possession, bare possession is not sufficient to enable the plaintiff in trespass to recover,<sup>18</sup> even though force is used by the

9. *Dean v. Comstock*, 32 Ill. 173, 179; *Kneeland-McLurg Lumb. Co. v. Lillie*, 156 Wis. 428, 145 N. W. 1093.

As to constructive possession, see *infra*, II, H, 1, c, (III).

10. **U. S.**—*Kraus v. Congdon*, 161 Fed. 18, 88 C. C. A. 182. **Cal.**—*Lightner Min. Co. v. Lane*, 161 Cal. 689, 120 Pac. 771, Ann. Cas. 1913C, 1093. **Ill.**—*Galt v. Chicago & N. W. Ry. Co.*, 157 Ill. 125, 41 N. E. 643. **Kan.**—*Davis v. Sim*, 100 Kan. 66, 163 Pac. 622. **Me.**—*Moore v. Moore*, 21 Me. 350. **Mich.**—*Weston v. Dunn*, 168 Mich. 563, 135 N. W. 316. **Mo.**—*Reed v. Price*, 30 Mo. 442; *Boston v. Neat*, 12 Mo. 125. **N. H.**—*Chandler v. Walker*, 21 N. H. 282, 53 Am. Dec. 202. **N. J.**—*Phillips v. Kent*, 23 N. J. L. 155. **N. C.**—*Frisbee v. Marshall*, 122 N. C. 760, 30 S. E. 21; *Myrick v. Bishop*, 8 N. C. 485. **S. C.**—*Gore v. Whiteville Lumb. Co.*, 96 S. E. 683. **Vt.**—*Potter v. Washburn*, 13 Vt. 558, 37 Am. Dec. 615. **Wyo.**—*Noble v. Hudson*, 20 Wyo. 227, 122 Pac. 901.

[a] "As against a mere trespasser, possession is sufficient title to support an action." *Bonner v. Wiggins*, 52 Tex. 125, 128.

[b] "The actual bona fide possession of land under a claim of right is such a title as will support an action for trespass against one not shown to

be in privity with a better title." *Culbertson Irr. & W. P. Co. v. Olander*, 51 Neb. 539, 540, 71 N. W. 298.

[c] A person in adverse possession of land may maintain trespass quare clausum fregit as against a mere trespasser without pretense of title. *Moore v. Moore*, 21 Me. 350.

11. **Ala.**—*Louisville & N. R. Co. v. Hall*, 131 Ala. 161, 32 So. 603. **Ky.**—*Stephens v. Stephens*, 165 Ky. 353, 176 S. W. 1137. **N. Y.**—*Domhoff v. Stier*, 157 App. Div. 204, 141 N. Y. Supp. 825.

12. *Greber v. Kleckner*, 2 Pa. 289.

13. *Blaisdell v. Roberts*, 37 Me. 239; *Reed v. Price*, 30 Mo. 442.

14. *Reed v. Price*, 30 Mo. 442.

15. See *infra*, this section.

16. *Chandler v. Walker*, 21 N. H. 282, 53 Am. Dec. 202; *Anderson v. Nesmith*, 7 N. H. 167; *Spurlock v. Port Townsend Southern R. Co.*, 13 Wash. 29, 42 Pac. 520.

17. **Ala.**—*Southern R. Co. v. Hayes*, 183 Ala. 465, 62 So. 874. **N. Y.**—*Hovt v. Gelston*, 13 Johns. 141. **Vt.**—*Swift v. Moseley*, 10 Vt. 208, 33 Am. Dec. 197.

[a] "Any possession is a legal possession as against a wrongdoer." *Graham v. Peat*, 1 East 244, 102 Eng. Reprint 95.

18. **Ala.**—*Southern Ry. Co. v. Hayes*, 183 Ala. 465, 62 So. 874. **Ill.**—*Dean*

owner in retaking possession and the use of force is prohibited by statute,<sup>19</sup> though in the latter case some authorities are to the contrary.<sup>20</sup> While undisputed possession in the plaintiff is in itself prima facie proof that he has such title as to authorize a suit by him,<sup>21</sup> such possession throws upon the defendant the burden of proving a better title, and a possessory right.<sup>22</sup> The defendant then may dispute the plaintiff's possessory right by showing that the title and possessory right are vested in himself, or another under whom he claims, or whose authority he has,<sup>23</sup> ownership and a right to enter at the time in question constituting a perfect defense to the action.<sup>24</sup> To succeed in the action, the plaintiff must prove such a legal possession as the defendant has no right to disturb.<sup>25</sup>

If, however, a person has a special property in the premises with the right of possession, he may maintain an action of trespass against any one disturbing his possession, even though the trespasser is the general owner of the premises.<sup>26</sup>

*v. Comstock*, 32 Ill. 173, 179; *Ambrose v. Root*, 11 Ill. 497, 52 Am. Dec. 456. **Ky.**—*Stillwell v. Duncan*, 103 Ky. 59, 44 S. W. 357, 39 L. R. A. 863; *McClain v. Todd's Heirs*, 5 J. J. Marsh. 335, 22 Am. Dec. 37. **N. J.**—*Phillips v. Kent*, 23 N. J. L. 155. **N. Y.**—*Hyatt v. Wood*, 4 Johns. 150, 4 Am. Dec. 258. **Tex.**—*Heironimus v. Duncan*, 11 Tex. Civ. App. 610, 33 S. W. 287.

As to plea of *liberum tenementum*, see *infra*, II, K, 2.

**19. Ala.**—*Southern Ry. Co. v. Hayes*, 183 Ala. 465, 62 So. 874. **Ky.**—*Stillwell v. Duncan*, 103 Ky. 59, 44 S. W. 357, 39 L. R. A. 863; *Tribble v. Frame*, 7 J. J. Marsh. 599, 23 Am. Dec. 439; *Yeates v. Allin*, 2 Dana 134. **Mass.** *Low v. Elwell*, 121 Mass. 309, 23 Am. Rep. 272, explaining *Sampson v. Henry*, 13 Pick. 36.

[a] **Rationale of Rule.**—The rule of law that the owner of land cannot take or retake possession of his own land by force applies to actions of trespass *de bonis asportatis*, trespass to the person, or forcible entry, but it does not apply to trespass *quare clausum fregit*. It is a perfect defense to the latter action to show that the defendant owns the land in question, and that he had, at the time in question, a right to enter. The fact that he entered by force, over the protest of the plaintiff does not destroy his defense. If he uses more force than is necessary and injures the person or property of the plaintiff, he is liable in an appropriate action, but that action is not trespass *quare clausum*

*fregit*. This action is to recover damages as for injury to the land. If the plaintiff did not own the land, and his possession was wrongful, he could not suffer any damages, so far as the land was concerned, whatever damages he may have otherwise suffered in person or estate. *Southern Ry. Co. v. Hayes*, 183 Ala. 465, 62 So. 874.

**20. Sprague Nat. Bank v. Erie R. Co.**, 62 N. J. L. 474, 41 Atl. 681; *Thiel v. Bull's Ferry Land Co.*, 58 N. J. L. 212, 33 Atl. 281 (the statutory remedy of forcible entry and detainer does not preclude relief); *Bonner v. Wiggins*, 52 Tex. 125; *Heironimus v. Duncan*, 11 Tex. Civ. App. 610, 33 S. W. 287.

**21. Higdon v. Kennemer**, 120 Ala. 193, 24 So. 439, 441; *Spurlock v. Port Townsend Southern R. Co.*, 13 Wash. 29, 42 Pac. 520.

**22. Hillhouse v. Jennings**, 60 S. C. 392, 401, 38 S. E. 596.

**23. Reed v. Price**, 30 Me. 442.

**24. Southern Ry. Co. v. Hayes**, 183 Ala. 465, 62 So. 874.

**25. Reed v. Price**, 30 Mo. 442.

**26. La Rue v. Russell**, 26 Ind. 386; *Phillips v. Kent*, 23 N. J. L. 155.

Action by tenant against landlord, see *infra*, II, H, 1, c, (IV), (B).

[a] A person who has acquired title by adverse possession may maintain trespass against one with a perfect paper title to the land, when his possession is disturbed by the latter. *Hughes v. Graves*, 39 Vt. 359, 94 Am. Dec. 331.



What constitutes actual possession depends somewhat upon the character of the land in dispute, the purpose for which it is used, and the condition in which it is permitted and desired to remain.<sup>27</sup> An actual *pedis possessio* is not necessary in all cases.<sup>28</sup> And exclusive use and possession of the premises is not requisite.<sup>29</sup> However, a possessor, without title, possesses only within the limit of his inclosures, and cannot maintain trespass for acts committed beyond such inclosures.<sup>30</sup>

(III.) **Constructive Possession.**—Under modern practice, constructive possession of the premises trespassed upon is sufficient to sustain an action of trespass *quare clausum fregit*.<sup>31</sup> Constructive possession of real property is that possession which exists in contemplation of law without actual personal occupancy of the property, or which the law annexes to legal title or ownership when there is a right to actual possession, but no actual possession.<sup>32</sup>

Thus, when the premises trespassed upon are unoccupied, the general owner is deemed to be in constructive possession and entitled to maintain an action of trespass.<sup>33</sup> In such case, the plaintiff must

27. *Truitt v. Osler*, 4 Boyce (Del.) 555, 90 Atl. 467.

[a] **Inclosure Is Unnecessary.**—*Pennington v. Lewis*, 4 Penne. (Del.) 447, 56 Atl. 378.

28. *Phillips v. De Groat*, 2 Lans. (N. Y.) 192. See *Lamb v. Swain*, 48 N. C. 370.

[a] **An actual *pedis possessio* is not always necessary.** "Thus, a constant and uninterrupted use of an unfenced lot, for twenty years as a wood lot for the farm on which the plaintiff lived, has been held a sufficient actual possession to maintain the action (*Machine v. Geortner*, 14 Wend. 239)." *Phillips v. De Groat*, 2 Lans. (N. Y.) 192.

29. *Stanton v. Lapp*, 113 Md. 324, 77 Atl. 672.

[a] **Possession jointly with another is sufficient to sustain trespass.** *Holly v. Brown*, 14 Conn. 255.

[b] **When possession is mixed**, that is, where the possession has been shared with some other person, and acts of ownership have been exercised by both parties from time to time by both parties claiming a property, the right of possession is in that party who has the legal title. *David v. State*, 4 Boyce (Del.) 464, 89 Atl. 214.

30. *Gray v. Grant Timber & Mfg. Co.*, 131 La. 922, 60 So. 617.

But as to possession of a part of a tract of land under a color of title to the whole, see *infra*, II, H, 1, c, (III.)

31. **Me.**—*Butler v. Taylor*, 86 Me. 17, 29 Atl. 923. **Md.**—*Carter v. Maryland & P. R. Co.*, 112 Md. 599, 77 Atl. 301. **Minn.**—*Woll v. Voigt*, 105 Minn. 371, 117 N. W. 608, 23 L. R. A. (N. S.) 270. **N. H.**—*Chandler v. Walker*, 21 N. H. 282, 286, 53 Am. Dec. 202.

*Contra*, *McClain v. Todd's Heirs*, 5 J. J. Marsh. (Ky.) 335, 22 Am. Dec. 37. And see *Truitt v. Osler*, 4 Boyce (Del.) 555, 90 Atl. 467, where the court says the plaintiff must prove actual and immediate possession.

[a] **Formerly** (1) mere legal or constructive possession was not sufficient to maintain the action. See *McClain v. Todd's Heirs*, 5 J. J. Marsh. (Ky.) 335, 22 Am. Dec. 37. See also 1 Chitt. Pl. 177; 3 Bl. Comm. 210. (2) But this rule was thought to be unsuited to this country where there is so much wild and uncultivated land, and the prevailing rule now is otherwise in most states. *Butler v. Taylor*, 86 Me. 17, 29 Atl. 923.

32. See *Lofstad v. Murasky*, 152 Cal. 64, 91 Pac. 1008.

33. **U. S.**—*Johnson v. C. & N. W. Sand & Gravel Co.*, 86 Fed. 269, 30 C. C. A. 35. **Ala.**—*Segar v. Kirkley*, 23 Ala. 680. **Conn.**—*Radican v. Hughes*, 86 Conn. 536, 86 Atl. 220. **Me.**—*Thurston v. McMillan*, 108 Me. 67, 78 Atl. 1122; *Millinocket v. Mullen*, 108 Me. 29, 78 Atl. 1120. **Md.** *Gent v. Lynch*, 23 Md. 58, 87 Am. Dec. 558. **Mo.**—*Wright v. Nickey* (Mo.

have had title to the property at the time of the trespass;<sup>34</sup> mere color of title without actual possession is insufficient,<sup>35</sup> although possession of a part of a tract of land under an instrument purporting to convey title to the whole is constructive possession of the whole sufficient to sustain trespass quare clausum against a stranger to the title,<sup>36</sup> unless the balance is in the actual possession of the owner or some one claiming title.<sup>37</sup> It is not necessary, however, that an owner, who has the legal title, should make an actual entry upon the premises, under his deed or grant.<sup>38</sup> Not only must the plaintiff have title, but it is also necessary that the land be unoccupied at the time of the trespass.<sup>39</sup> If the land should be in the adverse possession of another, the constructive possession of the general owner is defeated, and he cannot maintain trespass.<sup>40</sup> A mere temporary oc-

App.), 182 S. W. 1085; *Hammontree v. Huber*, 39 Mo. App. 326. **N. H.** *Warren v. Cochran*, 30 N. H. 379. **N. M.**—*First Nat. Bank v. Tome*, 23 N. M. 255, 167 Pac. 733. **N. Y.**—*Phillips v. De Groat*, 2 Lans. 192; *Caster v. Pitcher*, 87 Hun 500, 34 N. Y. Supp. 549, 68 N. Y. St. 661. **N. C.**—*Gordner v. Blades Lumber Co.*, 144 N. C. 110, 56 S. E. 695; *Cohoon v. Simmons*, 29 N. C. 189; *Myrick v. Bishop*, 8 N. C. 485. See also *Lamb v. Swain*, 43 N. C. 370. **N. D.**—*Russell v. Meyer*, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637. **Okla.**—*Casey v. Mason*, 8 Okla. 665, 59 Pac. 252. **Pa.**—*Darrah v. Kadison*, 51 Pa. Super. 133. **Wis.** *Gunsolus v. Lormer*, 54 Wis. 630, 12 N. W. 62.

[a] The possession is constructive when (1) the property is in the custody and occupancy of no one, but rightfully belongs to the plaintiff. In such case the title draws to it the possession. *Brown v. Hartzell*, 87 Mo. 564. (2) Constructive possession of realty is that possession which the law imputes to the holder of the paramount title to unoccupied land. *Kraus v. Congdon*, 161 Fed. 18, 88 C. C. A. 182.

[b] If neither party has actual possession at the time of the unlawful entry, the law adjudges possession to be in him who has the superior title. *Waters v. Dennis Simmons Lumb. Co.*, 154 N. C. 232, 70 S. E. 284.

[c] For an injury to wild land, the owner may maintain an action of trespass by showing his title to it, on the principle that the law gives him a constructive possession. *Caldwell v. Walters*, 22 Pa. 378; *Cannon v. Hatch-*

*er*, 1 Hill (C. C.) 260, 26 Am. Dec. 177.

[d] The possession of a trespasser does not divest the owner of his right to possession, whether the trespasser is in temporary or prolonged possession. *Wall v. Voigt*, 105 Minn. 371, 117 N. W. 608, 23 L. R. A. (N. S.) 270.

34. **N. C.**—*Gordner v. Blades Lumber Co.*, 144 N. C. 110, 56 S. E. 695. **Wash.**—*Spurlock v. Port Townsend Southern R. Co.*, 13 Wash. 20, 42 Pac. 520. **Wis.**—*Kneeland McLurg Lumb. Co. v. Lillie*, 156 Wis. 428, 145 N. W. 1093; *Wadleigh v. Marathon County Bank*, 58 Wis. 546, 17 N. W. 314.

[a] If the cause of action is for permanent injury to land, the plaintiff to recover must establish his title. *Wadleigh v. Marathon County Bank*, 58 Wis. 546, 17 N. W. 314.

[b] A trustee may maintain trespass for the cutting of timber from land in a wild state. *Meehan v. Edwards*, 92 Ky. 574, 18 S. W. 519, 19 S. W. 179.

35. *Kraus v. Congdon*, 161 Fed. 18, 88 C. C. A. 182; *Price v. Greer*, 76 Ark. 426, 83 S. W. 985.

36. *Edwards v. Noyes*, 65 N. Y. 125; *Hunt v. Taylor*, 22 Vt. 556; *Beach v. Sutton*, 5 Vt. 209.

37. *Fullam v. Foster*, 68 Vt. 590, 35 Atl. 484; *Aldrich v. Griffith*, 66 Vt. 390, 29 Atl. 376.

38. *Warren v. Cochran*, 30 N. H. 379.

39. See *supra*, this section.

40. **Ala.**—*Williams v. Lyon*, 181 Ala. 531, 61 So. 299. **Conn.**—*Sutton v. Lockwood*, 40 Conn. 318. **Ill.**—*Cook v. Foster*, 7 Ill. 652. **Vt.**—*Fullam v. Fos-*

cupancy, however, for the purpose of making a survey or taking off timber by one having no right of possession, is not such an actual occupancy as defeats the constructive possession of the owner.<sup>41</sup>

According to many authorities, where there is a tenancy at will, the landlord has such possession that he can maintain trespass, if the injury is to the freehold.<sup>42</sup>

(IV.) Application of Rules. — (A.) GENERALLY. — The general rules above stated have been applied to a mortgagor,<sup>43</sup> a licensee,<sup>44</sup> and a lienholder<sup>45</sup> in possession. But a remainderman or reversioner cannot maintain trespass, there being no possession.<sup>46</sup>

(B.) LANDLORD AND TENANT. — A tenant in possession of real property may maintain trespass against his landlord,<sup>47</sup> as well as against a stranger<sup>48</sup> who wrongfully invades and disturbs his possession, unless he has sublet the property to a sublessee who is in possession.<sup>49</sup> The lessor cannot maintain an action of trespass against a tortfeasor,<sup>50</sup> even though injury be done to the reversion,<sup>51</sup> unless he resumes

ter, 68 Vt. 590, 35 Atl. 484; Aldrich v. Griffith, 66 Vt. 390, 29 Atl. 376.

41. McGrew v. Foster, 113 Pa. 642, 6 Atl. 346.

42. See *infra*, II, H, 1, c, (IV), (B).

43. See 19 STANDARD PROC. 1101.

44. See 18 STANDARD PROC. 639.

45. See 18 STANDARD PROC. 1011, 1013.

Claimant of agricultural lien not entitled to possession cannot maintain trespass, see 18 STANDARD PROC. 643.

46. For injury to reversionary right, trespass will not lie, there being no possession. See 4 STANDARD PROC. 631.

Remainderman cannot maintain trespass, see 18 STANDARD PROC. 628.

47. Lunsford v. Deitrich, 86 Ala. 250, 253, 5 So. 461, 11 Am. St. Rep. 37; Phillips v. Kent, 23 N. J. L. 155.

48. Mass.—Anthony v. New York P. & B. R. Co., 162 Mass. 60, 37 N. E. 780. Me.—Bartlett v. Perkins, 13 Me. 87. S. C.—Hillhouse v. Jennings, 60 S. C. 392, 38 S. E. 596. Vt.—Weston v. Gravlin, 49 Vt. 507.

See 18 STANDARD PROC. 457.

[a] A tenant from year to year may maintain trespass against a purchaser of the owner with actual knowledge of his tenancy. Salimonie Min. & Gas Co. v. Wagner, 2 Ind. App. 81, 28 N. E. 158.

[b] A tenant at sufferance may maintain trespass. See Clark v. Smith, 25 Pa. 137.

[c] A tenant under a parol lease has a right of possession for a term

of twelve months from the time of entry, and may maintain an action for a trespass committed during that time. Hillhouse v. Jennings, 60 S. C. 392, 38 S. E. 596.

[d] Lessee of Administrator.—Boyer v. Anduiza, 90 Ore. 163, 175 Pac. 853.

Action by lessee of a mining claim, see 19 STANDARD PROC. 805.

[e] But if the owner resides on the premises, a person who cultivates the land on shares cannot maintain trespass for an injury to the crop, as he is not in possession of the land. Greber v. Kleckner, 2 Pa. 289.

49. Linn Woolen Co. v. Brown, 110 Me. 88, 85 Atl. 404.

50. Ala.—Middleton v. Alabama Power Co., 196 Ala. 1, 71 So. 461. N. H.—Wentworth v. Portsmouth & D. R. R., 55 N. H. 540; Robertson v. George, 7 N. H. 306; Anderson v. Nesmith, 7 N. H. 167. N. Y.—Campbell v. Arnold, 1 Johns. 511. Pa.—Greber v. Kleckner, 2 Pa. 289.

See 18 STANDARD PROC. 455.

[a] Tenancy for a Term.—Mass. Hingham v. Sprague, 15 Pick. 102. N. H.—Anderson v. Nesmith, 7 N. H. 167. Vt.—Catlin v. Hayden, 1 Vt. 375.

As to landlord's remedies generally, see 18 STANDARD PROC. 455.

51. Greber v. Kleckner, 2 Pa. 289. Contra, Parker v. Shackelford, 61 Mo. 68; Cramer v. Groseclose, 53 Mo. App. 648.



possession,<sup>52</sup> or unless, according to some authorities, the tenancy is at will and there is an injury to the reversion,<sup>53</sup> though even in the latter case the landlord can not sue if a notice to terminate the tenancy is required.<sup>54</sup> In the case of a tenant at will, the possession may be considered as in either the lessor or lessee,<sup>55</sup> and either the tenant,<sup>56</sup> or the landlord,<sup>57</sup> or both<sup>58</sup> may have actions of trespass against a stranger and recover damages according to their several losses.<sup>59</sup> So also, a landlord may sue a tenant at will in trespass for voluntary waste, as that terminates the lease.<sup>60</sup> There is, however, a distinction between renting the entire premises, and the renting of rooms in a building specifically. The owner in the latter case still has possession and may maintain trespass, especially if the building be destroyed.<sup>61</sup>

**Where There Are Reservations or Restrictions.** — If there is a reservation of trees or timber and the like in a lease, the lessor may maintain trespass for injury thereto.<sup>62</sup> There is a distinction, however, between a reservation and a mere restriction upon the tenant not to cut timber; the landlord in the latter case is deemed to have parted with possession and is therefore without right to maintain trespass.<sup>63</sup>

(C.) **DISSEISIN.** — Although a disseisee may maintain trespass for an act of disseisin and recover damages for the original entry,<sup>64</sup> he cannot, while he allows the disseisin to continue, maintain an action of trespass *quare clausum fregit* against the disseisor or his successor in title for any acts done subsequent to the disseisin.<sup>65</sup> But after

52. *Dorrell v. Johnson*, 17 Pick. (Mass.) 263.

53. See *infra*, this section.

54. *Clark v. Smith*, 25 Pa. 137, 140.

55. *Greber v. Kleckner*, 2 Pa. 289. But see *Clark v. Smith*, 25 Pa. 137.

56. *Smith v. Fortiscue*, 48 N. C. 65; *Greber v. Kleckner*, 2 Pa. 289.

57. *Me.*—*Davis v. Nash*, 32 Me. 411. *Mass.*—*Hingham v. Sprague*, 15 Pick. 102; *Starr v. Jackson*, 11 Mass. 519. *S. C.*—*Cannon v. Hatcher*, 1 Hill. L. 260, 26 Am. Dec. 177. *Vt.*—*Catlin v. Hayden*, 1 Vt. 375, 384, "we should incline to follow the decision in *Mass. Rep.*," if the tenancy involved were a tenancy at will.

*Contra*, *Campbell v. Arnold*, 1 Johns. (N. Y.) 511. And see *Smith v. Fortiscue*, 48 N. C. 65, not deciding the point.

[a] "The rule that case [by the landlord] lies for such an injury is also very clear." *Cannon v. Hatcher*, 1 Hill. L. (S. C.) 260, 262, 26 Am. Dec. 177.

[b] But it is only where damage is done to the land that the landlord can sue. *Smith v. Fortiscue*, 48 N. C. 65.

58. See *Greber v. Kleckner*, 2 Pa. 289. But see *Clark v. Smith*, 25 Pa. 137, holding the landlord cannot sue because notice to quit is essential.

59. *Greber v. Kleckner*, 2 Pa. 289.

60. *Daniels v. Pond*, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; *Catlin v. Hayden*, 1 Vt. 375, 384.

61. *Curtiss v. Hoyt*, 19 Conn. 154, 48 Am. Dec. 149.

62. *Phillips v. De Groat*, 2 Lans. (N. Y.) 192; *Greber v. Kleckner*, 2 Pa. 289.

63. *Greber v. Kleckner*, 2 Pa. 289; *Torrence v. Irwin*, 2 Yeates (Pa.) 210, 1 Am. Dec. 340.

64. *Smith v. Wunderlich*, 70 Ill. 426; *Cutting v. Cox*, 19 Vt. 517. See also *Abbott v. Abbott*, 51 Me. 575; *Putney v. Dresser*, 2 Mete. (Mass.) 583.

65. *Conn.*—*Avery v. Spicer*, 90 Conn. 576, 98 Atl. 135. *Ill.*—*Smith v. Wunderlich*, 70 Ill. 426. *Me.*—*Butler v. Taylor*, 86 Me. 17, 29 Atl. 923; *Abbott v. Abbott*, 51 Me. 575. *Md.*—*Gent v. Lynch*, 23 Md. 58, 87 Am. Dec. 558. *Mass.*—*Allen v. Thayer*, 17 Mass. 299. *Okla.*—*Casey v. Mason*, 8 Okla. 665, 59

reentry and regaining possession, by a legal fiction called relation, the owner is regarded as having been continuously invested with the freehold and possession, and he may have an action of trespass quare clausum for all the intermediate damage and for his rents and profits.<sup>66</sup>

(D.) TRUSTS AND TRUSTEES.—In trespass upon land conveyed in trust, the trustee can maintain the action unless the cestui qui trust is in possession, in which case he should be the plaintiff.<sup>67</sup>

d. *Assignee*.—Although there is authority to the contrary,<sup>68</sup> some authorities hold that an assignee may maintain an action to recover damages for a trespass to real or personal property committed prior to the assignment.<sup>69</sup> But he cannot maintain an action for trespass to the person,<sup>70</sup> unless authorized by statute,<sup>71</sup> as the injuries are personal.

2. *Joinder*.—Joint owners of property whether it be real<sup>72</sup> or

Pac. 252. Pa.—*Greber v. Kleckner*, 2 Pa. 289.

66. *Ore*.—*Pacific Live Stock Co. v. Isaacs*, 52 Ore. 54, 96 Pac. 460. *Vt.* *Cutting v. Fox*, 19 Vt. 519. *Eng.* *Liford's Case*, 11 Coke 46b, 51, 77 Eng. Reprint 1206, 1215.

[a] *Against Whom Action Lies*. The owner may maintain the action against the disseisor, his lessee, donee, or people, or against a stranger for mesne profits, according to the weight of authority. *Pacific Live Stock Co. v. Isaacs*, 52 Ore. 54, 96 Pac. 460. *Compare Liford's Case*, 11 Coke 46b, 51, 77 Eng. Reprint 1206, 1215.

67. *Cox v. Walker*, 26 Me. 504, 512. But *compare Rogers v. White*, 1 Sneed (Tenn.) 68.

68. *Allen v. Macon, D. & S. R. Co.*, 107 Ga. 838, 845, 33 S. E. 696; *Galt v. Chicago & N. W. Ry. Co.*, 157 Ill. 125, 41 N. E. 643; *Chicago & A. R. Co. v. Maher*, 91 Ill. 312. See *Hayes Creek Coal Co. v. Eagle Coal Co.*, 32 Ky. L. Rep. 888, 107 S. W. 297, holding the assignment vests the equitable title to the claim in the assignee, and the assignor can join with the assignee and sue for the benefit of the latter.

[a] *A grantee of land cannot maintain trespass for injuries committed before he became owner*. *Galt v. Chicago & N. W. Ry. Co.*, 157 Ill. 125, 136, 41 N. E. 643; *Chicago & Alton R. Co. v. Maher*, 91 Ill. 312; *Caledonian Coal Co. v. Rocky Cliff Min. Co.*, 16 N. M. 517, 120 Pac. 715.

69. *More v. Massini*, 32 Cal. 590; *North v. Turner*, 9 Serg. & R. (Pa.)

244. See the title "Assignments."

[a] *Reason of Rule*.—The fact that the remedy for trespass to goods survives to the personal representative shows that such a cause of action is separable from the person of the owner. *North v. Turner*, 9 Serg. & R. (Pa.) 244. See the title "Survival."

70. *North v. Turner*, 9 Serg. & R. (Pa.) 244.

71. See the statutes.

72. *Bowen v. John L. Roper Lumber Co.*, 162 N. C. 516, 77 S. E. 227.

[a] *Tenants in common of realty*

(1) must join in trespass quare clausum fregit. *Ala.*—*Pruitt v. Ellington*, 59 Ala. 454, as the injury is single and indivisible. But see *Wood v. Montgomery*, 60 Ala. 500, where there has not been a joint letting, each tenant may maintain a separate action for his share of the sum due for a trespass. *Me.*—*Haven v. Brown*, 7 Greenl. 421, 22 Am. Dec. 208. But see statutes of Maine. *Md.*—*Gent v. Lynch*, 23 Md. 58, 87 Am. Dec. 558. *N. Y.*—*Austin v. Hall*, 13 Johns. 286, 7 Am. Dec. 376. *Tex.*—*Cummings & Co. v. Masterson*, 42 Tex. Civ. App. 549, 93 S. W. 500. *Compare Murray v. Webster*, 5 N. H. 391, and the title "Tenants in Common." (2) Where tenant in common is in exclusive possession of a portion of the premises, he may sue alone for injury to that possession not amounting to an injury to the freehold. *Milner v. Milner*, 101 Ala. 599, 14 So. 373.

[b] *Former joint tenants who had parted with their interests before the commission of the trespass cannot be*

personal,<sup>73</sup> must generally join in actions for damages for a trespass thereon, unless statute authorizes a severance.<sup>74</sup> But in an action by a person in and entitled to possession, the reversioner or remaindermen should not be joined.<sup>75</sup> Thus in an action of trespass by a bailee or other person having a special property in realty or personalty, it is not necessary to join the bailor or the owner.<sup>76</sup>

Joint trespassers may be sued either jointly or severally.<sup>77</sup> And a servant may be joined with the master in accordance with general rules elsewhere discussed.<sup>78</sup>

**3. Intervention.**—A person with the requisite interest may intervene in the action.<sup>79</sup>

**I. PROCESS.**—The process should conform to general rules elsewhere discussed.<sup>1</sup>

**J. DECLARATION OR COMPLAINT.**—**1. Generally.**<sup>2</sup>—In an action of trespass the plaintiff in his first pleading must state facts constituting his cause of action in accordance with the general rules,<sup>3</sup>

joined as plaintiffs. *Logan v. Pennsylvania Tel. Co.*, 40 Pa. Super. 650.

**73.** *Pickering v. Pickering*, 11 N. H. 141, both joint tenants and tenants in common must join.

**74.** See the statutes and *Palmer v. Dougherty*, 33 Me. 502, 54 Am. Dec. 636.

**75.** See *infra*, this note.

[a] In an action by a widow entitled to possession, the heirs should not be joined. *Little Rock & Ft. S. R. Co. v. Dyer*, 35 Ark. 360.

**76.** *Chicago v. Pennsylvania Co.*, 119 Fed. 497, 57 C. C. A. 509.

[a] In an action by a tenant the landlord need not be joined. *Strohlburg v. Jones*, 78 Cal. 381, 20 Pac. 705; *Larkin v. Taylor*, 5 Kan. 433. Compare 18 STANDARD PROC. 458, et seq.

**77.** Cal.—*Myers v. Daubenbiss*, 84 Cal. 1, 23 Pac. 1027; *Lewis v. Johns*, 34 Cal. 629; *Davidson v. Dallas*, 8 Cal. 227, 253. Conn.—*Nichols v. Peck*, 70 Conn. 439, 39 Atl. 803, 66 Am. St. Rep. 122, 40 L. R. A. 81. Ill.—*Callaghan v. Myers*, 89 Ill. 566. Nev.—*Mandlebaum v. Russell*, 4 Nev. 551. N. J.—*Allen v. Craig*, 13 N. J. L. 294. N. Y.—*Guille v. Swan*, 19 Johns. 381, 10 Am. Dec. 234; *Low v. Mumford*, 14 Johns. 426, 7 Am. Dec. 469. Ohio.—*Bailey v. Berry*, 3 Ohio Dec. 483. Tex.—*Torrey v. Schneider*, 74 Tex. 116, 11 S. W. 1068. Vt.—*Myrick v. Downer*, 18 Vt. 360.

[a] **Several Actions Should Be Consolidated.**—*Nichols v. Peck*, 70 Conn. 439, 39 Atl. 803, 66 Am. St. Rep. 122, 40 L. R. A. 81.

**78.** *Brokaw v. New Jersey R. & T. Co.*, 32 N. J. L. 328, 90 Am. Dec. 699. See the title "Master and Servant."

**79.** See generally the title "Intervention," and *infra*, this note.

[a] A person claiming ownership of the premises, and alleging that the defendant entered the premises by his license may intervene. *Le Moyne v. Anderson*, 123 Ky. 584, 96 S. W. 843.

**1.** See the title "Process," and *Parris v. Brown*, 5 Yerg. (Tenn.) 267, justice's warrant should set out cause of action in trespass.

[a] The notice need not specify (1) the date (*Des Moines Nav. & R. Co. v. Doran*, 4 Iowa 553; *Bishop v. Lyman*, 6 N. H. 268), or (2) the venue. *Des Moines Nav. & R. Co. v. Doran*, 4 Iowa 553. (3) Nor need it allege force and arms. *Bishop v. Lyman*, 6 N. H. 268.

**2.** As to joinder of actions generally, see the title "Joinder of Actions."

**3.** See *Louisville & N. R. Co. v. Higginbotham*, 153 Ala. 334, 44 So. 872, and the title "Declaration and Complaint."

For forms, see 9 STANDARD PROC. 1212.

[a] An allegation of facts according to their legal effect, namely, that the defendant "entered, etc., and took and carried away, etc.," is not required under the code where the very facts themselves are stated. *Ives v. Humphreys*, 1 E. D. Smith (N. Y.) 196.



avoiding the anticipation of defenses.<sup>4</sup> Where the statute prescribes forms, a substantial conformity therewith is sufficient.<sup>5</sup> Although statute may do away with the technical distinction between trespass and case, the averments and proof to sustain trespass are the same as at common law.<sup>6</sup> Under the code, the plaintiff may ask damages for trespass, and in the same complaint ask an injunction to protect the subject of the action until the case is tried.<sup>7</sup>

**2. Title and Possession of Plaintiff.**<sup>8</sup>—In trespass quare clausum fregit, the plaintiff must allege the fact of possession either actual<sup>9</sup> or

[b] Pleading the names of the particular agents or employes of the defendant corporation who committed the trespasses is not required. *Commonwealth Co. v. Nunn*, 17 Colo. App. 117, 67 Pac. 342.

[c] Designating the particular wrongful act done by each of the several defendants is not required. *Commonwealth Co. v. Nunn*, 17 Colo. App. 117, 67 Pac. 342.

4. See *infra*, this note.

[a] That goods were exempt from execution need not be averred in trespass against an officer. *Stevens v. Somerindyke*, 4 E. D. Smith (N. Y.) 418.

5. *Gilliland & Son v. Martin*, 149 Ala. 672, 42 So. 7. See *Joseph v. Henderson*, 95 Ala. 213, 10 So. 843; 6 STANDARD PROC. 729.

6. *Chicago Title & Trust Co. v. Core*, 223 Ill. 58, 79 N. E. 108; *Blalock v. Randall*, 76 Ill. 224.

[a] Although formality is dispensed with, matters of substance must be alleged. *Busch v. Calhoun*, 14 Pa. Super. 578.

[b] The declaration should advise the defendant whether the suit is brought to recover damages for direct injuries from a trespass or for consequential injuries other than damages to the freehold or for both. *Cribbs v. Stiver*, 181 Mich. 82, 147 N. W. 587.

[c] **Conformity to Process.**—Where distinction between trespass and case is abolished, process in case may be followed by a declaration in trespass. *Adams v. Lorraine Mfg. Co.*, 29 R. I. 333, 71 Atl. 180.

7. *Brennan v. Gaston*, 17 Cal. 372; *Gates v. Kieff*, 7 Cal. 124; *Duclos v. Kelley*, 122 App. Div. 329, 106 N. Y. Supp. 1058.

See the titles "Joinder of Actions;" "Suits and Actions."

[a] **Form of Complaint.**—If the law and equity are inseparably mixed the complaint is demurrable. But it is not necessary to show by express words where the declaration in trespass terminates and the bill in equity begins. *Gates v. Kieff*, 7 Cal. 124.

[b] The injunction falls with the principal matter of which it is an accessory. *Brennan v. Gaston*, 17 Cal. 372.

8. See generally the title "Title."

9. **U. S.**—*Cochran v. Brannan*, 196 Fed. 219. **Ala.**—*Louisville & N. R. Co. v. Hall*, 131 Ala. 161, 32 So. 603; *O'Neal v. Simonton*, 109 Ala. 167, 19 So. 412. **Ark.**—*Crowder v. Fordyce Lumber Co.*, 93 Ark. 392, 125 S. W. 417; *Price v. Greer*, 76 Ark. 426, 88 S. W. 985. **Cal.**—*Gomez v. Reed*, 174 Pac. 658; *Demartin v. Albert*, 68 Cal. 277, 9 Pac. 157; *Pollock v. Cummings*, 38 Cal. 683. **Conn.**—*Parker v. Hotchkiss*, 25 Conn. 321. **Del.**—*Hunter v. Lank*, 1 Harr. 10. **Kan.**—*Wilkins v. Lee*, 73 Kan. 321, 85 Pac. 140; *Duncan v. Yordy*, 27 Kan. 348. **Md.**—*New Windsor v. Stocksedale*, 95 Md. 196, 52 Atl. 596; *Norwood v. Shipley*, 1 Har. & J. 295. **Minn.**—*Moon v. Avery*, 42 Minn. 405, 44 N. W. 257. **N. Y.**—*Cowenhoven v. Brooklyn*, 38 Barb. 9; *Alt v. Gray*, 55 App. Div. 563, 67 N. Y. Supp. 411. **Okla.**—*Casey v. Mason*, 8 Okla. 665, 59 Pac. 252. **Pa.**—*Fisher v. Morris*, 5 Whart. 358. **S. C.**—*Catheart v. Matthews*, 105 S. C. 329, 89 S. E. 1021. **Tex.**—*Creswell Ranch & C. Co. v. Scoggins*, 15 Tex. Civ. App. 373, 39 S. W. 612. *Leihy v. Ashland Lumbering Co.*, 49 Wis. 165, 5 N. W. 471.

[a] It must appear that plaintiff had actual possession of the premises,

constructive,<sup>10</sup> at the time of the trespass. But an averment of ownership is not required if the plaintiff alleges actual possession.<sup>11</sup> But if the plaintiff is not in actual possession, he must allege ownership,<sup>12</sup> and allege that the land is unoccupied.<sup>13</sup>

In trespass de bonis asportatis, the plaintiff must allege either<sup>14</sup> a gen-

or that being disseised, he regained possession, or had a judgment of a competent court awarding it to him. *Cowenhoven v. Brooklyn*, 38 Barb. (N. Y.) 9.

[b] An allegation of breaking and entry of plaintiff's close is a sufficient allegation (1) of possession. *Finch's Exrs. v. Alston*, 2 Stew. & P. (Ala.) 83, 23 Am. Dec. 299. (2) Such an allegation does not necessarily mean that the plaintiff owns the premises. It signifies an interest sufficient to maintain trespass. *Wright v. Bennett*, 4 Ill. 258.

[c] The character or extent of the plaintiff's title need not be shown when possession is alleged. *Watry v. Hiltgen*, 16 Wis. 516. See *Fisher v. Morris*, 5 Whart. (Pa.) 358.

10. *Ala.*—*Louisville & N. R. Co. v. Hall*, 131 Ala. 161, 32 So. 603. *Ky.* *Gray v. Peay*, 26 Ky. L. Rep. 989, 82 S. W. 1006. *N. D.*—*Russell v. Meyer*, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637. *Okla.*—*Casey v. Mason*, 8 Okla. 665, 59 Pac. 252.

11. *Iowa* *Dorey v. Patterson*, 7 Iowa 420; *Kissam v. Roberts*, 6 Bosw. (N. Y.) 154.

[a] An allegation of ownership is surplusage and its denial raises an immaterial issue. *Kissam v. Roberts*, 6 Bosw. (N. Y.) 154.

12. *Ark.*—*Price v. Greer*, 76 Ark. 426, 88 S. W. 985, where land was wild and unoccupied, ownership must be shown. *Md.*—*Norwood v. Shipley*, 1 Har. & J. 295, must allege title or possession. *Minn.*—*Booth v. Sherwood*, 12 Minn. 426. *N. Y.*—*Cowenhoven v. Brooklyn*, 38 Barb. 9. *Okla.*—*Casey v. Mason*, 8 Okla. 665, 59 Pac. 252.

[a] From an allegation of title or ownership, (1) possession in the plaintiff sufficiently appears without an express allegation thereof. *Ala.*—*South ern Ry. Co. v. McEntire*, 169 Ala. 42, 53 So. 158; *O'Neal v. Simonton*, 109 Ala. 167, 19 So. 412. *Fla.*—*Jacksonville T. & K. W. Ry. Co. v. Griffin*, 33 Fla. 602, 15 So. 336. *Ky.*—*Smith v. Hancock*, 4 Bibb. 222. *Mo.*—*Renshaw v. Lloyd*, 50 Mo. 368; *Holladay-Klotz*

*Land & Lumb. Co. v. T. J. Moss Tie Co.*, 79 Mo. App. 543; *Hammontree v. Huber*, 39 Mo. App. 326. *N. Y.*—*Cowenhoven v. Brooklyn*, 38 Barb. 9. *Wis.* *Leihy v. Ashland Lumber Co.*, 49 Wis. 165, 5 N. W. 471. See also *Cave v. Crafts*, 53 Cal. 135. (2) A mere allegation of breaking and entering "the lands and premises of the said plaintiff," describing them is insufficient as an allegation of ownership. *Orris v. Kempton*, 105 Mich. 229, 63 N. W. 68. But see *Ehrmantrott v. McMahon*, 78 Wis. 138, 47 N. W. 305, and the article "Title."

[b] Deraignment of title is unnecessary. *Ark.*—*Price v. Greer*, 76 Ark. 426, 88 S. W. 985. *Ga.*—*James v. Saunders*, 127 Ga. 336, 56 S. E. 491; *Burns v. Horkan*, 126 Ga. 161, 54 S. E. 946, abstract of title need not be set up. *Ky.*—*Asher v. Helton*, 31 Ky. L. Rep. 9, 101 S. W. 350; *Gray v. Peay*, 26 Ky. L. Rep. 989, 82 S. W. 1006.

13. *Casey v. Mason*, 8 Okla. 665, 59 Pac. 252.

14. *Ark.*—*Warner v. Capps*, 37 Ark. 32. *Colo.*—*Nachtrieb v. Stoner*, 1 Colo. 423, must show a right of property with right to immediate possession to maintain trespass de bonis. *Ind.*—*Day v. Watts*, 92 Ind. 442; *Richardson v. Brewer*, 81 Ind. 107. *Ky.*—*Smith v. Hancock*, 4 Bibb 222. *Md.*—*Neale v. Clautice*, 7 Har. & J. 372. *Mass.* *Carlisle v. Weston*, 1 Mete. 26.

[a] A statement that the property is "his" (1) is a sufficient statement of property. *Heath v. Conway*, 1 Bibb. (Ky.) 398. See also *Stowers Furn. Co. v. Brake*, 158 Ala. 639, 48 So. 89, and the title "Title." (2) The "cow of plaintiff's intestate" is a sufficient averment of interest. *Stanley v. Gaylord*, 10 Mete. (Mass.) 82. (3) But an averment that the property described was taken from the plaintiff is not an allegation of property. *Day v. Watts*, 92 Ind. 442. And see *Warner v. Capps*, 37 Ark. 32.

[b] The precedents state that the defendant took, etc., the goods of the plaintiff. *Kissam v. Roberts*, 6 Bosw. (N. Y.) 154, 165.

eral or special property in the personalty at the time of the trespass, or actual possession thereof.<sup>15</sup>

**3. Description of Property.**<sup>16</sup>—The property trespassed upon must be described whether it be realty,<sup>17</sup> or personalty.<sup>18</sup> In trespass to personal property, the quantity, number,<sup>19</sup> and value,<sup>20</sup> must be averred. Where a number of articles of different kinds are taken and the aggregate value of the whole is alleged, the number of articles of each description need not be stated,<sup>21</sup> unless it appears the plaintiff is able to give an accurate description.<sup>22</sup> And it has been held that where the items are given, the aggregate value of the whole may be alleged, without alleging the value of each separately.<sup>23</sup> In trespass *de bonis*, the place from which the goods are taken need not be described.<sup>24</sup>

[c] That goods were taken out of plaintiff's possession need not be alleged where plaintiff's property is alleged. *Brown v. Arther*, 1 Hill (N. Y.) 266; *Donaghe v. Roudeboush*, 4 Munf. (18 Va.) 251, the objection was raised on motion in arrest of judgment.

[d] That plaintiff was entitled to immediate possession of the chattel need not be alleged. *Clague v. Hodgson*, 16 Minn. 329. Compare *Nachtrieb v. Stoner*, 1 Colo. 423, and the title "Title." See also 22 STANDARD PROC. 921.

[e] Verdict does not cure omission to aver property. *Neale v. Clautice*, 7 Har. & J. (Md.) 372; *Carlisle v. Weston*, 1 Mete. (Mass.) 26.

15. Ala.—*Bartlett v. Chaviers*, 14 Ala. App. 279, 69 So. 975. Colo.—*Nachtrieb v. Stoner*, 1 Colo. 423. Mass. *Stanley v. Gaylord*, 10 Mete. 82. Mo. *Deland v. Vanstone*, 26 Mo. App. 297.

See also *Warner v. Capps*, 37 Ark. 32, holding it to be better pleading to allege a property in the goods.

16. Allegations as to enclosure, in case of trespassing animals, see the title, "Trespassing Animals."

17. *Elmore v. Fields*, 153 Ala. 345, 45 So. 66, 127 Am. St. Rep. 31; *Western Union Tel. Co. v. Dickens*, 148 Ala. 480, 41 So. 469 (where property was described as that of plaintiff, a description of which is attached and marked Exhibit A); *Moody v. Hinkley*, 34 Me. 200, declaration not describing close or specifying venue is bad.

18. *McKenna v. Fisk*, 1 Hayw. & H. 179, 16 Fed. Cas. No. 8,852; *Randlette v. Judkins*, 77 Me. 114, 52 Am. Rep. 747.

19. *Dainese v. Hale*, 1 MacArthur (D. C.) 86.

[a] Failure to specify number of articles carried away is not available in arrest of judgment. *Richardson v. Eastman*, 12 Mass. 505.

20. Ark.—*McConnell v. Hardeman*, 15 Ark. 151. Conn.—*Plumb v. Griffin*, 74 Conn. 132, 50 Atl. 1. D. C.—*Dainese v. Hale*, 1 MacArthur 86. Tex.—*Carter v. Wallace*, 2 Tex. 206.

[a] The verdict cures the omission to allege value. *Carter v. Wallace*, 2 Tex. 206.

21. Mass.—*Richardson v. Eastman*, 12 Mass. 505, as against objection after verdict. Va.—*Donaghe v. Roudeboush*, 4 Munf. (18 Va.) 251, where the taking of a quantity of poultry, consisting or turkeys, geese, ducks and hens, was alleged. W. Va.—*Newton v. Reitz*, 31 W. Va. 483, 7 S. E. 411, where a cutting of all the timber including oak, poplar, pine, walnut, etc., of the value of \$3000 was alleged.

But see *Forbes v. Moore*, 32 Tex. 195, holding an allegation of taking of all farming utensils and household and kitchen furniture of the value of \$2000 is too indefinite.

22. *Schneider v. Ferguson*, 77 Tex. 572, 14 S. W. 154, holding an allegation of a seizure of stock consisting of salt, coal oil, etc., reasonably worth the sum of \$600 was held insufficient, it being the duty of the officer to inventory the property taken.

23. *Jesse French Piano & Organ Co. v. Phelps*, 47 Tex. Civ. App. 385, 105 S. W. 225. But compare *Forbes v. Moore*, 32 Tex. 195.

24. *Peaslee v. Wadleigh*, 5 N. H. 317, such an allegation is surplusage.



In trespass quare clausum, it is not necessary to give a particular description of the premises<sup>25</sup> unless required by statute,<sup>26</sup> although it would undoubtedly be better practice to do so.<sup>27</sup> The premises may be designated by name,<sup>28</sup> or by some of the abutments,<sup>29</sup> or by some other sufficient description to identify it.<sup>30</sup>

**4. The Acts Constituting the Trespass.**—The declaration or complaint must allege the facts constituting the trespass,<sup>31</sup> whether to the

See *Richardson v. Brewer*, 81 Ind. 107, holding an allegation of taking from the close of the plaintiff in G. county is a sufficient description.

**25. Ark.**—*Randall v. Sanders*, 71 Ark. 609, 77 S. W. 56. **Colo.**—See *Sullivan v. Clements*, 1 Colo. 261, query. **Ill.**—*Meixsell v. Feezor*, 43 Ill. App. 180. **Ind.**—*Shipler v. Isenhower*, 27 Ind. 36. **Mich.**—*Macfarlane v. Ray*, 14 Mich. 465. **N. H.**—*Palmer v. Tuttle*, 39 N. H. 486. **N. C.**—*Womack v. Carter*, 160 N. C. 286, 75 S. E. 1102 (the Hilary rules are not in force in North Carolina); *Whitaker v. Forbes*, 68 N. C. 228.

[a] **A description as property or close of the plaintiff** situated in a particular county is sufficient. **Ill.**—*Prussner v. Brady*, 136 Ill. App. 395. **Ind.**—*Shipler v. Isenhower*, 27 Ind. 36. **Kan.**—*Larkin v. Taylor*, 5 Kan. 433. **Me.**—*Drummond v. Withee*, 115 Me. 522, 99 Atl. 458.

**26.** See the statutes and *Foley v. McCarthy*, 157 Mass. 474, 32 N. E. 669; *Sawyer v. Ryan*, 13 Metc. (Mass.) 144; *Forbush v. Lombard*, 13 Metc. (Mass.) 109.

**27. Ark.**—*Randall v. Sanders*, 71 Ark. 609, 77 S. W. 56. **Ill.**—*Meixsell v. Feezor*, 43 Ill. App. 180. **W. Va.**—*Glen Jean, L. L. & D. R. Co. v. Kanawha, G. J. & E. R. Co.*, 47 W. Va. 725, 35 S. E. 978.

**28. Md.**—*Lapp v. Stanton*, 116 Md. 197, 81 Atl. 675, Ann. Cas. 1913C, 755; *Tyson v. Shuey*, 5 Md. 540. **Mass.**—*Sawyer v. Ryan*, 13 Metc. 144. **Tex.**—See *Badu v. Satterwhite*, 125 S. W. 929. **W. Va.**—*Glen Jean, L. L. & D. R. Co. v. Kanawha, G. J. & E. R. Co.*, 47 W. Va. 725, 35 S. E. 978.

[a] **By Name.**—Dwelling house of the plaintiff situated in L., occupied by him, is a sufficient description by name. *Sawyer v. Ryan*, 13 Metc. (Mass.) 144.

**29. Rico-Aspen Consol. Min. Co. v. Enterprise Min. Co.**, 56 Fed. 131; *Glen*

*Jean, L. L. & D. R. Co. v. Kanawha, G. J. & E. R. Co.*, 47 W. Va. 725, 35 S. E. 978.

**30. Gray v. Peay**, 26 Ky. L. Rep. 989, 82 S. W. 1006, a description so land may be identified should be made. *Glen Jean, L. L. & D. R. Co. v. Kanawha, G. J. & E. R. Co.*, 47 W. Va. 725, 35 S. E. 978.

[a] **Sufficient particularity to prevent the defendant from being misled or uncertain as to the particular locus in quo of the trespass** is all that is required. *Elmore v. Fields*, 153 Ala. 345, 45 So. 66, 127 Am. St. Rep. 31; *Bessemer L. & Imp. Co. v. Jenkins*, 111 Ala. 135, 18 So. 565, 56 Am. St. Rep. 26; *Lohr v. Wolfe*, 71 W. Va. 627, 77 S. E. 71.

[b] **The accuracy of description required in ejectment, or unlawful detainer** is not required unless the action is brought to try title. *Glen Jean, L. L. & D. R. Co. v. Kanawha, G. J. & E. R. Co.*, 47 W. Va. 725, 35 S. E. 978. To same effect, see *Hall v. Mayo*, 97 Mass. 416.

[c] **Specifying the section in which the land lies** is not necessary, where it is otherwise identified. *Husted v. Willoughby*, 117 Mich. 56, 75 N. W. 279.

**31. Reed v. Maley**, 115 Ky. 816, 74 S. W. 1079; *Gray v. Peay*, 26 Ky. L. Rep. 989, 82 S. W. 1006; *New Windsor v. Stocksdales*, 95 Md. 196, 52 Atl. 596.

[a] **The trespass should be distinctly set forth so that the principal act complained of and matters in aggravation can be distinguished.** *Clark v. Langworthy*, 12 Wis. 441.

[b] **Directly, not by way of recital**, the trespass should be alleged. *Sturdevant v. Gains*, 5 Ala. 435; *Gordon v. Hood, Minor* (Ala.) 122 (the defect is aided by verdict); *Ballard v. Leavell*, 5 Call (9 Va.) 531, if not so alleged, plaintiff cannot have judgment though the defendant be found guilty.

[c] **The acts of violence must be**

person,<sup>32</sup> or to personal,<sup>33</sup> or real<sup>34</sup> property. At common law that the injury was committed *vi et armis* and *contra pacem* should be alleged.<sup>35</sup> But this allegation is not necessary under the code in trespass *quare clausum*,<sup>36</sup> and generally it has long since lost its seeming importance.<sup>37</sup>

5. **Time.**—The date of the trespass must be alleged,<sup>38</sup> unless statute provides otherwise.<sup>39</sup> In a proper case, to prevent the bringing of several actions, the trespass may be laid with a *continuando*,<sup>40</sup> or

described so that issue may be taken thereon. *Snedecor v. Pope*, 143 Ala. 275, 39 So. 318.

[d] But a count claiming damages "for a trespass" on certain goods and chattels is sufficient as a description of the wrong counted upon. *Hardeman v. Williams*, 169 Ala. 50, 53 So. 794.

32. See the titles, "Assault and Battery;" "False Imprisonment."

33. *Bartlett v. Chaviers*, 14 Ala. App. 279, 69 So. 975.

[a] An allegation that the defendant "took or caused to be taken" etc., is not bad as being in the alternative; and because they amount to the same thing, the second is surplusage. *Clague v. Hodgson*, 16 Minn. 329.

[b] The instrument used in injuring or destroying trees need not be designated. *Ellerbe v. Marion Co. Lumb. Co.*, 99 S. C. 158, 82 S. E. 1049.

[c] A loss of possession and use by the conversion of the personalty need not be alleged. *Clague v. Hodgson*, 16 Minn. 329.

[d] That the taking is wrongful or unlawful need not be alleged specifically. *Clague v. Hodgson*, 16 Minn. 329; *Buck v. Colbath*, 7 Minn. 310, 82 Am. Dec. 91 (under the code); *Barnum v. Baltimore & Ohio R. Co.*, 5 W. Va. 10. See *Hardeman v. Williams*, 169 Ala. 50, 53 So. 794.

34. *Gomez v. Reed* (Cal.), 174 Pac. 658; *Demartin v. Albert*, 68 Cal. 277, 9 Pac. 157; *Strohlburg v. Jones*, 78 Cal. 381, 20 Pac. 705; *Cathcart v. Matthews*, 105 S. C. 329, 89 S. E. 1021.

[a] That the defendant broke and entered plaintiff's close or land should be alleged. *U. S.—Rico-Aspen Consol. Min. Co. v. Enterprise Min. Co.*, 56 Fed. 131. *Me.—Sawyer v. Goodwin*, 34 Me. 419, although the distinction between trespass and case is abolished. *Mass. Wilcox v. Conway*, 115 Mass. 561. *Tex. Creswell Ranch & C. Co. v. Scoggins*, 15 Tex. Civ. App. 373, 39 S. W. 612. (2) But the literal use of this phrase

is not necessary; equivalent language is sufficient. *Griffin v. Gilbert*, 28 Conn. 493; *Lapp v. Stanton*, 116 Md. 197, 81 Atl. 675, Ann. Cas. 1913C, 755.

[b] A general allegation of wrongful entry is sufficient. *Morrell v. Chicago, M. & St. P. Ry. Co.*, 49 Minn. 526, 52 N. W. 140.

35. *Waterman v. Hall*, 17 Vt. 128, 42 Am. Dec. 484. See also *Mass.—Wilcox v. Conway*, 115 Mass. 561. *R. I. Gautieri v. Romano*, 28 R. I. 246, 66 Atl. 652. *Eng.—1 Chitt. Pl.* 209.

36. *Ark.—Little Rock & Fort Smith R. Co. v. Dyer*, 35 Ark. 360. *Cal. Darst v. Rush*, 14 Cal. 81, where trespass was caused by water which overflowed. *Mont.—Febes v. Tiernan*, 1 Vt. 179.

37. *Higgins & Bogue v. Hayward*, 5 Vt. 73.

[a] An omission of these allegations is a mere formal defect available only by special demurrer. *Griffin v. Gilbert*, 28 Conn. 493; *Higgins & Bogue v. Hayward*, 5 Vt. 73.

[b] The Omission Is Cured by the Verdict.—*Heimer v. Wilcox*, 1 Ind. 29; *Febes v. Tiernan*, 1 Mont. 179.

38. *Ala.—Snedecor v. Pope*, 143 Ala. 275, 39 So. 318. *Conn.—Andrews v. Thayer*, 40 Conn. 156. *Ga.—Warren v. Powell*, 122 Ga. 4, 49 S. E. 730.

[a] An allegation that "heretofore" the defendant did etc., is not a sufficient allegation of time. *Andrews v. Thayer*, 40 Conn. 156.

[b] Aider by Verdict.—If no day is laid or an impossible day is alleged, the defect is cured after verdict, unless the day is subsequent to the bringing of the action. *Charles v. Delpux*, 2 Browne (Pa.) 313.

39. See the statutes, and the following cases: *Kendall v. Bay State Brick Co.*, 125 Mass. 532; *Knapp v. Slocomb*, 9 Gray (Mass.) 73.

40. *Ill.—Western Book & Stat. Co. v. Jevne*, 179 Ill. 71, 53 N. E. 565. *Mass.—Kendall v. Bay State Brick Co.*,

the plaintiff may declare that on such a day "and on divers other days and times between that day and some other day," the defendant committed the trespasses complained of.<sup>41</sup>

**6. Other Allegations.**—Circumstances of aggravation must be alleged if exemplary damages are sought.<sup>42</sup> In trespass de bonis, a demand need not be alleged,<sup>43</sup> nor is it necessary to allege want of consent of the plaintiff to the trespass in actions of trespass generally.<sup>44</sup> In an action by an assignee of the demand sued on, the assignment must be pleaded.<sup>45</sup>

**7. Damages.**—The plaintiff in an action of trespass must allege his damages,<sup>46</sup> and plead any special damage resulting therefrom.<sup>47</sup>

125 Mass. 532; *Folger v. Fields*, 12 Cush. 93. **N. Y.**—*Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326; *Richardson v. Northrup*, 66 Barb. 85. **Eng.** *Manchester v. Vale*, 1 Saund. 23, note 1, 85 Eng. Reprint 25; *Monckton v. Pashley*, 2 Ld. Raym. 974, 92 Eng. Reprint 149 (consumption of plaintiff's grass and hunting may be laid with a continuando); *Fontleroy v. Aylmer*, 1 Ld. Raym. 239, 91 Eng. Reprint 1056.

[a] When the trespass is in its nature capable of continuance, as where cattle trampled on plaintiff's grass for several days, the trespass may be alleged with a continuando. *Kendall v. Bay State Brick Co.*, 125 Mass. 532.

[b] Trespasses which, when executed, terminate and cannot be done again and cannot be continued, such as cutting down trees, cannot be pleaded with a continuando, but must be alleged to have been committed on divers times, etc. *Folger v. Fields*, 12 Cush. (Mass.) 93; *Brook v. Bishop*, 7 Mod. 152, 87 Eng. Reprint 1158; *Monckton v. Pashley*, 2 Ld. Raym. 974, 92 Eng. Reprint 149.

[c] Under the code, the rule is still in force. *Richardson v. Northrup*, 66 Barb. (N. Y.) 85.

**41. Ala.**—*Alabama Midland Ry. Co. v. Martin*, 100 Ala. 511, 14 So. 401. **Ind.**—*Holcraft v. King*, 25 Ind. 352. **Mass.**—*Pierce v. Pickens*, 16 Mass. 470. **Eng.**—*Manchester v. Vale*, 2 Saund. 23, note 1, 85 Eng. Reprint 25, this method is used more frequently than that of declaring with a continuando.

See *Brady v. Bronson*, 45 Cal. 640.

[a] For repeated trespasses, this is the correct way of declaring. *Kendall v. Bay State Brick Co.*, 125 Mass.

532; *Brook v. Bishop*, 7 Mod. 152, 87 Eng. Reprint 1158.

**42.** *Sheldon v. Baumann*, 191 App. Div. 61, 45 N. Y. Supp. 1016. See 13 STANDARD PROC. 367.

[a] A wilful and wanton disregard of the rights of others must be alleged. *Kahle v. Crown Oil Co.*, 180 Ind. 131, 100 N. E. 681.

[b] The word "wanton" in an action of trespass is not governed by the rules of pleading applied to the same word in actions of negligence. It means only a violation of plaintiff's premises with knowledge thereof and of the injurious results therefrom. *Ex parte Birmingham Realty Co.*, 183 Ala. 444, 63 So. 67.

**43.** *Boise v. Knox*, 10 Metc. (Mass.) 40; *Stickney v. Davis*, 16 Pick. (Mass.) 19.

**44.** *Perkins v. Blauth*, 163 Cal. 782, 127 Pac. 50.

**45.** *Gates v. Comstock*, 107 Mich. 546, 65 N. W. 544. See the title, "Assignments."

**46. U. S.**—*Rico-Aspen Consol. Min. Co. v. Enterprise Min. Co.*, 56 Fed. 131. **Cal.**—*Gomez v. Reed*, 174 Pac. 658; *Mallory v. Thomas*, 98 Cal. 644, 33 Pac. 757. **Mo.**—*Young v. Home Telephone Co.* (Mo. App.), 201 S. W. 635. **N. C.** *Davis v. Wall*, 142 N. C. 450, 55 S. E. 350.

See generally the title "Injuries to Persons and Property."

[a] Formal ad damnum clause is not required where facts showing damage are stated. *Weaver v. Mississippi & Rum River Boom Co.*, 28 Minn. 542, 11 N. W. 113.

[b] That damages are due and unpaid need not be alleged. *Atkinson v. Mott*, 102 Ind. 431, 28 N. E. 217.

**47. Cal.**—*Gomez v. Reed*, 174 Pac.



**8. Trespass for Mesne Profits.**<sup>48</sup> — In trespass for mesne profits, the petition, or complaint must show title to or possession of the premises,<sup>49</sup> expulsion of the plaintiff,<sup>50</sup> reception of rents and profits by the defendant,<sup>51</sup> and a re-entry by the plaintiff.<sup>52</sup> But the relation of landlord and tenant between the parties need not be shown.<sup>53</sup>

**9. Amendment of.** — The declaration or complaint may be amended in accordance with the general rules regulating amendments,<sup>54</sup> provided the cause of action is not substantially changed thereby.<sup>55</sup>

**K. PLEA OR ANSWER.** — **1. Generally.** — The defendant in an action of trespass must plead or answer in accordance with the general rules.<sup>56</sup> Under the common law practice, he may plead the gen-

658; *Razzo v. Varni*, 21 Pac. 762. *Conn.* *Eldridge v. Gorman*, 77 Conn. 699, 60 Atl. 643. *Mass.* — *Knapp v. Slocomb*, 9 Gray 73, acts done after entry. *Minn.* *Rauma v. Bailey*, 80 Minn. 336, 83 N. W. 191. *Mo.* — *Macy v. Carter*, 67 Mo. App. 323, deprivation of use. *R. I.* *Hathaway v. Osborne*, 25 R. I. 249, 55 Atl. 700.

See the title "Injuries to Persons and Property."

**48.** See the title "Mesne Profits."

**49.** *Young v. Downey*, 145 Mo. 261, 46 S. W. 962; *Phillips v. Stewart*, 87 Mo. App. 486; *Ainslie v. New York*, 1 Barb. (N. Y.) 168, 177. See *O'Reilly v. Long*, 25 Ind. App. 529, 58 N. E. 563, that complainant is entitled to possession must be shown.

**[a]** Defect is cured by the statute of jeofails. *Phillips v. Stewart*, 87 Mo. App. 486.

**50.** *Young v. Downey*, 145 Mo. 261, 46 S. W. 962; *Ainslie v. New York*, 1 Barb. (N. Y.) 168.

**51.** *Young v. Downey*, 145 Mo. 261, 46 S. W. 962; *Ainslie v. New York*, 1 Barb. (N. Y.) 168.

**52.** *Young v. Downey*, 145 Mo. 261, 46 S. W. 962; *Ainslie v. New York*, 1 Barb. (N. Y.) 168.

**53.** *Schradskey v. Stimson*, 76 Fed. 730, 22 C. C. A. 515, as in an action of use and occupation.

**54.** *Randlette v. Judkins*, 77 Me. 114, 52 Am. Rep. 747 (description of premises); *Farrer v. Silver Creek Highway Comrs.*, 2 Mich. N. P. 106, as to description of premises. See the titles, "Amendments and Jeofails;" "New Cause of Action or Defense;" "Parties."

**[a]** An amendment more fully describing the manner of committing the

trespass is permissible. *Knapp v. Hartung*, 73 Pa. 290.

**[b]** **Date.** — Where a time subsequent to the date of the writ is alleged, the declaration may be amended by fixing a time prior to the date of the writ. *Hammat v. Russ*, 16 Me. 171.

**[c]** The word "forcibly" may be inserted. *Wilcox v. Conway*, 115 Mass. 561.

**[d]** Words "vi et armis" may be added. *Gautieri v. Romano*, 28 R. I. 246, 66 Atl. 652.

**[e]** In trespass for taking away annual profits, a count for usurpation of the fee cannot be added. *Bartlett v. Perkins*, 13 Me. 87.

**55.** *Royse v. May*, 93 Pa. 454; *Downing v. Burnham*, 84 Vt. 149, 78 Atl. 789. See the title "New Cause of Action or Defense."

**56.** See the titles "Answers;" "Confession and Avoidance;" "Denials;" "Pleas;" and titles dealing with particular pleas and defenses.

**[a]** Where the declaration contains several counts supposedly for the same injury, to avoid pleading to each separately, the defendant may in the introductory part of the plea enumerate all the trespasses and after the statement of the action non, allege that the cause of action mentioned in the first and every other count, specifying that contained in each, is the same cause of action and not other or different. After this follows the justification. *Rubottom v. McClure*, 4 Blackf. (Ind.) 505.

**[b]** Where the plaintiff alleges title, a plea denying possession in the plaintiff is bad because it fails to answer the allegation of title. *Miller v. Miller*, 41 Md. 623. See also *Neale v. Clautice*, 7 Har. & J. (Md.) 372.

eral issue, which is not guilty of the trespasses as alleged by the plaintiff.<sup>57</sup> If he relies on any new matter as a defense,<sup>58</sup> or any matter of justification or excuse,<sup>59</sup> he must specially plead it. But he need not specially plead matter in mitigation of damages merely.<sup>60</sup> Under the codes, it has been held that the defense of ownership of personality by the defendant must be specially pleaded.<sup>61</sup> Subject to the limitations elsewhere discussed<sup>62</sup> the defendant may plead<sup>63</sup> incon-

[c] **When denying title in the plaintiff,** (1) it is necessary to deny his title at the time of the trespass complained of. *Neale v. Clautice*, 7 Har. & J. (Md.) 372. (2) The same rule applies when part ownership in another is set up. *East v. Cain*, 49 Mich. 473, 13 N. W. 822.

[d] **The Allegation "Against the Peace" Is Not Traversable.**—*McKenna v. Fisk*, 1 How. (U. S.) 241, 11 L. ed. 117.

[e] **Need Not Answer Matters of Aggravation.**—Md.—*Neale v. Clautice*, 7 Har. & J. 372. Mo.—*Burton v. Sweaney*, 4 Mo. 1. Vt.—*Carpenter v. Barber*, 44 Vt. 441.

57. *Babcock v. Lamb*, 1 Cow. (N. Y.) 238; *Hess v. Sutton*, 33 Pa. Super. 530; *Siegfried v. So. Bethlehem Borough*, 27 Pa. Super. 456, under statute, the only plea in trespass is not guilty. See 1 Chitt. Pl. 209, and generally the title "Denials."

[a] **Notwithstanding a new assignment,** the general issue continues to be an answer to the whole cause of action. *Stewart v. Henry*, 5 Blackf. (Ind.) 445.

58. *Young v. Rummell*, 2 Hill (N. Y.) 478, 38 Am. Dec. 594, former recovery. See generally the titles "Answers;" "Confession and Avoidance."

59. Ala.—*Finch's Exrs. v. Alston*, 2 Stew. & P. 83, 23 Am. Dec. 299; *Jackson v. Bohlen* (Ala. App.), 75 So. 697. Cal.—*Razzo v. Varni*, 21 Pac. 762. Ill. Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108; *Hudson v. Miller*, 97 Ill. App. 74. Kan.—*McCartney v. Smith*, 10 Kan. App. 580, 62 Pac. 540. Ky.—*Smith v. Hancock*, 4 Bibb 222. Me.—*Dartnell v. Bidwell*, 115 Me. 227, 98 Atl. 743. N. J.—*United States Pipe Line Co. v. Delaware L. & W. R. Co.*, 62 N. J. L. 254, 41 Atl. 759, 42 L. R. A. 572. N. Y.—*Duclos v. Kelley*, 122 App. Div. 329, 106 N. Y. Supp. 1058; *Babcock v. Lamb*, 1 Cow. 238. S. C.—*Henderson v. Bennett*, 58 S. C. 30, 36 S. E. 2. Tex.—*Carter v. Wallace*, 2 Tex. 206. Vt.—*Andrews v. Chase*, 5

Vt. 409. Eng.—*Milman v. Dolwell*, 2 Camp. 378.

See 8 STANDARD PROC. 968.

[a] **A justification good as to a part only of the trespass alleged is bad as a whole,** if it professes to answer the whole. *Higby v. Williams*, 16 Johns. (N. Y.) 215; *Drake v. Barrymore*, 14 Johns. (N. Y.) 166; *Goodrich v. Judevine*, 40 Vt. 190.

[b] **License from the plaintiff must (1) be specially pleaded.** Del.—*Quillen v. Betts*, 1 Penne. 53, 39 Atl. 595. Ill. Chicago Title & Trust Co. v. Core, 126 Ill. App. 272, affirmed, 223 Ill. 58, 79 N. E. 108. Ind.—*Boltz v. Smith*, 3 Ind. App. 43, 29 N. E. 155. Mich.—*Vanderkarr v. Thompson*, 19 Mich. 82. Wis. Lockhart v. Geir, 54 Wis. 133, 11 N. W. 245. See also 18 STANDARD PROC. 985. (2) But a license from a stranger may be proved under the general issue or general denial. *Boltz v. Smith*, 3 Ind. App. 43, 29 N. E. 155. See also 18 STANDARD PROC. 985, 986. (3) In fact, a plea of license from a stranger amounts to the general issue. *Brown v. Arther*, 1 Hill (N. Y.) 266.

[c] **Plaintiff's negligence causing injury to his personality must be pleaded.** *Macdonald v. Monk*, 3 U. C. Q. B. O. S. (Can.) 20. But see *Siegfried v. So. Bethlehem Borough*, 27 Pa. Super. 456, 459.

60. *Western Union Tel. Co. v. Dickens*, 148 Ala. 480, 41 So. 469; *Jackson v. Bohlin* (Ala. App.), 75 So. 697; *Williams v. Hathaway*, 20 R. I. 534, 40 Atl. 418.

61. *Patterson v. Clark*, 20 Iowa 429; *Dyson v. Ream*, 9 Iowa 51, as there is no general issue.

As to common law, see *infra*, II, M, 1.

62. See the title "Answers."

63. *Johnson v. Eversole Lumb. Co.*, 147 N. C. 249, 60 S. E. 1129, defendant may deny plaintiff's allegation of title and ask that plaintiff be adjudged a trustee for his benefit.

[a] **A justification and the general issue may be pleaded together.** Shall-

sistent defenses. Pleas amounting to the general issue are bad.<sup>64</sup>

In justifying the trespass, the defendant must allege whatever facts are necessary to authorize the performance of the acts sought to be justified;<sup>65</sup> and it must appear that the acts justified are those complained of.<sup>66</sup> Whether it is necessary to allege the judgment as well as the execution when justifying under legal process depends upon the circumstances and the parties to the action.<sup>67</sup>

*cross v. West Jersey & S. R. Co.*, 75 N. J. L. 395, 67 Atl. 931.

[b] A denial of plaintiff's ownership of the premises and a denial of the commission of the trespass are not repugnant. *Gerbig v. Bell*, 143 Wis. 157, 126 N. W. 871.

64. See the title, "Denials."

[a] A plea setting up that plaintiff is not in possession is bad as amounting to the general issue. *Alexander v. Eastland*, 37 Miss. 554.

[b] A special plea claiming property in a stranger or in the defendant without giving the plaintiff color amounts to the general issue. *Del. Hastings v. Lankford*, 4 Boyce 490, 90 Atl. 43. *Md.*—*Miller v. Miller*, 41 Md. 623; *Hunter v. Hatton*, 4 Gill 115, 126; *Neale v. Clautice*, 7 Har. & J. 372. *N. Y.* *Brown v. Artcher*, 1 Hill 266.

[c] A plea denying the trespass on the land described and alleging it to be on other land where the defendant was justified in committing the act amounts to the general issue. *Dorman v. Long*, 2 Barb. (N. Y.) 214.

65. See *infra*, this note and 8 STANDARD PROC. 969.

[a] Justification by officer under writ authorizing entry on certain premises, must show that the premises trespassed on are those in the writ. *Isley v. Huber*, 45 Ind. 421.

[b] When setting up title in a third party in trespass de bonis, the defendant must connect himself with his right. *Kissam v. Roberts*, 6 Bosw. (N. Y.) 154.

[c] A plea showing necessity of going on plaintiff's land, must allege facts showing such necessity. *Fulton v. Monahan*, 4 Ohio 426.

[d] A justification under a statute authorizing the acts complained of must show a strict compliance with the statute. *Sherman v. Buick*, 32 Cal. 241, 91 Am. Dec. 577.

[e] A justification under judgment or order of a tribunal of inferior jur-

isdiction, must show substantial regularity of its proceedings at every step. *Nachtrieb v. Stoner*, 1 Colo. 423. See also *Robinson v. Jones*, 71 Mo. 582, as to justification under order of township board.

[f] Allegations of an assault by a defendant in retaking its goods must be denied in a plea justifying the taking on the ground of ownership. *Stowers Furn. Co. v. Brake*, 158 Ala. 639, 48 So. 89.

[g] A plea of right of way under a deed must show the parties thereto. *Smith v. Smith*, 3 U. C. Q. B. O. S. (Can.) 215.

[h] A plea setting up an easement, must allege also facts showing the enjoyment of the easement was impeded and that the entry was for the purpose of repairing or removing obstructions from the easement. *Pico v. Colimas*, 32 Cal. 578.

[i] A plea of private path, need not allege the termini. *Ellison v. Aiken*, 10 Rich. L. (S. C.) 369.

66. *Wheeler v. Me-shing-go-me-sia*, 30 Ind. 402.

67. See *Traylor v. McKeown*, 12 Rich. L. (S. C.) 251, statute authorizes giving this justification under the general issue.

[a] In an action against the officer, (1) it is sufficient for him to plead the execution without the judgment when he relies entirely on the execution and nothing beyond it. *Ala.*—*Olmstead v. Thompson*, 91 Ala. 130, 8 So. 755. *Ill.* *Jackson v. Hobson*, 5 Ill. 411. *Mo.* *Burton v. Sweaney*, 4 Mo. 1. *N. Y.* *Shaw v. Davis*, 55 Barb. 389; *Dennis v. Snell*, 50 Barb. 95, 54 Barb. 411, 34 How. Pr. 467. *S. C.*—*Traylor v. McKeown*, 12 Rich. L. 251. *Va.*—*Davis v. Davis*, 2 Gratt. (43 Va.) 363. (2) But if he desires to go further or it is necessary to inquire into the consideration of the judgment, the judgment must be pleaded. *Dennis v. Snell*, 50 Barb. (N. Y.) 95, 54 Barb. 411, 34 How.



**2. Liberum Tenementum.**—A plea of liberum tenementum is a good plea in trespass quare clausum,<sup>68</sup> and may be pleaded with a plea of not guilty in some states.<sup>69</sup> This plea may be used where the declaration is very general in its description of the premises, as well as where it gives a particular description. In the former case, it compels the plaintiff to give a more definite description, or to new assign.<sup>70</sup> In the latter, it admits possession in the plaintiff of the premises described, sufficient to maintain the action,<sup>71</sup> and also the trespass al-

Pr. 467, where it was claimed the property was not exempt as against the judgment in question. (3) When the action is not brought by the defendant in execution, and it is claimed that the sale to the plaintiff is fraudulent as to judgment creditors, the judgment must be shown but it need not be pleaded. **Ill.**—*Jackson v. Hobson*, 5 Ill. 411. **Mass.**—*Damon v. Bryant*, 2 Pick. 411. **N. Y.**—*Jansen v. Acker*, 23 Wend. 480. See *High v. Wilson*, 2 Johns. 46. **Eng.** *Lake v. Billers*, 1 Ld. Raym. 733, 91 Eng. Reprint 1389.

[b] Where the action is against plaintiff in the suit, or a stranger to the process he must plead not only the execution, but the judgment also. *Olmstead v. Thompson*, 91 Ala. 130, 8 So. 755; *Traylor v. McKeown*, 12 Rich. L. (S. C.) 251.

**68. Ala.**—*Louisville & N. R. Co. v. Hall*, 131 Ala. 161, 32 So. 603. **Ga.** *Jones v. Water Lot Co.*, 18 Ga. 539. **Ill.**—*Ward v. Mississippi River Power Co.*, 265 Ill. 486, 107 N. E. 115; *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133; See *Haskins v. Haskins*, 67 Ill. 446. **Ky.** *Stillwell v. Duncan*, 103 Ky. 59, 44 S. W. 357, 39 L. R. A. 863; *Tribble v. Frame*, 7 J. J. Marsh. 599, 23 Am. Dec. 439; *Yeates v. Allin*, 2 Dana 134. **N. J.** *Mayhew v. Ford*, 61 N. J. L. 532, 39 Atl. 914. **N. Y.**—*Shank v. Cross*, 9 Wend. 160. **Pa.**—*Fisher v. Morris*, 5 Whart. 358. **R. I.**—*Schaeffer v. Brown*, 23 R. I. 364, 50 Atl. 640. **S. C.**—*Blair v. Young*, 2 Hill 415.

[a] *Liberum tenementum* not only in himself but also in another with whom he is in privity may be pleaded by the defendant. *Jones v. Water Lot Co.*, 18 Ga. 539.

[b] *Illustration.*—A plea that the close and soil is H's., without saying it is his freehold, is not a plea of liberum tenementum. *Millison v. Holmes*, 1 Ind. 45.

[c] But where a person in peace-

able possession of land is forcibly evicted, a plea of liberum tenementum is bad, as answering only a part of the declaration, while professing to answer the whole. *Sprague Nat. Bank v. Fire R. Co.*, 62 N. J. L. 474, 41 Atl. 681.

[d] A plea of liberum tenementum as to a part of the premises only should show clearly just what part is meant. *Orange v. Berry*, 24 N. H. 105.

[e] When the pleadings in the justice's court are oral, the justice should write down the description of the premises, when a plea of title is made. *Tuthill v. Clark*, 12 Wend. (N. Y.) 207.

[f] In Michigan, the only form of pleading title is by claiming title under the notice filed with the plea. *Walters v. Tefft*, 57 Mich. 390, 24 N. W. 117.

**69. Fisher v. Morris**, 5 Whart. (Pa.) 358, usually pleaded with "not guilty." See *Boyd v. Kimmel*, 161 Ill. App. 206; *Palmer v. Tuttle*, 39 N. H. 486. But see *Faulkner v. Rocket*, 33 R. I. 152, 80 Atl. 380 (the general issue should be disregarded); *Lavin v. Dodge*, 30 R. I. 8, 73 Atl. 376.

**70. Ill.**—*Ward v. Mississippi River Power Co.*, 265 Ill. 486, 107 N. E. 115; *Marks v. Madsen*, 261 Ill. 51, 103 N. E. 625. **Me.**—*Palmer v. Dougherty*, 33 Me. 502, 54 Am. Dec. 636. **Mich.** *Macfarlane v. Ray*, 14 Mich. 465, present practice in Michigan does not permit of a new assignment, except by amendment of the declaration. **N. H.** *Palmer v. Tuttle*, 39 N. H. 486. **Pa.** *Collum v. Andrews*, 6 Watts 516. See *Fisher v. Morris*, 5 Whart. 358. **W. Va.** *Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824.

**71. Fla.**—*Tison v. Broward*, 17 Fla. 465. **Ill.**—*Marks v. Madsen*, 261 Ill. 51, 103 N. E. 625. **Miss.**—*Alexander v. Eastland*, 37 Miss. 554. **Pa.**—*Fisher v. Morris*, 5 Whart. 358. **R. I.**—*Lavin v. Dodge*, 30 R. I. 8, 73 Atl. 376; *Wilbur v. Peckham*, 22 R. I. 284, 47 Atl. 597.

leged,<sup>72</sup> except when a plea of not guilty is also filed,<sup>73</sup> and asserts a freehold in the defendant with the right to immediate possession as against the plaintiff.<sup>74</sup>

**3. Counterclaim and Cross-Complaint.**—The defendant may interpose a counterclaim to a complaint in trespass,<sup>75</sup> or he may file a cross-complaint setting up trespasses which relate to or depend upon the trespasses alleged in the complaint.<sup>76</sup>

**L. REPLICATION, REPLY, AND SUBSEQUENT PLEADING.**—Replications may and should be filed in some states.<sup>77</sup> Under the common law practice the plaintiff should reply to a plea of justification,<sup>78</sup> and should traverse or reply to a plea of liberum tenementum.<sup>79</sup> A general repli-

**S. C.**—*Caruth v. Allen*, 2 McCord 226; *Singleton v. Millet*, 1 Nott & McC. 355. **W. Va.**—*Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824. **Eng.**—*Doe v. Wright*, 10 Ad. & El. 763, 37 E. C. L. 401, 113 Eng. Reprint 289.

**72. Pa.**—*Fisher v. Morris*, 5 Whart. 358. **R. I.**—*Lavin v. Dodge*, 30 R. I. 8, 73 Atl. 376; *Carpenter v. Logee*, 24 R. I. 383, 53 Atl. 288. **S. C.**—*Caruth v. Allen*, 2 McCord 226. **Eng.**—*Brest v. Lever*, 7 M. & W. 593, 9 D. P. C. 246, 10 L. J. Ex. 337.

**73.** *Boyd v. Kimmel*, 161 Ill. App. 206.

**74. Ill.**—*Marks v. Madsen*, 261 Ill. 51, 103 N. E. 625. **Md.**—*Hunter v. Hatton*, 4 Gill. 115. **Miss.**—*Alexander v. Eastland*, 37 Miss. 554. **Pa.**—*Fisher v. Morris*, 5 Whart. 358. **W. Va.**—*Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824. **Eng.**—*Doe v. Wright*, 10 Ad. & El. 763, 37 E. C. L. 401, 113 Eng. Reprint 289.

**75.** *Vaughan v. Ruppel*, 69 Mo. App. 583. See generally, "Set-off, Counterclaim and Recoupment."

[a] **For Damages.**—In trespass based on possession, a defendant alleging title may counterclaim for damages for injury to the freehold, it being connected with the subject of the action, title in the defendant. *Stillwell v. Duncan*, 103 Ky. 59, 44 S. W. 357.

[b] **For Recovery of Land.**—In an action for trespass in which plaintiff alleges title in himself, the defendant may allege title in himself and by way of counterclaim seek to recover the whole tract in controversy, the subject of action being the land. *Whitlock v. Redford*, 82 Ky. 390.

**76.** *Demartin v. Albert*, 68 Cal. 277, 9 Pac. 157. See generally the title "Cross-Complaint."

**77.** *Wilmot v. Yazoo & Miss. Valley R. Co.*, 76 Miss. 374, 24 So. 701; *Davis v. Ford*, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393. See the title, "Replication and Reply."

[a] **An answer denying plaintiff's allegation of ownership and alleging ownership in the defendant does not require a reply, the latter being a mere affirmative denial.** *Cravens v. Despain*, 25 Ky. L. Rep. 2018, 79 S. W. 276; *Scaggs v. Potect*, 22 Ky. L. Rep. 775, 58 S. W. 822.

[b] **An averment of title in the defendant is not a counterclaim within the code requiring a reply to a counterclaim.** *Williams v. Upton*, 8 How. Pr. (N. Y.) 205.

**78.** See *infra*, this note and 8 STANDARD PROC. 971.

[a] **Where license is pleaded in the answer, cause of avoiding it when the license is voidable merely should be specially set up in the replication.** This applies to cases of revocation, excess and abuse. But if the license is void ab initio as in the case of fraud, the plaintiff may legally deny he gave any license at all. *Anthony v. Wilson*, 14 Pick. (Mass.) 303.

[b] **An abuse of the authority, pleaded in justification, must be set forth in a replication, unless disclosed by the plea.** *Ind.*—*West v. Blake*, 4 Blackf. 234. **Md.**—*Haines v. Haines*, 104 Md. 208, 64 Atl. 1044. **N. H.**—*Great Falls Co. v. Worster*, 15 N. H. 412. **Vt.**—*Andrews v. Chase*, 5 Vt. 409.

[c] **If the act justified was excessive, a replication showing the excess is proper.** *Stults v. Buckelew*, 28 N. J. L. 150.

**79.** *Fisher v. Morris*, 5 Whart. (Pa.) 358.

[a] **Where not guilty and liberum**

cation di injuria may be pleaded when the defendant pleads matter of excuse,<sup>80</sup> but not when he justifies or insists on a right,<sup>81</sup> unless the title is alleged only by way of inducement.<sup>82</sup> Sometimes the plaintiff must make a new assignment.<sup>83</sup>

tenementum are pleaded, issue must be joined on one and the other replied to. *Mangum v. Flowers*, 2 Munf. (16 Va.) 205.

[b] A plea of *liberum tenementum* may be answered by a replication showing plaintiff's possession is not colorable merely but rightful as by showing a tenancy, or some other title under the defendant. *Ill.*—*Fort Dearborn Lodge v. Klein*, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133. *Md.*—*Hunter v. Hatton*, 4 Gill. 115, 45 Am. Dec. 117. *N. Y.*—*Hyatt v. Wood*, 4 Johns. 150, 4 Am. Dec. 258. *R. I.*—*Lavin v. Dodge*, 30 R. I. 8, 73 Atl. 376. *Eng.*—*Thompson v. Hardinge*, 1 M. G. & S. 940, 50 E. C. L. 939.

[c] An assertion of title in the plaintiff is unnecessary in addition to the traverse and will be disregarded. *Lavin v. Dodge*, 30 R. I. 8, 73 Atl. 376.

[d] A replication that plaintiff is in possession under a lease, need not set out the lease in full. *Snedecor v. Pope*, 143 Ala. 275, 39 So. 318.

[e] Issues Raised.—(1) On a traverse of the plea, the issue is the freehold in the defendant. His right to possession is admitted should the jury find him entitled to the freehold. *Hunter v. Hatton*, 4 Gill (Md.) 115, 126, 45 Am. Dec. 117. (2) On a reply setting up rightful possession, the issue raised and to be tried by the jury is the plaintiff's right of possession. *Hunter v. Hatton*, 4 Gill (Md.) 115, 45 Am. Dec. 117.

80. *Del.*—*Dolson v. Hill*, 3 Houst. 255. *Md.*—*Neale v. Clautice*, 7 Har. & J. 372. *N. Y.*—*Coburn v. Hopkins*, 4 Wend. 577; *Hyatt v. Wood*, 4 Johns. 150, 4 Am. Dec. 258.

See *Ambrose v. Root*, 11 Ill. 497, 52 Am. Dec. 456; *Connor v. Greenberg*, 198 Ill. App. 129, 139; *Carpenter v. Barber*, 44 Vt. 441.

81. *Del.*—*Murden v. Russell*, 5 Boyce 362, 93 Atl. 379. *Md.*—*Neale v. Clautice*, 7 Har. & J. 372. *N. H.*—*Great Falls Co. v. Worster*, 15 N. H. 412. *N. Y.*—*Coburn v. Hopkins*, 4 Wend. 577. Compare *Comly v. Lockwood*, 15

*Johns*. 188, replication de injuria to justification by authority of law under statute. *Eng.*—*Taylor v. Markham*, Yelv. 157, 80 Eng. Reprint 105.

[a] To a plea of *liberum tenementum*, a replication de injuria is bad. *Hyatt v. Wood*, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; *Thompson v. Breakenbridge*, 3 U. C. Q. B. O. S. (Can.) 170.

[b] Where de injuria is improperly replied, the defendant may demur specially, but the defect will be aided by the verdict. *Connor v. Greenberg*, 198 Ill. App. 129, quot. 1 Chitty Pl. 639.

82. *Great Falls Co. v. Worster*, 15 N. H. 412, 433.

83. *Low v. Ross*, 3 Me. 256.

[a] Where a general issue to the whole trespass is filed, with or without a brief statement, a new assignment is not required. *Palmer v. Dougherty*, 33 Me. 502, 54 Am. Dec. 636.

Where *liberum tenementum* is pleaded, see *supra*, II, K, 2.

[b] If the plea covers the trespass but mistakes it, (1) that it does not hit the whole or some part of the trespass the plaintiff intended in his declaration, the plaintiff must new assign to explain. *Carpenter v. Barber*, 44 Vt. 441; *Waddell v. Corbett*, 25 U. C. Q. B. (Can.) 234. See *Cheswell v. Chapman*, 42 N. H. 47. (2) Thus where, in trespass q. c. f. the plaintiff alleges an entry and other matters such as his expulsion from the premises, or the taking away of goods, leaving it equivocal whether one trespass with matter as aggravation or whether distinct trespasses are alleged, the defendant may answer only the trespass to the freehold. If the plaintiff wishes to recover for additional trespasses he must new assign and allege that he brought his action as well for the trespass mentioned in the plea as for the trespass new assigned. *Carpenter v. Barber*, 44 Vt. 441.

[c] New assignment in another part of the same close, as well as in a different close is permissible. In the latter case the new assignment should not contain a traverse. In the former case, the plaintiff should traverse title to



**Rejoinders** and subsequent pleadings should comply with the general rules elsewhere discussed.<sup>84</sup>

**M. ISSUES, PROOF, AND VARIANCE.** — 1. **Issues.**<sup>85</sup> — The good faith of the plaintiff's possession cannot be made an issue in an action of trespass.<sup>86</sup> And an issue on the force and arms is immaterial.<sup>87</sup>

The general issue puts in issue the facts necessary to constitute the trespass,<sup>88</sup> and under it matters in justification or excuse cannot be shown,<sup>89</sup> but matters in mitigation of damages may be shown.<sup>90</sup>

**Title and Possession.** — Under the general issue, at common law, the defendant in trespass quare clausum fregit may show title or possession in himself,<sup>91</sup> or those under whom he claims,<sup>92</sup> or he may show

the part newly assigned only. *Low v. Ross*, 3 Me. 256.

[d] **A new assignment amplifying the charge** is not permissible. *Stults v. Buckelew*, 28 N. J. L. 150.

[e] **Where a single trespass is charged**, a reply traversing the justification and new assigns by setting up other trespasses is bad. *Stults v. Buckelew*, 28 N. J. L. 150. But see *Robbins v. Wolcott*, 19 Conn. 356.

84. See the title "**Rejoinder and Subsequent Pleadings**;" and *Dolson v. Hill*, 3 Houst. (Del.) 255; *Low v. Ross*, 3 Me. 256, a rejoinder of not guilty is proper where the plaintiff in the declaration does not describe the premise, where the defendant describes it particularly and asserts title, and where the plaintiff new assigns alleging trespass on and title to a part of the close.

85. **Issues on reply to liberum tenementum**, see *supra*, II, L.

86. *Eberhard v. Tuolumne Water Co.*, 4 Cal. 308.

87. *Buntin v. Duchane*, 1 Blackf. (Ind.) 56.

88. **N. Y.**—*Babcock v. Lamb*, 1 Cow. 238. **Tex.**—*Paraffine Oil Co. v. Berry* (Tex. Civ. App.), 93 S. W. 1089. **W. Va.**—*Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824.

See the title "**Denials**."

[a] **It operates as a denial** that the defendant committed the trespass in the place mentioned. *Cummings & Co. v. Masterson*, 42 Tex. Civ. App. 549, 93 S. W. 500.

[b] **That damage is caused by a cause other than defendant's omission** may be shown under a general issue. *Siegfried v. So. Bethlehem Borough*, 27 Pa. Super. 456, 459.

89. See 7 STANDARD PROC. 69.

[a] **Under a joint plea of not guilty**

in trespass, separate justifications cannot be set up. *Schermerhorn v. Tripp*, 2 Caines (N. Y.) 108.

90. **Western Union Tel. Co. v. Dickens**, 148 Ala. 480, 41 So. 469; *Anthony v. Gilbert*, 4 Blackf. (Ind.) 348.

[a] **Motives for Entry.**—*Carter v. Bedortha*, 124 Mich. 548, 83 N. W. 277.

91. **Del.**—*Quillen v. Betts*, 1 Penne. 53, 39 Atl. 595. **Md.**—*New Windsor v. Stocksdale*, 95 Md. 196, 52 Atl. 596. **Mass.**—*Bennett v. Clemence*, 6 Allen 10. **Mich.**—See *Ostrom v. Potter*, 104 Mich. 115, 62 N. W. 170, referring to common law. **Miss.**—*Alliance Trust Co. v. Nettleton Hdw. Co.*, 74 Miss. 584, 21 So. 396, 60 Am. St. Rep. 531, 36 L. R. A. 155. **N. H.**—*Murray v. Webster*, 5 N. H. 391. **N. Y.**—*Babcock v. Lamb*, 1 Cow. 238. **Pa.**—*Whitney v. Backus*, 149 Pa. 29, 24 Atl. 51. **Va.**—*Douglas Land Co. v. Thayer Co.*, 113 Va. 239, 74 S. E. 215. **W. Va.**—*Dickinson v. Mankin*, 61 W. Va. 429, 434, 56 S. E. 824. **Eng.**—*Milman v. Dolwell*, 2 Camp. 378.

[a] **Any matter provable under a plea of title, or liberum tenementum**, (1) may be shown. *Dickinson v. Mankin*, 61 W. Va. 429, 56 S. E. 824. (2) When in taking possession, the defendant has not injured or removed personalty of the plaintiff, liberum tenementum may be given in issue under a plea of not guilty. *Storr v. James*, 84 Md. 282, 35 Atl. 965; *Manning v. Brown*, 47 Md. 506. (3) But because the matter may be shown under a general issue, it does not follow that it cannot be pleaded specially. *Fisher v. Morris*, 5 Whart. (Pa.) 358.

92. **Conn.**—*Carrier v. Carrier*, 85 Conn. 203, 82 Atl. 187. **Mich.**—*Ostrom v. Potter*, 104 Mich. 115, 62 N. W. 170. **N. H.**—*Murray v. Webster*, 5 N.

possession in a third person.<sup>93</sup> But this was changed in England, by what are known as the Hilary rules,<sup>94</sup> which have been followed in some states of the United States.<sup>95</sup>

And in trespass de bonis, the general issue does not admit the property in the plaintiff,<sup>96</sup> except under the Hilary rules.<sup>97</sup> But property in some one else cannot be proved under the general issue,<sup>98</sup> except in mitigation of damages,<sup>99</sup> unless the defendant connect himself with the owner.<sup>1</sup>

**2. Proof and Variance.**—**Possession and Title.**—Notwithstanding plaintiff's allegation of ownership, proof of possession is sufficient,<sup>2</sup> unless the defendant prove title in himself or a license from the true owner.<sup>3</sup>

**The Acts Constituting the Trespass.**—In trespass quare clausum, the entry must be proved unless admitted, as this is the gist of the action.<sup>4</sup>

II. 391. **N. Y.**—*Babcock v. Lamb*, 1 Cow. 238.

See 7 STANDARD PROC. 98.

93. **Cal.**—*Uttendorffer v. Saegers*, 50 Cal. 496. **Md.**—*Baker v. Pearce*, 4 Har. & McH. 502. **N. Y.**—*Miller v. Decker*, 40 Barb. 228.

[a] **Not guilty puts the plaintiff on proof** of his possession. *Hess v. Sutton*, 33 Pa. Super. 530.

[b] **Possession by a tenant of the plaintiff may be shown under a general denial.** *Uttendorffer v. Saegers*, 50 Cal. 496.

94. **Reg. Gen. Hil. T.**, 4 Wm. IV, r. 5.

95. *Carter v. Wallace*, 2 Tex. 206; *Cummings & Co. v. Masterson*, 42 Tex. Civ. App. 549, 93 S. W. 500 (quot. Chitty, which states the law under the Hilary rules); *Nafe v. Hudson*, 19 Tex. Civ. App. 381, 47 S. W. 675. See *Lavin v. Dodge*, 30 R. I. 8, 73 Atl. 376.

[a] **In Michigan**, a declaration in trespass for breaking and entering plaintiff's close, without asserting and describing his title, is not such a claim of title as is admitted by the general issue. *Ostrom v. Potter*, 104 Mich. 115, 62 N. W. 170.

96. *Hastings v. Lankford*, 4 Boyce (Del.) 490, 90 Atl. 43; *Alliance Trust Co. v. Nettleton Hdw. Co.*, 74 Miss. 584, 21 So. 396, 60 Am. St. Rep. 531, 36 L. R. A. 155.

97. See *Harris v. Miner*, 28 Ill. 135, holding a plea of not guilty operates only as a denial of the taking determining nothing as to the right of property.

98. **Del.**—*Hastings v. Lankford*, 4 Boyce 490, 90 Atl. 43. **Mass.**—*Squire*

*v. Hollenbeck*, 9 Pick. 551, 20 Am. Dec.

506. **N. Y.**—*Hammer v. Wilsey*, 17 Wend. 91; *Demick v. Chapman*, 11 Johns. 132. See *Kissam v. Roberts*, 6 Bosw. 154.

99. *Anthony v. Gilbert*, 4 Blackf. (Ind.) 348; *Squire v. Hollenbeck*, 9 Pick. (Mass.) 551, 20 Am. Dec. 506.

1. *Hammer v. Wilsey*, 17 Wend. (N. Y.) 91.

2. **Conn.**—*Parker v. Hotchkiss*, 25 Conn. 321. **Ill.**—*Prussner v. Brady*, 136 Ill. App. 395. **Ind.**—*Ingram v. Jeffersonville N. A. & S. E. T. Co.* (Ind. App.), 116 N. E. 12. **S. C.**—*Gore v. Whiteville Lumb. Co.*, 96 S. E. 683; *Beaufort Land & Inv. Co. v. New River Lumb. Co.*, 86 S. C. 358, 68 S. E. 637, 30 L. R. A. (N. S.) 243. **Wis.**—*Leihy v. Ashland Lumber Co.*, 49 Wis. 165, 5 N. W. 471; *Kemp v. Seely*, 47 Wis. 687, 3 N. W. 830.

*Compare Akers v. Iberia Cypress Co.*, 131 La. 833, 60 So. 363, holding proof of title and thereby constructive possession cannot be made in an action of trespass based on possession.

3. **Southern Ry. Co. v. Hayes, 183 Ala. 465, 62 So. 874; *Gore v. Whiteville Lumb. Co.* (S. C.), 96 S. E. 683.**

4. **Cal.**—*Pico v. Colimas*, 32 Cal. 578. **Me.**—*Nichols v. Sonia*, 113 Me. 529, 95 Atl. 209; *Moore v. Archer*, 104 Me. 285, 71 Atl. 863. **Mass.**—*Knapp v. Slocomb*, 9 Gray 73. **Vt.**—*Goodrich v. Judevine*, 40 Vt. 190.

[a] **Notwithstanding the abolition of the distinctions between trespass and case.** *Nichols v. Sonia*, 113 Me. 529, 95 Atl. 209.

[b] **Nonsuit will be granted if no entry is proved before the plaintiff**

But failure to prove circumstances of aggravation do not prevent a recovery of compensatory or nominal damages.<sup>5</sup> An allegation of a taking or entry by the defendant is supported by proof of a taking or entry by another under his direction.<sup>6</sup> If a forcible injury is declared on, a recovery cannot be had on proof of negligence, even under the code.<sup>7</sup> But where the distinction between trespass and case has been abolished, it has been held that although the claim is set forth as in trespass, proof as for case will authorize a recovery.<sup>8</sup>

**Place.**—In trespass *quare clausum fregit*, proof of a trespass on any land in the plaintiff's possession in the county or township may be made, where a particular description of the premises is not given.<sup>9</sup> And if the defendant pleads *liberum tenementum*, proof of title in the defendant to any parcel of land within the general description or within the jurisdiction may be made,<sup>10</sup> unless the plaintiff makes a new assignment.<sup>11</sup> If the premises is particularly described, the proof is confined to the place described;<sup>12</sup> but proof of title or possession to any

rests. *Moore v. Archer*, 104 Me. 285, 71 Atl. 863.

[c] **Proof of Aggravation Only.**—In an action of trespass to realty and then and there taking and carrying away goods without another count, a recovery cannot be had on proof of the taking only. *Howe v. Willson*, 1 Denio (N. Y.) 181.

5. *Ex parte Birmingham Realty Co.*, 183 Ala. 444, 63 So. 67.

[a] **Wilfulness need not be proved.** *Chesapeake & O. Ry. Co. v. Greaver*, 110 Va. 350, 66 S. E. 59.

6. *Mecartney v. Smith*, 10 Kan. App. 580, 62 Pac. 540; *Allen v. Archer*, 49 Me. 346.

7. Ala.—*Pruitt v. Ellington*, 59 Ala. 454. Ga.—*Roach v. Trottie*, 50 Ga. 251. N. Y.—*Gordon v. Ellenville & K. R. Co.*, 119 App. Div. 797, 104 N. Y. Supp. 702.

See *Chicago Title & Trust Co. v. Core*, 223 Ill. 58, 79 N. E. 108.

8. *Duffield v. Rosenzweig*, 144 Pa. 520, 537, 23 Atl. 4, under statute declaring (1) damages recoverable in trespass, trover, and case shall be recovered in one form of action to be called trespass. See *Letson v. Brown*, 11 Colo. App. 11, 52 Pac. 287, holding (2) that though the plaintiff declare in trespass, if the proof show he might have maintained case, the verdict will be sustained, if the force is not direct or immediate. But compare *Chicago Title & Trust Co. v. Core*, 223 Ill. 58, 79 N. E. 108; *Blalock v. Randall*, 76

Ill. 224, proof must be same as at common law.

9. Ill.—*Meixsell v. Feezor*, 43 Ill. App. 180. Mich.—*Macfarlane v. Ray*, 14 Mich. 465. N. H.—*Palmer v. Tuttle*, 39 N. H. 486. N. Y.—*Shank v. Cross*, 9 Wend. 160.

10. Ill.—*Ward v. Mississippi River Power Co.*, 265 Ill. 486, 107 N. E. 115; *Marks v. Madsen*, 261 Ill. 51, 103 N. E. 625. Mich.—*Macfarlane v. Ray*, 14 Mich. 465. N. H.—*Palmer v. Tuttle*, 39 N. H. 486.

11. See *supra*, II, K, 2; II, L.

12. Colo.—*Sullivan v. Clements*, 1 Colo. 261. Ill.—*Sturman v. Colon*, 40 Ill. 463. Md.—*Houck v. Loveall*, 8 Md. 63, where the defense is taken on warrant. N. H.—*Palmer v. Tuttle*, 39 N. H. 486. N. Y.—*Dorman v. Long*, 2 Barb. 214; *Howe v. Willson*, 1 Denio 181. N. C.—*Whitaker v. Forbes*, 68 N. C. 228, he must prove every part of the description. Ore.—*Barnhart v. Ehrhart*, 33 Ore. 274, 54 Pac. 195. Vt. *Norcross v. Welton*, 59 Vt. 50, 71 Atl. 714.

[a] **A description by abutments or metes and bounds must be proved as laid.** Md.—*Tyson v. Shuee*, 5 Md. 540, 551. N. H.—*Wheeler v. Rowell*, 7 N. H. 515; *Peaslee v. Wadleigh*, 5 N. H. 317. N. C.—*Finchannon v. Sudderth*, 144 N. C. 587, 57 S. E. 337.

[b] **Strict proof is not required.** Evidence from which it may be reasonably inferred that the trespass was committed as laid will suffice. *Sturman v. Colon*, 40 Ill. 463; *Morrison v. Holder*, 214 Mass. 366, 101 N. E. 1067.



part of the land described and a trespass upon that part is sufficient.<sup>13</sup>

In the case of trespass to personalty, the place of taking need not be proved as alleged,<sup>14</sup> unless it is so coupled with a trespass to realty as to be made local.<sup>15</sup>

**Time.** — Where a single trespass on a single day is relied on, the allegation as to time need not be proved as laid,<sup>16</sup> provided the time proved be within the statute of limitations;<sup>17</sup> but the proof must be confined to a trespass on some one day.<sup>18</sup> If a continuando is properly pleaded the plaintiff is limited to the period alleged.<sup>19</sup> And where divers trespasses are alleged, the plaintiff may prove a number of trespasses within the period of time stated.<sup>20</sup> But in either case, the plaintiff may treat his pleading as confined to a single trespass.<sup>21</sup>

**Quantity and Value.** — Allegations as to value of personalty or the number of chattels injured need not be proved as laid.<sup>22</sup>

**N. TRIAL.** — **1. Generally.** — The general rules regulating the conduct of trials apply to the trial of actions of trespass.<sup>23</sup> Separate trials

13. **Md.**—*Tyson v. Shueey*, 5 Md. 540, distinguished in *Peters v. Tilghman*, 111 Md. 227, 236, 73 Atl. 726, on the ground the case was tried without plats and locations. **Mass.**—*Hall v. Mayo*, 97 Mass. 416. **N. H.**—*Palmer v. Tuttle*, 39 N. H. 486; *Wheeler v. Rowell*, 7 N. H. 515; *Peaslee v. Wadleigh*, 5 N. H. 317. **W. Va.**—*Glen Jean, L. L. & D. R. Co. v. Kanawha, G. J. & E. R. Co.*, 47 W. Va. 725, 35 S. E. 978.

[a] That plaintiff is entitled to the whole close described need not be proved. *Palmer v. Tuttle*, 39 N. H. 486.

14. *Howe v. Willson*, 1 Denio (N. Y.) 181.

15. *Howe v. Willson*, 1 Denio (N. Y.) 181.

16. **Ala.**—*Southern Ry. Co. v. Cleveland*, 169 Ala. 22, 53 So. 767; *Snedecor v. Pope*, 143 Ala. 275, 39 So. 318. **Me.**—*Allen v. Archer*, 40 Me. 346. **Mass.**—*Kendall v. Bay State Brick Co.*, 125 Mass. 532; *Pierce v. Pickens*, 16 Mass. 470. **Pa.**—*Charles v. Delpux*, 2 Browne 313. **Utah.**—*Burnham v. Call*, 2 Utah 433.

17. **Ala.**—*Southern Ry. Co. v. Cleveland*, 169 Ala. 22, 53 So. 767. **Me.**—*Allen v. Archer*, 40 Me. 346. **Mass.**—*Pierce v. Pickens*, 16 Mass. 470.

18. *Snedecor v. Pope*, 143 Ala. 275, 39 So. 318; *Myrick v. Downer*, 18 Vt. 360.

[a] Plaintiff may be required to elect some day in which the acts of trespass are to be proven. *Snedecor v. Pope*, 143 Ala. 275, 39 So. 318,

[b] Several acts of trespass upon the same close on the same day in pursuance of the same general purpose may be proved under an allegation of a single trespass. *Cheswell v. Chapman*, 42 N. H. 47.

19. **Mass.**—*Kendall v. Bay State Brick Co.*, 125 Mass. 532; *Folger v. Fields*, 12 Cush. 93. **N. H.**—*Little v. Downing*, 37 N. H. 355. **Pa.**—*Haak v. Breidenbach*, 3 Serg. & R. 204. **Vt.**—*Myrick v. Downer*, 18 Vt. 360. **Eng.**—*Manchester v. Vale*, 1 Saund. 23, note 1, 85 Eng. Reprint 25.

[a] When a continuando is improperly laid, evidence of a trespass on one day only can be given. *Monckton v. Pashley*, 2 Ld. Raym. 974, 92 Eng. Reprint 149.

20. *Pierce v. Pickens*, 16 Mass. 470.

21. *Kendall v. Bay State Brick Co.*, 125 Mass. 532; *Pierce v. Pickens*, 16 Mass. 470; *Little v. Downing*, 37 N. H. 355.

[a] Plaintiff may be required to elect whether he will rely on the allegation as to divers trespasses or treat his pleading as counting on a single trespass. *McDiarmid v. Caruthers*, 34 Mich. 49. See also *Pierce v. Pickens*, 16 Mass. 470.

22. *Plumb v. Griffin*, 74 Conn. 132, 50 Atl. 1, being matter of description.

23. See the title "Trial."

[a] **Opening and Closing.**—Where the general issue is not pleaded, and issue is taken on the plea of justification, the defendant has the right to begin notwithstanding the onus of

may be allowed joint trespasses who have pleaded separately, in the discretion of the court.<sup>24</sup> And several actions between the same parties for a trespass on the same close on different days which might have been included in one action may be tried together.<sup>25</sup> At any time before judgment, the plaintiff may dismiss as to either or any of the joint trespassers and proceed against those remaining.<sup>26</sup>

2. **Questions of Law and Fact.**—Questions of fact are for the jury in accord with the general rules.<sup>27</sup>

3. **Verdict.**—A general verdict is ordinarily proper.<sup>28</sup> An improper finding in a verdict, as to title or possession, may be disregarded.<sup>29</sup> In trespass against joint tort-feasors, the jury cannot sever

proving damages is on the plaintiff. *Tatnall v. Kiamensi Woolen Co.*, 4 *Houst.* (Del.) 287. See generally the title "Opening and Closing."

[b] Rules to stay waste are not granted. *Leeds v. Doughty*, 11 *N. J. L.* 193.

24. **La.**—*Clement v. Wafer*, 12 *La. Ann.* 599; *Sere v. Armitage*, 9 *Mart. O. S.* 394, 13 *Am. Dec.* 311, too late after verdict to insist on right. **Mass.** *Sawyer v. Merrill*, 10 *Pick.* 16. **N. J.** *Allen v. Craig*, 13 *N. J. L.* 294. See generally the title "Separate Trials."

25. *Field v. Lang*, 89 *Me.* 454, 36 *Atl.* 984.

26. **Ill.**—*Callaghan v. Myers*, 89 *Ill.* 566. **Ky.**—*Allen v. Feland*, 10 *B. Mon.* 306. **Md.**—*Gusdorff v. Duncan*, 94 *Md.* 160, 50 *Atl.* 574.

27. *Newberry v. Bunda*, 137 *Mich.* 69, 100 *N. W.* 277, the necessity of cutting overhanging branches when building a line fence is for the jury. See the title "Province of Judge and Jury."

[a] Whether the plaintiff was in actual possession of the premises is a question of fact for the jury. *Del.* *Truitt v. Osler*, 4 *Boyce* 555, 90 *Atl.* 467. **Md.**—*New Windsor v. Stocksedale*, 95 *Md.* 196, 52 *Atl.* 596. **N. J.**—*Willard v. Meeks*, 59 *N. J. L.* 56, 35 *Atl.* 455. **S. C.**—*Smyly v. Colleton Cypress Co.*, 95 *S. C.* 347, 78 *S. E.* 1026. **Wyo.** *Noble v. Hudson*, 20 *Wyo.* 227, 122 *Pac.* 901.

[b] Whether the trespass was wilful, or negligent, or through innocent mistake is for the jury. *United States v. McCaskill*, 200 *Fed.* 332.

[c] Whether there is a simple trespass or an implied agreement to pay rent held a question for the jury under the facts. *Cole v. Thompson*, 134 *Iowa* 685, 112 *N. W.* 178.

[d] Defendant's knowledge of plaintiff's ownership is a question for the jury. *Abbott v. Parker*, 103 *Ark.* 425, 147 *S. W.* 70.

[e] Whether the injury was caused by the immediate act of the defendant, or resulted from a culpable omission is a question of fact. *Gates v. Miles*, 3 *Conn.* 64.

[f] The Question of Damages. **Cal.**—*Drake v. Palmer, Cook & Co.*, 4 *Cal. 11.* *Miss.*—*Hall v. Shean*, 111 *Miss.* 223, 71 *So.* 323. **N. Y.**—*Ives v. Humphreys*, 1 *E. D. Smith* 196. **Wis.** *Watry v. Hiltgen*, 16 *Wis.* 516.

28. *Boyer v. Essington*, 45 *Ind. App.* 683, 90 *N. E.* 478; *Sutliff v. Gilbert*, 8 *Ohio* 405, where there are several defendants. See the title "Verdict."

[a] But where the replication traverses the justification and new assigns other trespasses, a general verdict is bad as part of the jury may have found against the justification and held the defendant guilty of the whole, and part may have found him guilty only of the trespasses newly assigned. *Cheswell v. Chapman*, 42 *N. H.* 47, 55.

[b] A general verdict is conclusive of an issue of title made by the pleadings. *McLaughlin v. Kelly*, 22 *Cal.* 211.

[c] A finding of a verdict of guilty as to some without naming the other defendants is a sufficient verdict. *Wilderaman v. Sandusky*, 15 *Ill.* 59.

29. **Ga.**—*Huxford v. Southern Pine Co.*, 124 *Ga.* 181, 52 *S. E.* 439. **La.** *Peytavin v. Winter*, 6 *La.* 553. **S. C.** *Love v. Turner*, 71 *S. C.* 322, 61 *S. E.* 101.

[a] A verdict establishing the location of a disputed boundary is improper. *Seale v. Shepherd*, 16 *Ky. L. Rep.* 563, 29 *S. W.* 31.

the damages, although several pleas are filed,<sup>30</sup> unless statute authorizes it.<sup>31</sup>

**4. Findings of Fact and Conclusions of Law.**—The findings of fact should conform to the general rules.<sup>32</sup>

**O. JUDGMENT AND ITS ENFORCEMENT.**—So also the judgment should follow the general rules elsewhere treated.<sup>33</sup> Some of the joint trespassers may be acquitted, and judgment rendered against the remainder.<sup>34</sup> But upon a joint issue, the judgment must be joint as to those found guilty,<sup>35</sup> unless the statute provides otherwise.<sup>36</sup> Ownership should not be adjudged or a judgment for the land rendered, where title is not in issue.<sup>37</sup>

**30. Mass.**—*Halsey v. Woodruff*, 9 Pick. 555. **N. J.**—*Allen v. Craig*, 13 N. J. L. 294. **Pa.**—*Shultz v. Hunter*, 2 Browne 233. **Eng.**—*Hill v. Goodechild*, 5 Burr. 2790, 98 Eng. Reprint 465.

[a] **Remedy.**—(1) The plaintiff may have a venire de novo, or enter a nolle prosequi as to all the defendants but one before rendition of judgment, if the jury assess several damages against two or more defendants. *Fields v. Williams*, 91 Ala. 502, 8 So. 808. (2) Or the plaintiff may enter a remittitur for the lesser damages and take judgment against all found guilty for the greater damages. *Halsey v. Woodruff*, 9 Pick. (Mass.) 555.

**31.** See the statutes and *Ivey v. Cowart*, 124 Ga. 159, 52 S. E. 436, 110 Am. St. Rep. 160.

**32.** See the title "Findings of Fact and Conclusions of Law."

[a] A finding that no trespass was committed on the property of the plaintiff is a mere conclusion of law. *Kemp v. Seely*, 47 Wis. 687, 3 N. W. 830.

[b] A finding that the defendant did not take the property of the plaintiff is a negative pregnant as it may be a finding against plaintiff's ownership. *Kemp v. Seely*, 47 Wis. 687, 3 N. W. 830.

[c] If the issue of title is tried, a finding upon it as a distinct issue should be made. *Kemp v. Seely*, 47 Wis. 687, 3 N. W. 830.

**33.** See the title "Judgments."

[a] **Form of Judgment.**—See *Williams v. Bramble*, 2 Md. 313; *Vaughan's Admr. v. Winckler's Exr.*, 4 Munf. (18 Va.) 136.

Collateral attack on judgment, see 15 STANDARD PROC. 389.

A default admits a trespass alleged in the complaint. See 14 STANDARD PROC. 886.

Damages must be assessed before judgment by default can be entered. See 14 STANDARD PROC. 892, 896.

[b] Where plaintiff shows neither title to nor possession of any part of the land an absolute judgment should be rendered for the defendant, instead of a mere judgment of nonsuit. *Collins v. Louisiana Sawmill Co.*, 132 La. 161, 61 So. 150.

[c] Any error in rendering a judgment in trespass in an action improperly brought in case is cured by the statute of jeofails. *Cleek v. Haines*, 2 Rand. (23 Va.) 440.

**34. Ala.**—*Milner v. Milner*, 101 Ala. 599, 14 So. 373. **Ga.**—*Ivey v. Cowart*, 124 Ga. 159, 52 S. E. 436, 110 Am. St. Rep. 160. **Ill.**—*Wilderman v. Sandusky*, 15 Ill. 59; *Owens v. Derby*, 3 Ill. 26. **Me.**—*Gillerson v. Small*, 45 Me. 17. **N. Y.**—*Drake v. Barrymore*, 14 Johns. 166.

**35.** *Fields v. Williams*, 91 Ala. 502, 8 So. 808; *Ashcraft v. Knoblock*, 146 Ind. 169, 45 N. E. 69.

[a] But one execution can be had, if several judgments for a joint trespass are rendered. *Ashcraft v. Knoblock*, 146 Ind. 169, 45 N. E. 69.

**36.** See the statutes and *Ivey v. Cowart*, 124 Ga. 159, 52 S. E. 436, 110 Am. St. Rep. 160.

**37. Cal.**—*Berry v. Ivanice*, 53 Cal. 653. **Ky.**—*Hagins v. Whitaker*, 19 Ky. L. Rep. 1050, 42 S. W. 751, where appellant was in possession but did not own the land. **La.**—*Union Sawmill Co. v. Summit Lumber Co.*, 124 La. 270, 50 So. 35, the allegation of ownership being merely in aid of the action of trespass.



**Effect of.** — A judgment in trespass *quare clausum fregit* is conclusive upon the right of possession,<sup>38</sup> and determines only that a trespass has been committed on some part of the described premises.<sup>39</sup> It does not transfer the title to the subject-matter involved as in trover.<sup>40</sup> There is a conflict of authority as to the effect of the verdict and judgment on a plea of ownership.<sup>41</sup>

**A writ of possession** cannot issue under a judgment in trespass.<sup>42</sup>

**P. NEW TRIAL.** — A new trial may be granted in a proper case.<sup>43</sup>

**Q. APPEAL AND ERROR.**<sup>44</sup> — The action of trespass *quare clausum* is not within a statute conferring, upon an appellate court, jurisdiction in controversies concerning the title and boundaries of land,<sup>45</sup> even though title was drawn in question,<sup>46</sup> or a plea of *liberum tenementum* is filed;<sup>47</sup> but some courts hold otherwise in the latter case,<sup>48</sup> unless the defense is abandoned by a failure to offer proof under the plea.<sup>49</sup>

**R. COSTS.**<sup>50</sup> — Under some statutes, costs in trespass are not recoverable if the damages recovered are less than a prescribed amount, unless title to property is in question.<sup>51</sup>

38. Colo.—McClellan *v.* Hurd, 21 Colo. 197, 40 Pac. 445. Conn.—Parker *v.* Hotchkiss, 25 Conn. 321. Ill.—Elson *v.* Comstock, 150 Ill. 303, 37 N. E. 207.

39. Morrison *v.* Holder, 214 Mass. 366, 101 N. E. 1067.

**Recovery by landlord for injury to freehold does not bar recovery by tenant for injury to possession**, see 18 STANDARD PROC. 458.

40. May *v.* Georger, 21 Misc. 622, 47 N. Y. Supp. 1057.

41. See the title "Res Judicata."

[a] But a judgment of a justice of the peace or of a superior court on appeal therefrom is not an estoppel in another action upon the question of freehold. Pitts *v.* Looby, 142 Ill. 534, 32 N. E. 519; Weidner *v.* Lund, 105 Ill. App. 454.

42. Dickinson *v.* Mankin, 61 W. Va. 429, 56 S. E. 824.

43. Power *v.* Fairbanks, 146 Cal. 611, 80 Pac. 1075. See the title "New Trial."

[a] That jury made an improper finding as to title is not ground for new trial as the finding may be disregarded. Peytavin *v.* Winter, 6 La. 553.

[b] Granting new trial as to a part of the defendants, see Ind.—Kentucky & Ind. Cement Co. *v.* Morgan, 28 Ind. App. 89, 62 N. E. 68. Ky.—Allen *v.* Feland, 10 B. Mon. 306, distinguishing applications by plaintiffs and defend-

ants. Mass.—Sawyer *v.* Merrill, 10 Pick. 16, and the title "New Trial."

44. See generally the titles "Appeals;" "Writ of Error;" and titles dealing with particular aspects of appellate procedure.

45. Hutchinson *v.* Kellam, 3 Munf. (17 Va.) 202; Dickinson *v.* Mankin, 61 W. Va. 429, 56 S. E. 824 (where plea was *liberum tenementum*); Greathouse *v.* Sapp, 26 W. Va. 87, where the plea was not guilty.

46. Hutchinson *v.* Kellam, 3 Munf. (17 Va.) 202.

47. Dickinson *v.* Mankin, 61 W. Va. 429, 56 S. E. 824.

48. McClellan *v.* Hurd, 21 Colo. 197, 40 Pac. 445; Illinois Central R. R. Co. *v.* Hatter, 207 Ill. 88, 69 N. E. 751; Weidner *v.* Lund, 105 Ill. App. 454.

49. Tomhave *v.* Vortman, 274 Ill. 28, 113 N. E. 46.

50. Costs where separate actions against joint trespassers are brought, see 5 STANDARD PROC. 838.

51. See the statutes and Bowen *v.* Holdredge, 134 App. Div. 855, 119 N. Y. Supp. 199; Wolfe *v.* Furman, 142 Wis. 94, 124 N. W. 1039.

[a] Title is in question, within the statute, when the general issue is pleaded with a notice that defendant would give evidence that the soil and freehold was his. Mansfield *v.* Church, 21 Conn. 73, distinguishing Bishop *v.* Seeley, 18 Conn. 389.

**III. ACTIONS FOR DOUBLE AND TREBLE DAMAGES AND PENALTIES.** — A. **GENERALLY.** — Statutes frequently provide that for certain trespasses, rights of action for double and treble damages,<sup>52</sup> or for penalties,<sup>53</sup> shall exist. These statutes are cumulative and provide an additional, or rather an alternative, remedy to the owner of land trespassed upon;<sup>54</sup> but a resort to either remedy is a bar to the other.<sup>55</sup>

B. **JURISDICTION AND VENUE.**<sup>56</sup> — Jurisdiction over the action depends on the amount involved.<sup>57</sup>

C. **FORM OF ACTION.** — To recover the double or treble damages, the form of the action should be trespass,<sup>58</sup> and to recover the penalty provided, debt is a proper remedy.<sup>59</sup>

D. **PARTIES.** — Tenants in common deriving title from a common ancestor may and should join in an action for treble damages.<sup>60</sup>

E. **PROCESS.** — The process must conform to the general rules regulating process.<sup>61</sup>

52. See the statutes.

[a] Whether the action is trespass de bonis asportatis or trespass quare clausum fregit et de bonis asportatis, treble damages may be allowed. *O'Reilly v. Shadle*, 33 Pa. 489.

53. See the statutes.

As to actions for penalties generally, see the title "Penalties, Forfeitures and Fines."

54. Ill.—*Whitecraft v. Vanderver*, 12 Ill. 235. Mo.—*Tackett v. Huesman*, 19 Mo. 525. Pa.—*Hughes v. Stevens*, 36 Pa. 320.

55. *Hughes v. Stevens*, 36 Pa. 320.

56. See generally the titles "Jurisdiction;" "Venue."

57. *Terrone v. Harrison*, 87 N. J. L. 541, 94 Atl. 600, where the penalty is over \$100 the superior court has jurisdiction.

Amount in controversy as affecting jurisdiction, see 17 STANDARD PROC. 831, et seq.

[a] A justice has jurisdiction of an action for treble damages where the amount of the single damages is within the limits of his jurisdiction, although by trebling the damages that limit is exceeded. *Shrewsbury v. Bawlit*, 57 Mo. 414, his power to treble the damages is derived from the trespass act, not from the justice's court act. But see 17 STANDARD PROC. 875.

58. Mass.—*Pierce v. Spring*, 15 Mass. 489; *Prescott v. Tufts*, 4 Mass. 146. Mo.—*Ellis v. Whitlock*, 10 Mo. 781. Pa.—*O'Reilly v. Shadle*, 33 Pa. 489.

59. *Higdon v. Kennemer*, 120 Ala. 193, 24 So. 439; *Rogers v. Brooks*, 99 Ala. 31, 11 So. 753; *Cato v. Gill*, 1 N. J. L. 11. See generally the title "Penalties, Forfeitures and Fines." and also the title "Debt."

[a] Action must be in contract to recover statutory penalty. *Lott v. Leventhal*, 80 N. J. L. 216, 76 Atl. 328.

[b] **Nature of Action.**—An action of debt for penalty for trespass is an action in tort, and the rule applying to tort actions obtains. Thus the plaintiff may discontinue as to some of the defendants and proceed against those remaining. *Wright v. Sample*, 162 Ala. 222, 50 So. 268. See also *Crawford v. Slaton*, 133 Ala. 393, 31 So. 940. But compare *Higdon v. Kennemer*, 120 Ala. 193, 24 So. 439.

60. *Van Deusen v. Young*, 29 Barb. (N. Y.) 9. See generally the title "Tenants in Common," and also the title "Parties."

61. See the titles "Process;" "Service of Process and Papers."

[a] **Indorsements.**—(1) The name of the prosecutor and the title of the statute should be indorsed on process in debt for a penalty for cutting a tree. *Miller v. Stoy*, 5 N. J. L. 476. (2) But a summons in an action to recover treble damages need not be indorsed with a reference to the statute as the statute creates a forfeiture only but does not give the action. *Sprague v. Irwin*, 27 How. Pr. (N. Y.) 51.

**F. PLEADINGS. — Declaration or Complaint.** — In an action to recover multiple damages, the declaration or complaint should contain the allegations required in a complaint in trespass,<sup>62</sup> and allege, in addition, all the circumstances essential to support the action and to bring the case clearly within the statute.<sup>63</sup> But a statement of the cause of action in the language of the statute is sufficient.<sup>64</sup> The declaration must count upon the statute.<sup>65</sup> In doing so it is sufficient to conclude against the statute,<sup>66</sup> but such a conclusion is not necessary when it

**62. As to allegations in trespass** generally, see *supra*, II, J.

[a] **A petition insufficient under the statute may be sustained as a petition for common law trespass.** **Idaho.** *Menasha Woodenware Co. v. Spokane International Ry. Co.*, 19 Idaho 586, 115 Pac. 22. **Mo.**—*Mishler Lumb. Co. v. Craig*, 112 Mo. App. 454, 87 S. W. 41. **Neb.**—*Lundgren v. Crum*, 47 Neb. 242, 66 N. W. 284, the prayer for treble damages is surplusage. **Ore.** *Roots v. Boring Junction Lumb. Co.*, 50 Ore. 298, 92 Pac. 811, 94 Pac. 182. *Contra*, *Buchanan v. Jencks*, 38 R. I. 443, 452, 96 Atl. 307, the reference to the statute cannot be rejected as surplusage.

**63. U. S.**—*Neff v. Pennoyer*, 3 Sawy. 495, 17 Fed. Cas. No. 10,085. **Ill.** *Whitecraft v. Vanderver*, 12 Ill. 235. **Mass.**—See *Snelling v. Garfield*, 114 Mass. 443, lack of reason to believe land is his own need not be alleged. **Mich.**—*Howser v. Melcher*, 40 Mich. 185. **Mo.**—*Hewitt v. Harvey*, 46 Mo. 368.

See *Rogers v. Brooks*, 99 Ala. 31, 11 So. 753, holding complaint sufficient.

[a] **In what right the plaintiff sues, whether as owner or informer should be stated.** *Miller v. Stoy*, 5 N. J. L. 476. See *Wright v. Bennett*, 4 Ill. 258, ownership must be alleged.

[b] **Scienter on part of defendant need not be alleged (Ill.)**—*Gebhart v. Adams*, 23 Ill. 397, 76 Am. Dec. 702, explaining *Whitecraft v. Vanderver*, 12 Ill. 235, and holding the use of the statutory language imports knowledge without a specific allegation thereof. **Me.**—*Black v. Mace*, 66 Me. 49; *Fogg v. Cushing*, 40 Me. 315. **Pa.**—*O'Reilly v. Shadle*, 33 Pa. 489. But see *McHargue v. Calchina*, 78 Ore. 326, 153 Pac. 99 [but the omission of the words "wilfully" or "intentionally" is cured by the verdict], unless (2) the statute is limited to wilful and ma-

licious trespass. *Lundgren v. Crum*, 47 Neb. 242, 66 N. W. 284.

[c] **Want of permission of owner of land must be alleged, this being an exception contained in the same clause giving the right of action.** *Whitecraft v. Vanderver*, 12 Ill. 235; *Lott v. Leventhal*, 80 N. J. L. 216, 76 Atl. 328.

[d] **That plaintiff has no interest in the trees cut or that they were taken from land not his own, must be stated.** *Hewitt v. Harvey*, 46 Mo. 368; *Mishler Lumber Co. v. Craig*, 112 Mo. App. 454, 87 S. W. 41; *O'Bannon v. St. Louis & Suburban Ry. Co.*, 106 Mo. App. 316, 80 S. W. 321. See *Miller v. Stoy*, 5 N. J. L. 476.

[e] **The kinds of trees (1) and the number of each variety need not be specified (Stoneman-Zearing Lumb. Co. v. McComb, 92 Ark. 297, 122 S. W. 648; Clark v. Collins, 15 N. J. L. 473), unless (2) the statute provides different penalties for different kinds.** *Whitecraft v. Vanderver*, 12 Ill. 235.

[f] **Where the tree was cut should be stated.** *Miller v. Stoy*, 5 N. J. L. 476.

**64. Gebhart v. Adams**, 23 Ill. 397, 76 Am. Dec. 702.

**65. Mich.**—*Howser v. Melcher*, 40 Mich. 185. See *Hitchcock v. Pratt*, 51 Mich. 263, 16 N. W. 639. **Mo.**—See *Lowe v. Harrison*, 8 Mo. 350, declaration should use words of statute. **N. Y.** *Livingston v. Platner*, 1 Cow. 175. **Pa.**—*Dunbar Furnace Co. v. Fairchild*, 121 Pa. 563, 15 Atl. 656; *Henning v. Keiper*, 37 Pa. Super. 488. **R. I.** *Buchanan v. Jencks*, 38 R. I. 443, 452, 96 Atl. 307.

[a] **As the Common Law Action of Trespass Will Not Suffice.**—*Dunbar Furnace Co. v. Fairchild*, 121 Pa. 563, 15 Atl. 656.

[b] **Omission Is Fatal.**—*Howser v. Melcher*, 40 Mich. 185.

**66. Hughes v. Stevens**, 36 Pa. 320.



clearly appears the action is founded on a statute providing for multiple damages.<sup>67</sup> It has been held that a specific allegation that the plaintiff is entitled to treble damages need not be made.<sup>68</sup>

**Amendment.**—A cause of action in trespass may be amended so as to claim double or treble damages,<sup>69</sup> if the application for leave is timely.<sup>70</sup>

**Plea or Answer.**—The defendant must answer or plead in accordance with the general rules.<sup>71</sup>

**G. TRIAL AND JUDGMENT.**—Questions of fact are for the jury.<sup>72</sup>

If the plaintiff prevails, the jury must find generally for the plaintiff<sup>73</sup> and assess the single value of the damages in terms,<sup>74</sup> to be increased by the court,<sup>75</sup> or the court may direct the jury after estimat-

67. **Ill.**—*Whitecraft v. Vanderver*, 12 Ill. 235. **Me.**—*Black v. Mace*, 66 Me. 49\* (statute is remedial not penal); *Fogg v. Cushing*, 40 Me. 315. **Mo.**—*Hewitt v. Harvey*, 46 Mo. 368. *Compare* *Lowe v. Harrison*, 8 Mo. 350.

See *Brown v. Bristol*, 1 Cow. (N. Y.) 176, must refer to statute.

68. *Black v. Mace*, 66 Me. 49; *Snelling v. Garfield*, 114 Mass. 443. But see *Neff v. Pennoyer*, 3 Sawy. (U. S.) 495, 17 Fed. Cas. No. 10,085; *McQuillan v. Tanana Electric Co.*, 3 Alaska 110.

69. *Eklund v. B. R. Lewis Lumber Co.*, 13 Idaho 581, 92 Pac. 532. But see *Higdon v. Kennemer*, 120 Ala. 193, 24 So. 439, holding that, in debt for the statutory penalty, a count for trespass cannot be added by amendment.

70. *Dunbar Furnace Co. v. Fairchild*, 121 Pa. 563, 15 Atl. 656, too late after verdict.

71. See *supra*, II, K, and the titles "Answers;" "Confession and Avoidance;" "Denials;" "Pleas;" and titles dealing with particular pleas and defenses.

[a] A denial of wilfulness is an admission of the trespass. *Wagoner v. Silva*, 139 Cal. 559, 73 Pac. 433.

[b] Under general issue, proof that the trespass is involuntary and under claim of right may be made without a notice of intention to make such proof. *Osburn v. Lovell*, 36 Mich. 246.

[c] Default of defendant admits allegation as to lack of legal authority so that proof thereof need not be made. *Eklund v. B. R. Lewis Lumber Co.*, 13 Idaho 581, 92 Pac. 532.

72. See the title "Province of Judge and Jury."

[a] Whether the trespass is casual and involuntary is for the jury. *Connor v. McRae*, 193 Mich. 682, 160 N. W. 479.

73. *Livingston v. Platner*, 1 Cow. (N. Y.) 175.

74. **Mo.**—*Shrewsbury v. Bawltitz*, 57 Mo. 414. **N. Y.**—*Livingston v. Platner*, 1 Cow. 175; *Newcomb v. Butterfield*, 8 Johns. 342. **Pa.**—*Hughes v. Stevens*, 36 Pa. 320.

[a] The verdict must state specifically that it is for the value (1) of the timber cut, or the coal mined (*Chilton v. Missouri Lumber & Min. Co.*, 144 Mo. App. 315, 127 S. W. 941), unless (2) the value is agreed on (*Chilton v. Missouri Lumber & Min. Co.*, 144 Mo. App. 315, 127 S. W. 941), or unless (3) the court limits the jury to that issue only. *Henry v. Lowe*, 73 Mo. 96.

[b] It will be presumed the treble value was found, if the single value in terms is not found. *Livingston v. Platner*, 1 Cow. (N. Y.) 175; *Hughes v. Stevens*, 36 Pa. 320; *Henning v. Keiper*, 37 Pa. Super. 488. But see *Cooper v. Maupin*, 6 Mo. 624, 634, 35 Am. Dec. 456.

75. **Me.**—*Black v. Mace*, 66 Me. 49. **Mass.**—*Snelling v. Garfield*, 114 Mass. 443. **Mo.**—*Cooper v. Maupin*, 6 Mo. 624, 634, 35 Am. Dec. 456; *Chilton v. Missouri Lumber & Min. Co.*, 144 Mo. App. 315, 127 S. W. 941. **N. Y.**—*Yeamans v. Nichols*, 81 N. Y. 500; *Newcomb v. Butterfield*, 8 Johns. 342. **Pa.**—*Henning v. Keiper*, 37 Pa. Super. 488. **Vt.**—*Guild v. Prentiss*, 83 Vt. 212, 74 Atl. 1115.

[a] Only that which the jury reports as "damages" can be trebled, and the language of the verdict con-

ing single damages, to treble them themselves.<sup>76</sup> When several causes of action are joined, some only of which are under the statute, the verdict should distinguish how much of the award is for trespass.<sup>77</sup>

**Exemption.** — The action being tortious, no right of exemption exists against the judgment.<sup>78</sup>

**IV. INJUNCTIVE RELIEF.**<sup>79</sup> — A. AGAINST TRESPASS TO PERSONAL PROPERTY. — Ordinarily an injunction will not be awarded to restrain trespasses on personal property.<sup>80</sup>

B. AGAINST TRESPASS TO REAL PROPERTY. — 1. Generally. — Courts of equity have undoubted jurisdiction to enjoin trespasses upon real property.<sup>81</sup> In accord with the rules relating to injunctions generally,<sup>82</sup> the application for relief, is addressed to the sound discretion of the chancellor.<sup>83</sup> Formerly this jurisdiction was sparingly exercised,<sup>84</sup> but in modern times, the rules have been relaxed, and in-

trols in this regard. *Howser v. Melcher*, 40 Mich. 185.

[b] After verdict for single damages, the court may hear evidence on issue of probable cause for believing the land belonging to the defendant, it being the duty of the court to pass upon that question. *Chilton v. Missouri Lumber & Min. Co.*, 144 Mo. App. 315, 127 S. W. 941.

[c] The judgment must be for some multiple of the penalty. *Behymer v. Odell*, 31 Ill. App. 350.

76. *Snelling v. Garfield*, 114 Mass. 443; *Henning v. Keiper*, 37 Pa. Super. 488.

77. Mich. — *Osburn v. Lovell*, 36 Mich. 246. Mo. — *Shrewsbury v. Bawltitz*, 57 Mo. 414; *Lowe v. Harrison*, 8 Mo. 350. Compare *Cooper v. Maupin*, 6 Mo. 624, 35 Am. Dec. 456, the verdict being presumed to be for single damages, a general verdict is good under either count, and judgment will not be arrested. N. Y. — *Yeamans v. Nichols*, 81 N. Y. Supp. 500; *Mooers v. Allen*, 2 Wend. 247.

78. *Crawford v. Slaton*, 133 Ala. 393, 31 So. 940.

[a] Although the Action Is in Form Debt for a Penalty. — *Crawford v. Slaton*, 133 Ala. 393, 31 So. 940.

As to exemptions generally see title "Homesteads and Exemptions." As to what property exempt from levy see the title "Judgments and Decrees, Enforcement of."

79. Injunction against waste, see the title "Waste."

Life tenant may enjoin continuing trespass, see 18 STANDARD PROC. 624.

Owners of inheritance may enjoin continuing trespasses, though the life estate still exists. See 18 STANDARD PROC. 632.

80. *Cullman Property Co. v. H. H. Hitt Lumber Co. (Ala.)*, 77 So. 574; *Ganow v. Denney*, 68 Neb. 706, 94 N. W. 959.

[a] But a gas company may enjoin the placing of attachments on its meters. The consumers are not necessary parties to an action against the proprietor of the attachment. *Blondell v. Consol. Gas Co.*, 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187.

81. Ala. — *H. H. Hitt Lumber Co. v. Cullman Property Co.*, 189 Ala. 13, 66 So. 720; *Bowling v. Crook*, 104 Ala. 130, 16 So. 131; *Boulo v. New Orleans M. & T. R. Co.*, 55 Ala. 480. Fla. — *Carney v. Hadley*, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233. Me. — *Spofford v. Bangor & Bucksport R. Co.*, 66 Me. 51. Ore. — *Moore v. Halliday*, 43 Ore. 243, 72 Pac. 801, 99 Am. St. Rep. 724.

[a] Jurisdiction Is an Outgrowth of Equitable Interference to Prevent Waste. — *Moore v. Halliday*, 43 Ore. 243, 72 Pac. 801, 99 Am. St. Rep. 724.

82. See the title "Injunctions."

83. *Cragg v. Levinson*, 238 Ill. 69, 87 N. E. 121, 21 L. R. A. (N. S.) 417, 15 Ann. Cas. 1229, note.

84. *Mendenhall v. Harrisburgh Water Power Co.*, 27 Ore. 38, 39 Pac. 399; *Smith v. Gardner*, 12 Ore. 221, 6 Pac. 771, 53 Am. Rep. 342. See *Hanson v.*

junctive relief is granted much more freely.<sup>85</sup>

Generally, to warrant equitable interference against trespasses two conditions must exist; first, the complainant's title must be established,<sup>86</sup> or at least he must have a *prima facie* title,<sup>87</sup> and secondly, there must be a ground for equitable relief,<sup>88</sup> such as the prevention of irreparable injury,<sup>89</sup> or inadequacy of legal remedy,<sup>90</sup> or a prevention of a multiplicity of suits,<sup>91</sup> all of which amount essentially to irreparable injury.<sup>92</sup> If the remedy at law is adequate, an injunction will not be granted,<sup>93</sup> and as an action for damages is usually an adequate remedy for a mere trespass, it is a general rule that an injunction against a mere threatened trespass will not be granted.<sup>94</sup>

**2. Title in Plaintiff.**—To warrant a permanent injunction against a trespass, not only must there be an equitable ground of relief,<sup>95</sup> but the complainant's title must be admitted,<sup>96</sup> or established by a legal

Gardiner, 7 Ves. Jr. 305, 32 Eng. Rep. 125.

85. *Carney v. Hadley*, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233; *Camp v. Dixon*, 112 Ga. 872, 38 S. E. 71, 52 L. R. A. 755.

Enjoining occupation of land by railroad, see 22 STANDARD PROC. 114.

86. *Carney v. Hadley*, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233. See *infra*, IV, B, 2.

[a] On the strength of his own title, plaintiff must recover. *Boulo v. New Orleans M. & T. R. Co.*, 55 Ala. 480.

87. *King v. Campbell*, 85 Fed. 814.

[a] *Prima facie* title in plaintiff is sufficient in the absence of a better outstanding title. *McArthur v. Matthewson*, 67 Ga. 134.

88. *Heman v. Wade*, 74 Mo. App. 339; *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556.

89. *Thorn v. Sweeney*, 12 Nev. 251. See *infra*, IV, B, 4, a.

90. *Slater v. Gunn*, 170 Mass. 509, 49 N. E. 1017, 41 L. R. A. 268. See *H. H. Hitt Lumber Co. v. Cullman Property Co.*, 189 Ala. 13, 66 So. 720, and see *infra*, IV, B, 4, a.

91. *Powell v. Waits*, 147 Ga. 619, 95 S. E. 214; *Thorn v. Sweeney*, 12 Nev. 251. And see *infra*, IV, B, 4, a and b.

92. See *Bishop v. Owens*, 5 Cal. App. 83, 89 Pac. 844.

93. Ala.—*High v. Whitfield*, 130 Ala. 444, 30 So. 449. Fla.—*Carney v. Hadley*, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233. Ind.

*Wabash R. Co. v. Engleman*, 160 Ind. 329, 66 N. E. 892. N. J.—*Lamphear v. Subers*, 84 N. J. Eq. 391, 93 Atl. 194. Okla.—*Roma Oil Co. v. Long*, 173 Pac. 957. Wis.—*Miller v. Hoeschler*, 121 Wis. 558, 99 N. W. 228, 7 L. R. A. (N. S.) 49.

94. U. S.—*Kennedy v. Elliott*, 85 Fed. 832. Cal.—*Harmon v. De Turk*, 176 Cal. 758, 169 Pac. 680. Conn.—*Smith v. King*, 61 Conn. 511, 23 Atl. 923. Ga.—*Moore v. Ferrell*, 1 Ga. 7. Mich.—*Hendershott v. Moore*, 188 Mich. 364, 154 N. W. 17; *Brassington v. Waldron*, 143 Mich. 364, 107 N. W. 100. Ore.—*Roots v. Boring Junction Lumb. Co.*, 50 Ore. 298, 313, 92 Pac. 811, 94 Pac. 182; *Allen v. Dunlap*, 24 Ore. 229, 33 Pac. 675. Pa.—*Kramer v. Slattey*, 261 Pa. 234, 103 Atl. 610. Va.—*Miller v. Wills*, 95 Va. 337, 28 S. E. 337. W. Va.—*Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. Wis.—*Miller v. Hoeschler*, 121 Wis. 558, 99 N. W. 228, 7 L. R. A. (N. S.) 49; *German Evangelical Cong. v. Hoessli*, 13 Wis. 348.

[a] Merely because defendant is a trespasser, equity will not interfere. *Boulo v. New Orleans M. & T. R. Co.*, 55 Ala. 480; *Jerome v. Ross*, 7 Johns. Ch. (N. Y.) 315, 11 Am. Dec. 484.

95. See *supra*, IV, B, 1.

96. Fla.—*Carney v. Hadley*, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233. Ill.—*Cragg v. Levinson*, 238 Ill. 69, 87 N. E. 121, 21 L. R. A. (N. S.) 417, 15 Ann. Cas. 1229, note (admission by demurrer); *Stroup v. Chalcraft*, 52 Ill. App. 608. N. H.—*Ellis v. Blue Mountain Forest Assn.*, 69 N. H. 385, 41 Atl. 856, 42 L. R. A.



adjudication.<sup>97</sup> Following this rule, some courts have denied relief where the defendant sets up claims as owner or under color of right.<sup>98</sup> But under the modern practice, where the plaintiff's right is in dispute, equity may grant a temporary injunction until title can be determined in an action at law.<sup>99</sup> Generally equity will remand the parties to the law courts for the establishment of the title.<sup>1</sup> But some courts

570. **N. C.**—Gause v. Perkins, 56 N. C. 177, 69 Am. Dec. 728. **Ore.**—Norton v. Elwert, 29 Ore. 583, 588, 41 Pac. 926.

[a] **Mere denial of the plaintiff's right** does not preclude relief; the denial must be based on facts showing a substantial dispute. *Miller v. Lynch*, 149 Pa. 460, 24 Atl. 80.

[b] **A trespasser cannot enjoin removal of structures** erected on another's land. *Currier v. Jones*, 121 Iowa 160, 96 N. W. 766.

97. **Fla.**—Carney v. Hadley, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233. **N. C.**—Gause v. Perkins, 56 N. C. 177, 69 Am. Dec. 728. **Ore.**—Norton v. Elwert, 29 Ore. 583, 587, 41 Pac. 926. **Pa.**—Booher v. Browning, 169 Pa. 18, 32 Atl. 85. **W. Va.**—Lazell v. Garlow, 44 W. Va. 466, 30 S. E. 171.

[a] **This Is More a Rule of Discretion Than of Jurisdiction.**—*Baron v. Korn*, 127 N. Y. 224, 27 N. E. 804.

[b] **The previous establishment of plaintiff's title is seldom required in modern times.** *Hayois v. Salt River Valley Canal Co.*, 8 Ariz. 285, 290, 71 Pac. 944.

98. **Ind. Ter.**—Munyon v. Filmore, 4 Ind. Ter. 619, 76 S. W. 257. **Miss.**—Eskridge v. Eskridge, 51 Miss. 522. **N. H.**—Morgan v. Palmer, 48 N. H. 336.

99. **U. S.**—Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. ed. 1116; *King v. Campbell*, 85 Fed. 814. **Ga.**—Moore v. Ferrell, 1 Ga. 7. **Idaho.**—Shields v. Johnson, 10 Idaho 454, 79 Pac. 394. **Ind.**—Wabash R. Co. v. Engleman, 160 Ind. 329, 66 N. E. 892. **Mo.**—Smith v. Jameson, 91 Mo. 13, 3 S. W. 212; *Echelkamp v. Schrader*, 45 Mo. 505. **Mont.**—Heinze v. Boston & M. Consol. C. & S. Min. Co., 20 Mont. 528, 52 Pac. 273. **N. J.**—New Jersey Zinc & Iron Co. v. Trotter, 38 N. J. Eq. 3. **N. C.**—Gause v. Perkins, 56

N. C. 177, 69 Am. Dec. 728. **Okla.**—Burnett v. Sapulpa Ref. Co., 159 Pac. 360. **Ore.**—Norton v. Elwert, 29 Ore. 583, 41 Pac. 926. **Vt.**—Griffith v. Hilliard, 64 Vt. 643, 25 Atl. 427. **W. Va.**—Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556; *Bettman v. Harness*, 42 W. Va. 433, 439, 26 S. E. 271, 36 L. R. A. 566. **Eng.**—Bacon v. Jones, 4 Myl. & C. 433, 1 Beav. 382, 3 Jur. (O. S.) 994, 41 Eng. Reprint 167.

[a] **If the bill sets up that an action is brought or is about to be instituted to establish title, equity will grant an injunction in aid of the action at law.** *Gause v. Perkins*, 56 N. C. 177, 69 Am. Dec. 728.

[b] **A stronger case of irremediable mischief** must be presented to obtain relief when title is in dispute. *Le Roy v. Wright*, 4 Sawy. 530, 15 Fed. Cas. No. 8,273; *Chesapeake & Ohio Canal Co. v. Young*, 3 Md. 480, 489.

[c] **If the plaintiff is in possession and is therefore not in a position and without occasion to sue, the injunction may be made perpetual if the defendant neglects to sue in a reasonable time.** *Echelkamp v. Schrader*, 45 Mo. 505.

1. *Moore v. Ferrell*, 1 Ga. 7.

See generally the title "Transfer of Causes."

[a] **An issue to the law court may be directed.** *Hicks v. Michael*, 15 Cal. 107, 116.

[b] **It is error to determine title in the injunction suit.** **Ala.**—*Hamilton v. Brent Lumber Co.*, 127 Ala. 78, 28 So. 698. **Md.**—*Clayton v. Shoemaker*, 67 Md. 216, 9 Atl. 635. **W. Va.**—*Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556, *disapproving Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. **Eng.**—*Harman v. Jones*, *Craig & Ph.* 299, 41 Eng. Reprint 505. See *Harms v. Jacobs*, 158 Ill. 505, 41 N. E. 1071.

hold that, having taken jurisdiction, they may award complete relief, even though they may have to try title or determine boundaries.<sup>2</sup>

**3. Possession in Plaintiff.**—To maintain a suit to enjoin a trespass, the plaintiff must have and allege possession of the premises,<sup>3</sup> unless statute provides otherwise,<sup>4</sup> or he must allege facts showing that he is entitled to an injunction without being in possession.<sup>5</sup> It is clear that the remedy by injunction cannot be substituted for ejectment or unlawful detainer.<sup>6</sup> But temporary injunctions are frequently granted to persons out of possession, until they can establish their title by a proper action.<sup>7</sup> And equity may be resorted to in the first instance to enjoin a trespasser in possession without right from committing irreparable injury.<sup>8</sup>

2. **N. J.**—*Deveney v. Gallagher*, 20 N. J. Eq. 33. **N. Y.** *Hinckel v. Stevens*, 17 App. Div. 279, 45 N. Y. Supp. 678. **Vt.**—*Griffith v. Hilliard*, 64 Vt. 643, 25 Atl. 427.

See *McLaughlin v. Kelly*, 22 Cal. 211; *Shirley v. Hicks*, 110 Ga. 516, 35 S. E. 782.

3. *Ramey v. Counts*, 102 Va. 902, 47 S. E. 1006. See also *Ala.*—*Tidwell v. H. H. Hitt Lumber Co.*, 73 So. 486; *Hamilton v. Brent Lumber Co.*, 127 Ala. 78, 28 So. 698. **Ga.**—*Nethery v. Payne*, 71 Ga. 374. **Ill.**—*Toledo St. L. & N. O. R. Co. v. St. Louis & O. R. Co.*, 208 Ill. 623, 70 N. E. 715. **R. I.** *Lewis v. North Kingstown*, 16 R. I. 15, 11 Atl. 173, 27 Am. St. Rep. 724.

Allegation of, see *infra*, IV, B, 5, d.

[a] The same character of possession as is necessary to maintain trespass *quare clausum* is required to support actions of this kind. *Hillman v. Hurley*, 82 Ky. 626 (but see present statute); *Gildersleeve v. Overstolz*, 97 Mo. App. 303, 71 S. W. 371. See *supra*, II, C.

4. See the statutes and *Reddick v. Meffert*, 32 Fla. 409, 13 So. 894 (as to trespass for cutting trees); *Wiggins v. Jackson*, 24 Ky. L. Rep. 2189, 73 S. W. 779.

5. *Ramey v. Counts*, 102 Va. 902, 47 S. E. 1006.

[a] Where the plaintiff is out of possession (1) the court will refuse to interfere by granting an injunction, unless there be fraud or collusion, or unless the acts perpetrated or threatened are so injurious as to tend to the destruction of the estate. *Lowndes v. Bettie*, 33 L. J. Ch. (Eng.) 451, 4 New. Rep. 609, 10 Jur. N. S. 226, 10 L. T. N. S. 55, 42 W. R. 399. See

*In re Leininger's Appeal*, 106 Pa. 398.

(2) And the plaintiff must satisfy the court that there is an action pending at law which will try the right between the plaintiff and defendant. *Spofford v. Bangor & Bucksport R. Co.*, 66 Me. 51, *quot. Kerr on Injunctions*. See also *North Lumber Co. v. Gary*, 83 Miss. 640, 36 So. 2.

[b] Where defendant is in possession under a bona fide claim of title, and is solvent, an injunction to restrain trespass will not be granted on a bill setting up title in the plaintiff where no suit at law to try the right is pending. *North Lumber Co. v. Gary*, 83 Miss. 640, 36 So. 2.

6. **Ala.**—*Bowling v. Crook*, 104 Ala. 130, 16 So. 131. See *Woodstock Operating Corp. v. Quinn*, 79 So. 253. **Cal.** *Harmon v. De Turk*, 176 Cal. 758, 169 Pac. 680. **Ia.**—*Minneapolis & St. L. Ry. Co. v. Chicago, M. & St. P. R. Co.*, 116 Iowa 681, 88 N. W. 1082. **Kan.**—*Bodwell v. Crawford*, 26 Kan. 292, 40 Am. Rep. 306.

7. **U. S.**—*King v. Campbell*, 85 Fed. 814, granting relief pending action of ejectment. **Cal.**—*Hicks v. Michael*, 15 Cal. 107, where an action of forcible entry and detainer was pending. **Mo.** *Heman v. Wade*, 74 Mo. App. 339. **Va.**—*Ramey v. Counts*, 102 Va. 902, 47 S. E. 1006.

See the title "Title," and see *supra*, IV, B, 2.

[a] But an injunction against continuing in possession, or against the ordinary and natural use of the premises will not be granted. *Snyder v. Hopkins*, 31 Kan. 557, 3 Pac. 367.

8. *Harmon v. De Turk*, 176 Cal. 758, 169 Pac. 680; *Hicks v. Michael*, 15 Cal. 107, 115; *Dunker v. Field & Tule Club*,

**4. Grounds of Relief.** — a. *Irreparable Injury and Inadequacy of Legal Remedy.* — It is a general rule that trespasses to real property which will cause irreparable injury will be enjoined.<sup>9</sup> When the trespass is destructive of the very substance of the estate in the character in which it is enjoyed, the injury is irreparable and will be enjoined.<sup>10</sup>

6 Cal. App. 524, 92 Pac. 502; Lowndes v. Bettle, 33 L. J. Ch. (Eng.) 451, 4 N. R. 609, 12 W. R. 399, 10 Jur. N. S. 226, 10 L. T. N. S. 55.

[a] But where defendant is in adverse possession of land, an injunction against alleged trespasses committed subsequent to entry will not be granted. Taylor v. Clark, 89 Fed. 7; Felton v. Justice, 51 Cal. 529.

9. **U. S.**—King v. Stuart, 84 Fed. 546. **Fla.**—Carney v. Hadley, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233. **Ga.**—Gray Lumber Co. v. Gaskin, 122 Ga. 342, 50 S. E. 164; Ocmulgee Lumb. Co. v. Mitchell, 112 Ga. 528, 37 S. E. 749; Moore v. Ferrell, 1 Ga. 7. **Ill.**—Harms v. Jacobs, 158 Ill. 505, 41 N. E. 1071; Newlin v. Prevo, 81 Ill. App. 75. **Ky.**—Hillman v. Hurley, 82 Ky. 626. **Md.**—Levenson v. Bonaparte, 131 Md. 635, 102 Atl. 998; Gilbert v. Arnold, 30 Md. 29. **Mich.**—Brassington v. Waldron, 143 Mich. 364, 107 N. W. 100. **Mo.**—Heman v. Wade, 74 Mo. App. 339. **N. J.** Deveney v. Gallagher, 20 N. J. Eq. 33. **N. Y.**—Jerome v. Ross, 7 Johns. Ch. 315, 11 Am. Dec. 484, leading case. **Nev.**—Thorn v. Sweeney, 12 Nev. 251. **N. C.**—Gause v. Perkins, 56 N. C. 177, 69 Am. Dec. 728. **Ore.**—Mendenhall v. Harrisburgh Water-Power Co., 27 Ore. 38, 39 Pac. 399; Smith v. Gardner, 12 Ore. 221, 6 Pac. 771, 53 Am. Rep. 342. **R. I.**—Lewis v. North Kingtown, 16 R. I. 15, 11 Atl. 173, 27 Am. St. Rep. 724. **Va.**—Miller v. Wills, 95 Va. 337, 28 S. E. 337; Switzer v. McCulloch, 76 Va. 777. **W. Va.**—Lazzell v. Garlow, 44 W. Va. 466, 480, 30 S. E. 171; Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566.

[a] The word "irreparable" means (1) that which cannot be repaired, restored or adequately compensated for in money, or where the compensation cannot be safely measured. Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. To same effect, see Cal.—Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74. **N. C.** Gause v. Perkins, 56 N. C. 177, 69 Am.

Dec. 728. **Wis.**—Wilson v. Mineral Point, 39 Wis. 160. See also Jerome v. Ross, 7 Johns. Ch. (N. Y.) 315, 11 Am. Dec. 484. (2) In the light of modern decisions, an irreparable injury may be said to be one which, either from its nature, or from the circumstances surrounding the person injured, or the financial condition of the person committing the injury cannot be readily, adequately, and completely compensated with money. Gause v. Perkins, 56 N. C. 177, 69 Am. Dec. 728.

[b] The relief is based on the theory of irreparable injury resulting from the peculiar character of the property affected, from the frequency of the acts complained of, or from the insolvency of the tort-feasor, so that an action at law is inadequate. Moore v. Halliday, 43 Ore. 243, 72 Pac. 801, 99 Am. St. Rep. 724.

[c] The injury must be threatened and impending. Union Mill & Min. Co. v. Warren, 82 Fed. 522.

10. **U. S.**—Denver & R. G. R. Co. v. Mills, 222 Fed. 481, 138 C. C. A. 77. **Ala.**—Cullman Property Co. v. H. H. Hitt Lumber Co., 77 So. 574. **Ga.** Moore v. Ferrell, 1 Ga. 7. **Ill.**—McGuire v. Boyd Coal & Coke Co., 236 Ill. 69, 86 N. E. 174. **Ky.**—Hillman v. Hurley, 82 Ky. 626. **Md.**—Duvall v. Ridout, 124 Md. 193, 92 Atl. 209, L. R. A. 1915C, 345; Chesapeake Brew. Co. v. Mt. Vernon Brew. Co., 107 Md. 528, 68 Atl. 1046; Gilbert v. Arnold, 30 Md. 29. **Mo.**—Weigel v. Walsh, 45 Mo. 560; Echelkamp v. Schrader, 45 Mo. 505. **Mont.**—Harley v. Montana Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407; King v. Mullins, 27 Mont. 364, 71 Pac. 155. **Neb.**—Peterson v. Hopewell, 55 Neb. 670, 76 N. W. 451. **Ore.**—Roots v. Boring Junction Lumb. Co., 50 Ore. 298, 92 Pac. 811, 94 Pac. 182; Moore v. Halliday, 43 Ore. 243, 72 Pac. 801, 99 Am. St. Rep. 724; Allen v. Dunlap, 24 Ore. 229, 33 Pac. 675; Smith v. Gardner, 12 Ore. 221, 6 Pac. 771, 53 Am. Rep. 342. **R. I.**—Lewis v. North Kingtown, 16 R. I. 15, 11 Atl. 173, 27 Am. St. Rep. 724. **Va.**—Miller v.



Some cases limit the term "irreparable injury" to cases of this character,<sup>11</sup> but generally the term is given a much broader signification.<sup>12</sup> And it is held that a trespass is irreparable and will be enjoined when from its nature full and complete reparation in damages cannot be made,<sup>13</sup> or when the injury is not capable of estimation in terms of money,<sup>14</sup> or according to some cases, when, although it may be thus atoned for, the party trespassing is insolvent.<sup>15</sup> Indeed, whenever the remedy at law is inadequate, equity will enjoin the trespass.<sup>16</sup>

b. *Continuous and Repeated Trespasses.*—For the purpose of preventing irreparable injury,<sup>17</sup> and of avoiding a multiplicity of suits,<sup>18</sup> an injunction will be granted to prevent continuous or repeated trespasses of the same person or of several persons,<sup>19</sup> of such a character

Wills, 95 Va. 337, 28 S. E. 337. **Wis.**—Miller v. Hoessler, 121 Wis. 558, 99 N. W. 228, 7 L. R. A. (N. S.) 49; German Evangelical Cong. v. Hoessli, 13 Wis. 348.

[a] Where the plaintiff would be deprived of the substance of the inheritance which cannot be specifically replaced. **Cal.**—More v. Massini, 32 Cal. 590. **N. Y.**—Jerome v. Ross, 7 Johns. Ch. 315, 11 Am. Dec. 484. **W. Va.**—Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566.

**Enjoining cutting of timber**, see the title "Logs and Logging."

**Enjoining removal of ore**, see the title "Mines and Minerals."

11. Smith v. King, 61 Conn. 511, 23 Atl. 923; Jerome v. Ross, 7 Johns. Ch. (N. Y.) 315, 11 Am. Dec. 484. See also Harley v. Montana Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407; King v. Mullins, 27 Mont. 364, 71 Pac. 155; Thorn v. Sweeney, 12 Nev. 251.

12. See Wabash R. Co. v. Engleman, 160 Ind. 329, 333, 66 N. E. 892.

13. **Cal.**—Bishop v. Owens, 5 Cal. App. 83, 89 Pac. 844. **Ga.**—Gray Lumber Co. v. Gaskin, 122 Ga. 342, 50 S. E. 164; Camp v. Dixon, 112 Ga. 872, 38 S. E. 71, 52 L. R. A. 755; Justices v. P. R. Co., 11 Ga. 246. **Ill.**—First Evangelical Church v. Walsh, 57 Ill. 363, 11 Am. Rep. 21. **Md.**—Gilbert v. Arnold, 30 Md. 29. **Mo.**—Heman v. Wade, 74 Mo. App. 339. **Neb.**—Munger v. Yeiser, 80 Neb. 285, 114 N. W. 166. **Nev.**—Thorn v. Sweeney, 12 Nev. 251. **N. J.**—Tainter v. Morristown, 19 N. J. Eq. 46. **Ore.**—Norton v. Elwert, 29 Ore. 583, 41 Pac. 926; Garrett v. Bishop, 27 Ore. 349, 41 Pac. 10; Smith v. Gardner, 12 Ore. 221, 6 Pac. 771,

53 Am. Rep. 342. **Wis.**—German Evangelical Cong. v. Hoessli, 13 Wis. 348.

14. **Ala.**—Cullman Property Co. v. H. H. Hitt Lumber Co., 77 So. 574. **Ariz.**—Hoyois v. Salt River Valley Canal Co., 8 Ariz. 285, 290, 71 Pac. 944. **Cal.**—Daubenspeck v. Grear, 18 Cal. 443. **Ky.**—Hillman v. Hurley, 82 Ky. 626. **Md.**—Gilbert v. Arnold, 30 Md. 29. **Ore.**—Norton v. Elwert, 29 Ore. 583, 41 Pac. 926. **W. Va.**—Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566.

15. See Gause v. Perkins, 56 N. C. 177, 69 Am. Dec. 728, and see *infra*, IV, B, 4, c.

16. Moore v. Ferrell, 1 Ga. 7; Miller v. Wills, 95 Va. 337, 28 S. E. 337.

17. Pittsburgh, S. & W. R. Co. v. Fiske, 123 Fed. 760, 60 C. C. A. 621; Barbee v. Shannon, 1 Ind. Ter. 199, 40 S. W. 584.

18. **U. S.**—Pittsburgh, S. & W. R. Co. v. Fiske, 123 Fed. 760, 60 C. C. A. 621; Lake Shore & M. S. Ry. Co. v. Felton, 103 Fed. 227, 43 C. C. A. 139. **Ind.**—Barbee v. Shannon, 1 Ind. Ter. 199, 40 S. W. 584. **Neb.**—Hackney v. McIninch, 79 Neb. 128, 112 N. W. 296.

See generally the title "Multiplicity of Suits."

19. See 20 STANDARD PROC. 75, and cases cited *infra*, the next two notes.

[a] According to some authorities, most of which have been overruled by subsequent cases (see cases cited in notes following) to justify an injunction in order to avoid a multiplicity of suits, there must be several persons controverting the same right, and each standing on his own claim. **U. S.**—John A. Roebling Sons' Co. v. First Nat. Bank, 30 Fed. 744, West Virginia

as to produce irreparable injury,<sup>20</sup> or as to necessitate many actions at law to obtain redress,<sup>21</sup> no one of which could compensate for the whole

district court. **Ala.**—*Deegan v. Neville*, 127 Ala. 471, 29 So. 173, 85 Am. St. Rep. 137. **Fla.**—*Carney v. Hadley*, 32 Fla. 344, 353, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233. **Ga.**—*Hatcher v. Hampton*, 7 Ga. 49. **Ill.**—*Chicago General Ry. Co. v. Chicago, B. & Q. R. Co.*, 181 Ill. 605, 54 N. E. 1026. **Md.**—*Nicodemus v. Nicodemus*, 41 Md. 529. **Mass.**—*Washburn v. Miller*, 117 Mass. 376. **Mo.**—*Crenshaw v. Cook*, 65 Mo. App. 264. **Nev.**—See *Thorn v. Sweeney*, 12 Nev. 251. **N. Y.**—*Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484. **Ohio.**—*McCoy v. Chillicothe*, 3 Ohio 370, 17 Am. Dec. 607.

20. **U. S.**—See *Whelpley v. Grosvold*, 249 Fed. 812, 162 C. C. A. 46. **Ariz.** *Hayoio v. Salt River Valley Canal Co.*, 8 Ariz. 285, 290, 71 Pac. 944, must be great vexation from continued trespasses. **Cal.**—*Randall v. Freed*, 154 Cal. 299, 97 Pac. 669; *Mechanics' Foundry v. Ryall*, 62 Cal. 416, 75 Cal. 601, 17 Pac. 703. **Ill.**—*McGuire v. Boyd Coal & Coke Co.*, 236 Ill. 69, 86 N. E. 174, continuing and repeated trespasses of a grave character causing irreparable injury and absolute destruction of property will be enjoined. **N. J.** *Simpson v. Moorhead*, 65 N. J. Eq. 623, 56 Atl. 887, the injury though small is irreparable. **Ore.**—*Moore v. Halliday*, 43 Ore. 243, 72 Pac. 801, 99 Am. St. Rep. 724. **Wis.**—See *De Pauw v. Oxley*, 122 Wis. 656, 100 N. W. 1028, 13 L. R. A. (N. S.) 173.

*Contra*, *Tantlinger v. Sullivan*, 80 Iowa 218, 45 N. W. 765 (irreparable injury need not be alleged); *Lambert v. St. Louis & Gulf R. Co.*, 212 Mo. 692, 111 S. W. 550, damage is not "irreparable."

[a] The remedy at law (1) must be inadequate. *Kramer v. Slattery*, 260 Pa. 234, 103 Atl. 610. (2) The necessity of a multiplicity of suits shows the inadequacy of the legal remedy. *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. See *Gilbert v. Arnold*, 30 Md. 29.

[b] The classes of cases in which an injunction is granted include those where the facts give rise to interminable litigation if relief is not granted; or those where the facts show either torts inherently of a permanent character or circumstances strongly sug-

gesting that the wrongs complained of would, in all probability, be repeated so continuously that by reason of their persistency in this respect, they in effect would be permanent in nature, and so harassing as to amount to a harmful nuisance, the damage from which could be estimated only by conjecture. In some of the cases, the facts show that the acts in question, if persisted in, would constitute a permanent use of or would be ruinous to or seriously interfere with the occupancy and enjoyment of plaintiff's real estate; others are instances of waste. *Kramer v. Slattery*, 260 Pa. 234, 103 Atl. 610.

[c] Where the repeated acts of trespass will ripen into a prescriptive right, an injunction will be granted though substantial damage is not done. *Vestal v. Young*, 147 Cal. 715, 82 Pac. 381; *Mendelson v. McCabe*, 144 Cal. 230, 77 Pac. 915, 103 Am. St. Rep. 78; *Moore v. Clear Lake Water-Works*, 68 Cal. 146, 8 Pac. 816; *Richards v. Dower*, 64 Cal. 62, 28 Pac. 113; *Poirier v. Fetter*, 20 Kan. 47.

[d] But a discharged employee will not be enjoined from occupying his former place, the injury not being irreparable. *Mechanics' Foundry v. Ryall*, 62 Cal. 416, 75 Cal. 601, 17 Pac. 703.

[e] Continuous trespasses upon barren or waste land of little value will not be enjoined. *Hoye v. Sweetman*, 19 Nev. 376, 12 Pac. 504; *Thorn v. Sweeney*, 12 Nev. 251; *Crescent Min. Co. v. Silver King Min. Co.*, 17 Utah 444, 54 Pac. 244, 70 Am. St. Rep. 810, where pipe line over waste land was maintained.

21. **U. S.**—*Pittsburgh, S. & W. R. Co. v. Fiske*, 123 Fed. 760, 60 C. C. A. 621; *King v. Stuart*, 84 Fed. 546. **Ala.** *Woodstock Operating Corp. v. Quinn*, 79 So. 253; *Coleman v. Elliott*, 147 Ala. 689, 40 So. 666; *Bowling v. Crook*, 104 Ala. 130, 16 So. 131. **Cal.**—*Mendelson v. McCabe*, 144 Cal. 230, 77 Pac. 915, 103 Am. St. Rep. 78. But compare *Randall v. Freed*, 154 Cal. 299, 97 Pac. 669. **Fla.**—*Carney v. Hadley*, 32 Fla. 344, 352, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233. **Ga.**—*Moore & Co. v. Daugherty, Allen & Co.*, 146 Ga. 176, 91 S. E. 14; *Gray Lumber*

wrong, although each act by itself may not inflict great or irreparable injury.<sup>22</sup>

c. *Insolvency of Trespasser.*—If the elements of irreparable injury

Co. v. Gaskin, 122 Ga. 342, 350, 50 S. E. 164, explaining *Hatcher v. Hampton*, 7 Ga. 49. **Ill.**—Cragg v. Levinson, 238 Ill. 69, 87 N. E. 121, 21 L. R. A. (N. S.) 417, 15 Ann. Cas. 1229, note. **Ind.**—Barbee v. Shannon, 1 Ind. Ter. 199, 40 S. W. 584. **Ky.**—Musselman v. Marquis, 1 Bush 463, 89 Am. Dec. 637; Chambers v. Haskell, 25 Ky. L. Rep. 1707, 78 S. W. 478. **Mass.**—Providence, F. R. & N. S. Co. v. Fall River, 183 Mass. 535, 67 N. E. 647; Boston & Me. R. Co. v. Sullivan, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275. **Mich.** Winans v. Willetts, 197 Mich. 512, 163 N. W. 993. **Minn.**—Heath v. Minneapolis, St. P. & S. S. M. R. Co., 126 Minn. 470, 148 N. W. 311. **Miss.**—Warren Mills v. New Orleans Seed Co., 65 Miss. 391, 4 So. 298, 7 Am. St. Rep. 671; Whitfield v. Rogers, 26 Miss. 84, 59 Am. Dec. 244. **Mo.**—Hobart Lee Tie Co. v. Stone, 135 Mo. App. 438, 117 S. W. 604. **Neb.**—Nattinger v. Howard, 102 Neb. 175, 166 N. W. 263; Lynch v. Egan, 67 Neb. 541, 93 N. W. 775; Pohlman v. Evangelical Lutheran Trinity Church, 60 Neb. 364, 83 N. W. 201. **N. Y.**—Hinckel v. Stevens, 17 App. Div. 279, 45 N. Y. Supp. 678; Olivella v. New York & H. R. Co., 31 Misc. 203, 64 N. Y. Supp. 1086. **N. C.** Cobb v. Atlantic Coast Line R. Co., 172 N. C. 58, 89 S. E. 807. **Ohio.** Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686, 21 Am. St. Rep. 828, 8 L. R. A. 578. **Ore.**—Fraser v. Portland, 81 Ore. 92, 158 Pac. 514; Smith v. Gardner, 12 Ore. 221, 6 Pac. 771, 53 Am. Rep. 342. **Pa.**—Kramer v. Slattery, 260 Pa. 234, 103 Atl. 610. **Vt.**—Murphy v. Lincoln, 63 Vt. 278, 22 Atl. 418. **Va.**—Miller v. Wills, 95 Va. 337, 28 S. E. 337. **Wash.**—Sequim Bay Canning Co. v. Bugge, 49 Wash. 127, 94 Pac. 922. **W. Va.**—Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. **Wis.**—De Pauw v. Oxley, 122 Wis. 656, 100 N. W. 1028, 13 L. R. A. (N. S.) 173; Miller v. Hoeschler, 121 Wis. 558, 99 N. W. 228, 7 L. R. A. (N. S.) 49. **Eng.**—Goodson v. Richardson, L. R. 9 Ch. 221, 226, 43 L. J. Ch. 790, 30 L. T. N. S. 142, 22 W. R. 337.

[a] **Rule Stated.**—If the trespass is so permanent and continuous that it

can never be said to be complete so that the injury cannot be computed, or if it be so vexatiously persisted in that a multiplicity of suits must result, an injunction will lie. *Hillman v. Hurley*, 82 Ky. 626.

[b] **Rule applies not only to cases of threatened public use of land, but also to actions between private parties.** *Miller v. Hoeschler*, 121 Wis. 558, 99 N. W. 228, 7 L. R. A. (N. S.) 49.

**22. Cal.**—Mendelson v. McCabe, 144 Cal. 230, 77 Pac. 915, 103 Am. St. Rep. 78, although the damage is small. **Ill.**—Cragg v. Levinson, 238 Ill. 69, 87 N. E. 121, 21 L. R. A. (N. S.) 417, 15 Ann. Cas. 1229, note. **Mass.** O'Brien v. Murphy, 189 Mass. 353, 75 N. E. 700, repeated trespasses relatively harmless. **Miss.**—Warren Mills v. New Orleans Seed Co., 65 Miss. 391, 4 So. 298, 7 Am. St. Rep. 671. **Mont.** Palmer v. Israel, 13 Mont. 209, 33 Pac. 134. **N. H.**—Ellis v. Blue Mountain Forest Assn., 69 N. H. 385, 41 Atl. 856, 42 L. R. A. 570. **Vt.**—Griffith v. Hilliard, 64 Vt. 643, 25 Atl. 427. **W. Va.**—Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566.

[a] **Though each act is not destructive of the inheritance, and not irreparable, and the legal remedy is adequate if that act stood alone, equity will grant an injunction where repeated acts are done.** *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. To same effect, see *Minn.*—Colliton v. Oxborough, 86 Minn. 361, 90 N. W. 793. **Miss.**—Warren Mills v. New Orleans Seed Co., 65 Miss. 391, 4 So. 298, 7 Am. St. Rep. 671. **Neb.**—Munger v. Yeiser, 80 Neb. 285, 114 N. W. 166. **Vt.**—Murphy v. Lincoln, 63 Vt. 278, 22 Atl. 418.

[b] **Where the damages recoverable for each act of trespass would not equal the expense of prosecuting the repeated actions, an injunction will be awarded.** **Ill.**—Cragg v. Levinson, 238 Ill. 69, 87 N. E. 121, 21 L. R. A. (N. S.) 417, 15 Ann. Cas. 1229, note. **Mass.** Boston & M. R. Co. v. Sullivan, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275. **Ohio.**—Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686, 21 Am. St. Rep. 828, 8 L. R. A. 578.



be present,<sup>23</sup> or if the trespass is continuing or repeated,<sup>24</sup> the insolvency of the defendant is immaterial and need not be alleged.<sup>25</sup> But in such case the insolvency is an element to be taken into consideration in awarding relief. It is an additional reason for injunctive relief.<sup>26</sup> Although the nature of the injury may be such that adequate compensation in damages might otherwise be awarded, some courts, sometimes under statute, hold the injury to be irreparable when the trespasser is insolvent,<sup>27</sup> although there are authorities to the contrary.<sup>28</sup>

23. **U. S.**—Union Min. & Mill. Co. v. Warren, 82 Fed. 522. **Ala.**—Tidwell v. H. H. Hitt Lumber Co., 73 So. 486. **Cal.**—Kellogg v. King, 114 Cal. 378, 382, 46 Pac. 166, 55 Am. St. Rep. 74; Richards v. Dower, 64 Cal. 62, 28 Pac. 113. See Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828. **Ill.**—See Kesner v. Miesch, 90 Ill. App. 437, general allegation of irreparable injury without allegation of insolvency is insufficient. **S. C.**—Crawford v. Atlantic Coast Lumb. Corp., 77 S. C. 81, 57 S. E. 670. **W. Va.**—Bettman v. Harness, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566.

[a] In the absence of a finding, the defendant is presumed solvent. Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828.

[b] Where the destruction of the estate is threatened. **Cal.**—More v. Massini, 32 Cal. 590. **Ga.**—McConnell v. Jones Naval Stores Co., 125 Ga. 376, 54 S. E. 117. **N. C.**—Gause v. Perkins, 56 N. C. 177, 69 Am. Dec. 728.

[c] In Missouri, insolvency of the defendant is not necessary when the legal remedy is inadequate, under statute. Turner v. Stewart, 78 Mo. 480.

24. **Ga.**—Moore & Co. v. Daugherty, Allen & Co., 146 Ga. 176, 91 S. E. 14; Kimbrell v. Thomas, 139 Ga. 146, 76 S. E. 1024. **Ill.**—Edwards v. Haeger, 180 Ill. 99, 54 N. E. 176. **Kan.**—Poirier v. Fetter, 20 Kan. 47. **Ky.**—Musselman v. Marquis, 1 Bush 463, 89 Am. Dec. 637. **Mass.**—Boston & M. R. Co. v. Sullivan, 177 Mass. 230, 58 N. E. 689, 83 Am. St. Rep. 275. **Mo.**—Lambert v. St. Louis & Gulf Ry. Co., 212 Mo. 692, 111 S. W. 550; Turner v. Stewart, 78 Mo. 480 (under a statute); Metropolitan Land Co. v. Manning, 98 Mo. App. 248, 71 S. W. 696. **Neb.**—Hornung v. Herring, 74 Neb. 637, 104 N. W. 1071; Lynch v. Egan, 67 Neb. 541, 93 N. W. 175; Pohlman v. Evangelical Lutheran Trinity Church, 60 Neb. 364, 83 N. W. 201. **N. C.**—Cobb

v. Atlantic Coast Line R. Co., 172 N. C. 58, 89 S. E. 807.

25. See *infra*, IV, B, 5, d.

26. **Fla.**—Carney v. Hadley, 32 Fla. 344, 352, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233. **Ill.**—Owens v. Crossett, 105 Ill. 354. **Ind.**—Wabash R. Co. v. Engleman, 160 Ind. 329, 66 N. E. 892. **N. H.**—Morgan v. Palmer, 48 N. H. 336. **N. M.**—Waddingham v. Robledo, 6 N. M. 347, 373, 28 Pac. 663. **Va.**—Miller v. Wills, 95 Va. 337, 28 S. E. 337.

27. **U. S.**—King v. Stuart, 84 Fed. 546. **Ala.**—Woodstock Operating Corp. v. Quinn, 79 So. 253. **Ark.**—Richards v. Howell, 129 Ark. 390, 196 S. W. 483. **Ga.**—Gray Lumber Co. v. Gasikin, 122 Ga. 342, 50 S. E. 164 (under statute); Camp v. Dixon, 112 Ga. 872, 38 S. E. 71, 52 L. R. A. 755; Ocmulgee Lumber Co. v. Mitchell, 112 Ga. 528, 37 S. E. 749. **Ill.**—Cragg v. Levinson, 238 Ill. 69, 87 N. E. 121, 21 L. R. A. (N. S.) 417, 15 Ann. Cas. 1229, note. See Harms v. Jacobs, 158 Ill. 505, 41 N. E. 1071; Kesner v. Miesch, 90 Ill. App. 437, general allegations of irreparable injury without an allegation of insolvency are insufficient. **Ky.**—Hillman v. Hurley, 82 Ky. 626. **N. C.**—Kistler v. Weaver, 135 N. C. 388, 47 S. E. 478; Gause v. Perkins, 56 N. C. 177, 69 Am. Dec. 728. **W. Va.**—Lazzell v. Garlow, 44 W. Va. 466, 484, 30 S. E. 171.

28. **Cal.**—Mechanics' Foundry v. Ryall, 75 Cal. 601, 17 Pac. 703. **Ind.**—Wabash R. Co. v. Engleman, 160 Ind. 329, 66 N. E. 892; Centreville & A. Tp. Co. v. Barnett, 2 Ind. 536. **N. H.**—Morgan v. Palmer, 48 N. H. 336. **Ore.**—Moore v. Halliday, 43 Ore. 243, 72 Pac. 801, 99 Am. St. Rep. 724. **Va.**—Miller v. Wills, 95 Va. 337, 28 S. E. 337. But compare Collins v. Sutton, 94 Va. 127, 26 S. E. 415.

d. *Other Grounds*.—An injunction against trespasses may be granted when there exist circumstances which in the discretion of the court render the writ necessary,<sup>29</sup> and some statutes so provide.<sup>30</sup> The nonresidence of the defendant is entitled to considerable weight in determining the propriety of the injunction.<sup>31</sup> And if the plaintiff is under a legal disability so that he is unable to pursue a legal remedy otherwise adequate, an injunction against trespass may be had.<sup>32</sup>

5. *Proceedings To Obtain Relief*.—a. *Generally*.—An injunction against trespass may be obtained as an original proceeding,<sup>33</sup> or as ancillary to an action for damages.<sup>34</sup>

b. *Jurisdiction and Venue*.<sup>35</sup>—According to some authorities a suit to enjoin a trespass on real property is local,<sup>36</sup> and must be brought in the state in which the land lies.<sup>37</sup> But according to other authorities, following the general rule as to extraterritorial jurisdiction,<sup>38</sup> if the court has jurisdiction of the necessary parties, it may enjoin a trespass on lands in another state.<sup>39</sup> Where the action is local, under some statutes it must be brought in the county where the land lies,<sup>40</sup> but under other statutes it must be in the county in which the defendant resides.<sup>41</sup>

29. *White v. Flannigain*, 1 Md. 525, 54 Am. Dec. 668; *Hamilton v. Ely*, 4 Gill. (Md.) 34.

30. See the statutes and *Gray Lumber Co. v. Gaskin*, 122 Ga. 342, 350, 50 S. E. 164; *Justice v. Aikin*, 104 Ga. 714, 30 S. E. 941.

[a] Nonresidence of a defendant who has no property in the state is one circumstance within the statute. *Gray Lumber Co. v. Gaskin*, 122 Ga. 342, 350, 50 S. E. 164.

31. *Miller v. Wills*, 95 Va. 337, 28 S. E. 337. See *Gray Lumber Co. v. Gaskin*, 122 Ga. 342, 50 S. E. 164.

32. *Thomas v. James*, 32 Ala. 723, trespass in cutting timber.

33. *Brennan v. Gaston*, 17 Cal. 372.

34. See *supra*, II.

35. See generally the titles "Jurisdiction;" "Venue."

36. *Lindsley v. Union Silver Star Min. Co.*, 26 Wash. 301, 66 Pac. 382. Compare *supra*, II, G.

37. **U. S.**—*Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 15 How. 233, 14 L. ed. 674. **D. C.**—*Columbia Nat. Sand Dredg. Co. v. Morton*, 28 App. Cas. 288, 7 L. R. A. (N. S.) 114. **Md.** *White v. White*, 7 Gill & J. 208. **N. Y.** *Chase v. Knickerbocker Phos. Co.*, 32 App. Div. 400, 53 N. Y. Supp. 220.

**Wash.**—*Lindsley v. Union Silver Star Min. Co.*, 26 Wash. 301, 66 Pac. 382.

[a] Even though all the necessary parties are before the court, equity has no jurisdiction to enjoin trespasses on land in another state. *Lindsley v. Union Silver Star Min. Co.*, 26 Wash. 301, 66 Pac. 382.

[b] The fact that the realty trespassed upon is a wharf does not deprive the state court of jurisdiction. *Turner v. Stewart*, 78 Mo. 480.

38. See 17 STANDARD PROC. 776, 785, note 27.

39. See 17 STANDARD PROC. 785, note 27.

40. *Cox v. Railway Co.*, 55 Ark. 454, 18 S. W. 630; *Drinkhouse v. Spring Valley Water-Works*, 80 Cal. 308, 22 Pac. 252. But see *Clad v. Paist*, 181 Pa. 148, 37 Atl. 194, holding the parties being within the jurisdiction of the court, relief could be granted as to land in another county.

[a] The code section prescribing the venue of actions for "injuries to real property" governs. *Cox v. Railway Co.*, 55 Ark. 454, 18 S. W. 630.

41. See the statutes, and the title "Venue."

[a] If there be joint wrongdoers, both may be sued in the county of the residence of either. *Wall v. Mercer*, 119 Ga. 346, 46 S. E. 420.

c. *Parties*.—In accordance with the general rules elsewhere treated,<sup>42</sup> persons interested in the matter in litigation should be made parties.<sup>43</sup> But in the case of joint trespassers, the plaintiff may join all or sue each separately.<sup>44</sup> Persons owning adjoining tracts in severalty inclosed as one boundary and used by them in common may join in an action to restrain a trespass.<sup>45</sup>

d. *Pleadings*.<sup>46</sup>—The complaint for an injunction should allege the plaintiff's ownership or title,<sup>47</sup> and his possession, when possession is required,<sup>48</sup> the trespasses of the defendant, actual or threatened,<sup>49</sup>

42. See the titles "Injunctions;" "Parties."

43. *Florida East Coast R. Co. v. Worley*, 49 Fla. 297, 38 So. 618.

[a] **The city is not a necessary party in an action to enjoin trespasses on land claimed by adjoining lot owners to be a public park.** *Florida East Coast R. Co. v. Worley*, 49 Fla. 297, 38 So. 618.

[b] **Complainants' tenant may be joined.** *Woodstock Operating Corp. v. Quinn (Ala.)*, 73 So. 253.

[c] **Life tenant and a joint occupant of the premises, in recognition of the former's title, may join.** *Justice v. Aikin*, 104 Ga. 714, 30 S. E. 941.

[d] **The state is not a necessary party defendant to an action by a lessee of state lands for a trespass thereon.** *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 94 Pac. 922.

44. *Sammons v. Gloversville*, 34 Misc. 459, 70 N. Y. Supp. 284. See *supra*, II, H.

45. *Bartrug v. Edgell*, 80 W. Va. 220, 92 S. E. 438.

46. See generally the title "Injunctions."

47. *Ala.*—*Boulo v. New Orleans M. & T. R. Co.*, 55 Ala. 480. *Cal.*—See *McRae v. Blakeley*, 3 Cal. App. 171, 84 Pac. 679. *Fla.*—*Louisville & N. R. Co. v. Gibson*, 43 Fla. 315, 31 So. 230. *Ga.*—*Prey v. Oemler*, 120 Ga. 223, 47 S. E. 546. *Ind.*—*Peoria & E. R. Co. v. Attica, C. & S. Ry. Co.*, 154 Ind. 218, 56 N. E. 210; *Burr v. Smith*, 152 Ind. 469, 53 N. E. 469. *Mont.*—*Haupt v. Independent Tel. Mesgr. Co.*, 25 Mont. 122, 63 Pac. 1033. *Va.*—*Collins v. Sutton*, 94 Va. 127, 26 S. E. 415. *Eng.*—*Davies v. Leo*, 6 Ves. Jr. 784, 31 Eng. Reprint 1807.

[a] **An allegation that plaintiff is the true and lawful owner of the land is sufficient.** *Fletcher v. Fletcher*, 123 Ga. 326, 51 S. E. 418. But see *Kramer v. Slattey*, 260 Pa. 234, 103 Atl. 610, some degree of particularity is essen-

tial. See generally the title "Title."

[b] **Muniments of title need not be pleaded.** *Lee v. Pearson*, 138 Ga. 646, 75 S. E. 1051; *Gillis v. Hilton & Dodge Lumb. Co.*, 113 Ga. 622, 38 S. E. 940.

[c] **Privity of title between plaintiff and defendant need not be shown.** *H. H. Hitt Lumber Co. v. Cullman Property Co.*, 189 Ala. 13, 66 So. 720. Compare the title "Waste."

48. *Ala.*—*Hamilton v. Brent Lumber Co.*, 127 Ala. 78, 28 So. 698. *Cal.*—*San Antonio W. Co. v. Bodenhamer*, 133 Cal. 248, 65 Pac. 471. *Ga.*—*Downing v. Anderson*, 126 Ga. 373, 55 S. E. 184. *Ore.*—*Norton v. Elwert*, 29 Ore. 583, 590, 41 Pac. 926, he must allege the establishment or admission of his legal title, and possession of the locus in quo to obtain a permanent injunction. *Va.*—*Ramey v. Counts*, 102 Va. 902, 47 S. E. 1006.

See *supra*, IV, B, 3.

But compare *McRae v. Blakeley*, 3 Cal. App. 171, 84 Pac. 679, holding an allegation of possession is unnecessary where ownership is alleged.

49. *Cal.*—*More v. Massini*, 32 Cal. 590. See *McRae v. Blakeley*, 3 Cal. App. 171, 84 Pac. 679. *Ill.*—See *Kesner v. Miesch*, 90 Ill. App. 437. *Mont.*—*Haupt v. Independent Tel. Messenger Co.*, 25 Mont. 122, 63 Pac. 1033. *Wash.*—*Wilkeson Coal & Coke Co. v. Driver*, 9 Wash. 177, 37 Pac. 307. *Eng.*—*Gibson v. Smith*, 2 Atk. 182, 26 Eng. Reprint 514.

Compare *supra*, II, J, 4.

[a] **The commission of an overt act independent of mere threats need not be alleged.** *Union Mill. & Min. Co. v. Warren*, 82 Fed. 522.

[b] **But an allegation that the entry and the act complained of is wrongful and unlawful is not required.** *McRae v. Blakeley*, 3 Cal. App. 171, 84 Pac. 679, being a conclusion of law.

[c] **In an action against a public service corporation for taking property without a determination of the sum**



and fact showing a cause for equitable relief.<sup>50</sup> If the prevention of irreparable injury is the basis of the action he must allege facts showing that the acts complained of will cause irreparable injury.<sup>51</sup> If the trespass is continuing or repeated, the plaintiff must allege an intention to continue the injurious acts,<sup>52</sup> a reasonable ground to apprehend the defendant would continue them,<sup>53</sup> and facts showing the necessity of a multiplicity of suits,<sup>54</sup> or that irreparable injury will be suffered.<sup>55</sup> When the insolvency of the defendant is a necessary element, it must be alleged.<sup>56</sup> The petition should not allege in money the damages

to be paid therefor and payment thereof, the plaintiff must allege a threatened taking of possession of his land without making such payment or tender. *Diedrichs v. Northwestern Union Ry. Co.*, 33 Wis. 219.

50. See *infra*, this section.

[a] **Showing Inadequacy of the Legal Remedy.**—*Miller v. Burket*, 132 Ind. 469, 32 N. E. 309.

51. **Ark.**—*Western Tie & Timber Co. v. Newport Land Co.*, 75 Ark. 286, 87 S. W. 432; *Myers v. Hawkins*, 67 Ark. 413, 56 S. W. 640. **Cal.**—*Randall v. Freed*, 154 Cal. 299, 97 Pac. 669; *Mechanics' Foundry v. Ryall*, 75 Cal. 601, 17 Pac. 703. **Colo.**—*Smith v. Schlink*, 15 Colo. App. 325, 62 Pac. 1044. **Ga.** See *Gillis v. Hilton & Dodge Lumb. Co.*, 113 Ga. 622, 38 S. E. 940. **Ill.** *Harms v. Jacobs*, 158 Ill. 505, 41 N. E. 1071. **Ind.**—*Wabash R. Co. v. Engleman*, 160 Ind. 329, 66 N. E. 892; *Miller v. Burket*, 132 Ind. 469, 32 N. E. 309. See *Chappell v. Jasper Co. Oil & Gas Co.*, 31 Ind. App. 170, 66 N. E. 515, an allegation plaintiff will suffer great injury is sufficient. **Md.**—*Chesapeake & Ohio Canal Co. v. Young*, 3 Md. 480, 489; *Carlisle v. Stevenson*, 3 Md. Ch. 499; *White v. Flannigain*, 1 Md. 525, 551, 54 Am. Dec. 668, holding an allegation in words is not essential. **Mont.**—*Haupt v. Independent Tel. Messenger Co.*, 25 Mont. 122, 63 Pac. 1033. **Nev.**—*Thorn v. Sweeney*, 12 Nev. 251. **N. C.**—*Frink v. Stewart*, 94 N. C. 484; *Gause v. Perkins*, 56 N. C. 177, 69 Am. Dec. 728. **Ore.**—*Moore v. Halliday*, 43 Ore. 243, 72 Pac. 801, 99 Am. St. Rep. 724. **Va.**—*Collins v. Sutton*, 94 Va. 127, 26 S. E. 415. **W. Va.** *Lazzell v. Garlow*, 44 W. Va. 466, 483, 30 S. E. 171; *Bettman v. Harness*, 42 W. Va. 433, 441, 26 S. E. 271, 36 L. R. A. 566; *Watson v. Ferrell*, 34 W. Va. 406, 12 S. E. 724.

See 13 STANDARD PROC. 73.

[a] **Specific allegations of facts are**

required. *Frink v. Stewart*, 94 N. C. 484.

52. *Mendelson v. McCabe*, 144 Cal. 230, 77 Pac. 915, 103 Am. St. Rep. 78; *Miller v. Burket*, 132 Ind. 469, 32 N. E. 309.

[a] **When, where and under what circumstances the threat to repeat the trespass was made should be shown.** *Kramer v. Slattery*, 260 Pa. 234, 103 Atl. 610.

53. **Ark.**—*Western Tie & Timber Co. v. Newport Land Co.*, 75 Ark. 286, 87 S. W. 432. **Cal.**—*Mendelson v. McCabe*, 144 Cal. 230, 77 Pac. 915, 103 Am. St. Rep. 78. **Ind.**—*Wabash R. Co. v. Engleman*, 160 Ind. 329, 335, 66 N. E. 892, a continuance so as to afford defendant a claim for title by adverse possession should be shown.

54. *Kramer v. Slattery*, 260 Pa. 234, 103 Atl. 610.

55. *Randall v. Freed*, 154 Cal. 299, 97 Pac. 669; *Hamilton v. Ely*, 4 Gill (Md.) 34, restraining a repetition of mere trespasses not working irreparable injury is not the practice in Maryland. See *Tantlinger v. Sullivan*, 80 Iowa 218, 45 N. W. 765, irreparable injury need not be alleged where an avoidance of a multiplicity of suits is the basis of relief.

[a] **An allegation that the continued trespass will ripen into an easement is a mere conclusion of the pleader.** *Bishop v. Owens*, 5 Cal. App. 83, 89 Pac. 844.

56. *Western Tie & Timber Co. v. Newport Land Co.*, 75 Ark. 286, 87 S. W. 432; *Gillis v. Hilton & Dodge Lumb. Co.*, 113 Ga. 622, 38 S. E. 940. See *supra*, IV, B, 4, c.

[a] **Where a sale of property by a sheriff at the instance of an insolvent is alleged, the insolvency of the sheriff need not be averred.** *Justice v. Aikin*, 104 Ga. 714, 30 S. E. 941.

[b] **An allegation is sufficient which states that the defendant has inflicted**

sustained by each act of trespass.<sup>57</sup> And a reference to the statute giving multiple damages and allegations attempting to state a cause of action thereunder may be treated as surplusage.<sup>58</sup>

**Amendment.** — The bill or petition may be amended in accord with the general rules.<sup>59</sup>

e. *Relief Awarded.* — The decree must conform to the allegations in the bill and the prayer.<sup>60</sup> And under a prayer for general relief, damages may be awarded for the injury done before the injunction is issued.<sup>61</sup> A mandatory injunction may be awarded in a proper case,<sup>62</sup> although, according to some authorities, in determining whether such an injunction will be granted, the court will balance the injuries.<sup>63</sup>

**V. CRIMINAL PROSECUTION OF.** — A. GENERALLY.<sup>64</sup> — Forcible trespass is an offense at common law.<sup>65</sup> And by virtue of statutory

great damage on the plaintiff, and has not sufficient property, subject to execution, to respond to the judgments, should he be sued at law. *New York, N. H. & H. R. Co. v. Scovill*, 71 Conn. 136, 41 Atl. 246, 71 Am. St. Rep. 159, 42 L. R. A. 157.

57. *Ocmulgee Lumb. Co. v. Mitchell*, 112 Ga. 528, 37 S. E. 749, as there can then be no claim the damages are irreparable.

[a] But an allegation that the money value of the injury sustained was \$1000 or other large sum is not objectionable within the rule. *Roberts v. Heinsohn*, 123 Ga. 685, 51 S. E. 589.

58. *Roots v. Boring Junction Lumb. Co.*, 50 Ore. 298, 312, 92 Pac. 811, 94 Pac. 182.

59. See the titles "Amendments and Joefails;" "Bills and Answers;" "New Cause of Action or Defense."

[a] **Insolvency and Irreparable Damage.** — A petition setting up perfect title in the plaintiff, under a statute rendering allegations of insolvency and irreparable injury unnecessary in such case, may be amended by inserting allegations of insolvency and irreparable injury. *Swindell & Co. v. Saddler*, 122 Ga. 15, 49 S. E. 753.

60. *Harms v. Jacobs*, 158 Ill. 505, 41 N. E. 1071.

[a] But relief will not be denied if it should appear that the defendant had a right to enter and is liable for waste instead of trespass, as the remedies are substantially the same. *Roots v. Boring Junction Lumb. Co.*, 50 Ore. 298, 316, 92 Pac. 811, 94 Pac. 182.

61. *Winslow v. Nayson*, 113 Mass. 411.

62. *Cal.* — *McRae v. Blakeley*, 3 Cal. App. 171, 84 Pac. 679, to compel filling up of a ditch. *Mass.* — *Kershishian v. Johnson*, 210 Mass. 135, 96 N. E. 56, 36 L. R. A. (N. S.) 402, to compel removal of building. *N. Y.* — *Baron v. Korn*, 127 N. Y. 224, 27 N. E. 804, to compel removal of wall. *Ore.* — *Norton v. Elwert*, 29 Ore. 583, 593, 41 Pac. 926. *Pa.* — *Baugh v. Bergdoll*, 227 Pa. 420, 76 Atl. 207; *Pile v. Pedrick*, 167 Pa. 296, 31 Atl. 647, 46 Am. St. Rep. 677. *Wis.* — *Huber v. Stark*, 124 Wis. 359, 102 N. W. 12, 109 Am. St. Rep. 937, 4 Ann. Cas. 340.

**Ordering removal of trespassing railroad**, see 22 STANDARD PROC. 115, note 55.

63. See *infra*, this note.

[a] **Balance of Injury.** — When by innocent mistake, erections have been placed on plaintiff's land and when the damage to the plaintiff is greatly disproportionate to the damage which would be sustained by removing the structure, an injunction may be denied. *Lynch v. Union Institution*, 159 Mass. 306, 34 N. E. 364, 20 L. R. A. 842; *Goldbacher v. Eggers*, 38 Misc. 36, 76 N. Y. Supp. 881. But see *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374 (a nuisance case). Balancing equities generally, see 13 STANDARD PROC. 129.

64. See the titles, "Assault and Battery," "Forcible Entry and Detainer," "Malicious Mischief;" "Rescue."

65. See *infra*, this note.

[a] The only distinction between forcible trespass and forcible entry and detainer is that the former relates to personal property and the latter re-

enactment, trespasses after warning, and trespasses in removing produce from the lands of others, are sometimes made offenses.<sup>66</sup>

B. JURISDICTION AND VENUE. — Statutes sometimes confer exclusive jurisdiction of prosecutions for trespass upon justices of the peace.<sup>67</sup>

C. INDICTMENT, INFORMATION, AFFIDAVIT AND COMPLAINT. — **1. For Forcible Trespass.** — An indictment for forcible trespass must charge a trespass which involves a breach of the peace or directly tends to it.<sup>68</sup> It must allege a taking of the chattels with a strong hand,<sup>69</sup> in the presence of the owner,<sup>70</sup> from his actual possession,<sup>71</sup> to his terror,<sup>72</sup> or against his will.<sup>73</sup> In forcible trespass to a dwelling house, the indictment must charge who was present at the time of the trespass.<sup>74</sup>

**2. For Statutory Trespasses.** — The affidavit or complaint which is the basis of a prosecution of a statutory trespass before an inferior court,<sup>75</sup> or the preliminary complaint and warrant,<sup>76</sup> and indictment

lates to realty, but this distinction is not always observed. *State v. Lawson*, 123 N. C. 740, 31 S. E. 667, 68 Am. St. Rep. 844.

66. See the statutes and *infra*, this section.

67. *State v. Dudley*, 83 N. C. 660. See *State v. Edney*, 80 N. C. 360; *Ex parte Cox*, 53 Tex. Crim. 240, 109 S. W. 369, county court. But see *State v. Presly*, 72 N. C. 204, the superior court has concurrent jurisdiction.

68. N. C.—*State v. Mills*, 13 N. C. 420, as being done in the presence of the party to his terror or against his will. Tenn.—*State v. Watkins*, 4 Humph. 256; *State v. Farnsworth*, 10 Yerg. 261. Va.—*Com. v. Israel*, 4 Leigh (31 Va.) 675.

[a] A warning not to enter need not be alleged in an indictment for forcible trespass. *State v. Austin*, 121 N. C. 620, 28 S. E. 361.

[b] That the property is that of a person other than the defendant must be shown. *Com. v. Israel*, 4 Leigh (31 Va.) 675.

69. *State v. Ray*, 32 N. C. 39, this implies greater force than the words "vi et armis" implies. See *Com. v. Israel*, 4 Leigh (31 Va.) 675.

70. *State v. Mills*, 13 N. C. 420; *State v. Love*, 19 N. C. 267; *State v. Watkins*, 4 Humph. (Tenn.) 256.

[a] Illustration.—After charging possession, an allegation of taking from the owner, etc., is sufficient to show the presence of the owner. *State v. Mills*, 13 N. C. 420.

71. *State v. Love*, 19 N. C. 267; *State v. Watkins*, 4 Humph. (Tenn.)

256; *State v. Farnsworth*, 10 Yerg. (Tenn.) 261.

72. *State v. Love*, 19 N. C. 267.

73. *State v. Armfield*, 27 N. C. 207; *State v. Love*, 19 N. C. 267.

[a] Words of equivalent import may be used, as where it is alleged the taking was with a strong hand from the possession of the prosecutor, he being personally present and forbidding the same. *State v. Armfield*, 27 N. C. 207.

74. *State v. Walker*, 32 N. C. 234.

[a] Proof.—If the person alleged to be present was not present, the defendant must be acquitted. *State v. Walker*, 32 N. C. 234.

75. See the title, "Indictment and Information."

[a] Designation of offense by name (1) is sufficient. *Randle v. State*, 155 Ala. 121, 46 So. 759. (2) Whether the trespass was in entering after warning or in refusing to leave after warning need not be shown where the offense is designated by name. *Randle v. State*, 155 Ala. 121, 46 So. 759.

[b] A complaint for retaking possession of land, after being ejected by legal process need not show in what manner the defendant was dispossessed or the time thereof. *Cofer v. State*, 157 Ala. 10, 47 So. 1010. See also *Wilson v. State*, 115 Ala. 129, 22 So. 567.

76. See *infra*, this note, and the titles, "Indictment and Information;" "Warrants."

[a] The warrant may be amended by charging the entry was "wilful and unlawful." *State v. Smith*, 103 N. C. 410, 9 S. E. 200.



or information<sup>77</sup> therefor, when the trial is by indictment or information must charge the offense in accordance with the general rules relating thereto. Generally it is sufficient to describe the offense in the language of the statute,<sup>78</sup> except where the statute fails to specify the acts constituting the offense.<sup>79</sup>

The lands trespassed upon should be described.<sup>80</sup> Under statutes for trespassing on the land of another, the owner of the land trespassed upon must be designated, if known.<sup>81</sup> And in such case, it is generally sufficient to describe the land as that of some named person other than the defendant, situated in the county and state,<sup>82</sup> provided no provision

77. *State v. Pottmeyer*, 30 Ind. 287 (for cutting ice from land of another); *State v. Bullard*, 72 N. C. 445. See the title, "**Indictment and Information.**"

[a] Time should be alleged. *State v. Hoover*, 31 Ark. 676, the words "or about" in an allegation of time are surplusage.

78. **Ala.**—*McQueen v. State*, 10 Ala. App. 244, 65 So. 310. **Ark.**—*State v. Hooker*, 72 Ark. 382, 81 S. W. 231; *State v. Hoover*, 31 Ark. 676. **Fla.**—*Long v. State*, 42 Fla. 509, 28 So. 775. **Ill.**—*Mettler v. People*, 135 Ill. 410, 25 N. E. 748. **Tex.**—*State v. West*, 10 Tex. 553.

For general rule and exceptions, see the title, "**Indictment and Information.**"

79. *Com. v. Moore*, 17 Ky. L. Rep. 212, 30 S. W. 873.

80. **Fla.**—*Long v. State*, 42 Fla. 509, 28 So. 775. **Ga.**—*Mitchell v. State*, 12 Ga. App. 557, 77 S. E. 889, particular description held sufficient. **Tex.**—*Ha-worth v. State*, 74 Tex. Crim. 488, 168 S. W. 859, description as "the Commons" held too indefinite.

[a] Specific description is unnecessary. *Watson v. State*, 63 Ala. 19; *State v. Young*, 21 Ind. App. 546, 52 N. E. 760. But see *Morrow v. State*, 17 Ga. App. 116, 86 S. E. 280; *People v. O'Brien*, 60 Mich. 8, 26 N. W. 795, complaint.

81. *Brown v. State*, 16 Ga. App. 268, 85 S. E. 262; *State v. McConkey*, 20 Iowa 574 (cutting timber on land of another); *State v. Watrous*, 13 Iowa 489.

[a] Ownership either in the tenant or the landlord may be alleged. *State v. Burns*, 123 Ind. 427, 24 N. E. 154. See also *Miller v. State*, 109 Ark. 362, 159 S. W. 1125.

[b] Describing land as belonging to an estate is sufficient. *Boorman v. State*, 66 Ark. 65, 48 S. W. 899. See also *State v. Paul*, 81 Iowa 596, 47 N. W. 773.

[c] Where joint ownership in several persons is alleged, the word "and" must be used between the last two names. *McMillan v. State*, 160 Ala. 115, 49 So. 680, holding indictment uncertain because of omission.

82. **Ala.**—*Holland v. State*, 139 Ala. 120, 35 So. 1009; *Watson v. State*, 63 Ala. 19, statute dispenses with statement of county as a matter of venue and it is not necessary as a matter of description. **Ark.**—*State v. Hooker*, 72 Ark. 382, 81 S. W. 231. **Ill.**—*Mettler v. People*, 135 Ill. 410, 25 N. E. 748, 36 Ill. App. 324. **Ind.**—*State v. Anderson*, 177 Ind. 437, 98 N. E. 289; *Winlock v. State*, 121 Ind. 531, 23 N. E. 514; *State v. Smith*, 7 Ind. App. 166, 34 N. E. 127. **Ky.**—*Com. v. Moore*, 17 Ky. L. Rep. 212, 30 S. W. 873.

*Contra*, *Morrow v. State*, 17 Ga. App. 116, 86 S. E. 280; *Heard v. State*, 4 Ga. App. 572, 61 S. E. 1055.

[a] An allegation of a trespass on the "premises" of a named person is sufficient, the words "premises" and "land" being now synonymous. *State v. Yellowday*, 152 N. C. 793, 67 S. E. 480. But see *State v. French*, 120 Ind. 229, 22 N. E. 108, explained and adhered to in *Winlock v. State*, 121 Ind. 531, 23 N. E. 514.

[b] That defendant had no bona fide claim to the land need not be averred under statute forbidding trespass on "land of another." *State v. Whitehurst*, 70 N. C. 85.

[c] Whether the land is enclosed or unenclosed need not be stated, as an entry is an offense in either case. *State v. French*, 120 Ind. 229, 22 N. E. 108.

for restoration of the property is made.<sup>83</sup> This is not sufficient, however, under a statute prohibiting trespass by a person on premises "not his own."<sup>84</sup>

If intent is an element of the offense it must be alleged.<sup>85</sup>

An indictment for trespass after warning must allege that the defendant entered upon the land<sup>86</sup> of a named person,<sup>87</sup> without his consent,<sup>88</sup> and, under some statutes, without a license therefor,<sup>89</sup> after being forbidden to do so,<sup>90</sup> or<sup>91</sup> that he remained on such land after a notification to depart.<sup>92</sup> In some states, the indictment should aver the trespass was committed within the statutory time after warning,<sup>93</sup> and must allege that the defendant is not an officer on lawful business.<sup>94</sup> Actual possession of the owner need not be shown.<sup>95</sup>

For Cutting Timber or Removing Produce From Land of Another, etc. The indictment for trespass upon property and cutting down timber, or removing produce, or detaching property from the freehold should allege the wrongful entry,<sup>96</sup> and the commission of the acts thereon prohibited by the statute.<sup>97</sup> Under some statutes, that the taking was

83. *Winlock v. State*, 121 Ind. 531, 23 N. E. 514.

84. *Binhoff v. State*, 49 Ore. 419, 90 Pac. 586.

85. Del.—*Johnson v. State*, 6 Penne. 450, 67 Atl. 785; *Vandever v. State*, 1 Marv. 209, 40 Atl. 1105, affidavit. Fla. *Long v. State*, 42 Fla. 509, 28 So. 775. Mich.—*People v. O'Brien*, 60 Mich. 8, 26 N. W. 795, allegation of intent in language of statute is sufficient. Tex. *State v. Stalls*, 37 Tex. 440, the word "unlawfully" is not equivalent to "knowingly."

[a] But Omission Is Not Fatal on Collateral Attack.—*Mooneyham v. Bowles*, 72 Fla. 259, 72 So. 931.

86. *Rube v. State*, 101 Miss. 362, 58 So. 99.

[a] The particular spot where the accused was seen, need not be designated. *Mitchell v. State*, 12 Ga. App. 557, 77 S. E. 889.

[b] An allegation of "trespass" after notice is a sufficient allegation of an "entry" after notice. *State v. Tenny*, 58 S. C. 215, 36 S. E. 555, affidavit.

87. See *supra*, this section.

88. *Rube v. State*, 101 Miss. 362, 58 So. 99.

89. *State v. Yellowday*, 152 N. C. 793, 67 S. E. 480; *State v. Bullard*, 72 N. C. 445. It is the license from the justice to search for stray cattle that is referred to so that warning from the owner does not negative license.

90. *Beggs v. State*, 122 Ind. 54, 23 N. E. 693; *State v. Bullard*, 72 N. C. 445.

[a] Where joint ownership is alleged, an allegation of warning by one is sufficient. *State v. Whitehurst*, 70 N. C. 85.

[b] That land entered was land on which the accused was forbidden to enter must be shown. *State v. Young*, 21 Ind. App. 546, 52 N. E. 760.

[c] By amendment, an allegation of warning not to enter may be added to an affidavit. *Morrison v. State*, 151 Ala. 115, 44 So. 150.

91. See *infra*, this note.

[a] "And."—An affidavit which charges that the defendant trespassed after warning and refused to leave after warning charges two offenses conjunctively, proof of both of which is essential to a conviction. *Templin v. State*, 159 Ala. 128, 48 So. 1027.

92. *Rube v. State*, 101 Miss. 362, 58 So. 99.

93. *Musgrove v. State*, 139 Ala. 137, 35 So. 884.

94. *Binhoff v. State*, 49 Ore. 419, 90 Pac. 586.

95. *Beggs v. State*, 122 Ind. 54, 23 N. E. 693.

96. *McQueen v. State*, 10 Ala. App. 244, 65 So. 310 (holding allegation by implication sufficient); *State v. Scott*, 68 Ind. 267, "unlawful going upon" land of another must be alleged.

97. *Johnson v. State*, 68 Ind. 43, that corn was "growing on the stalk" must be alleged. See *Mettler v. People*, 135 Ill. 410, 25 N. E. 748, holding indictment sufficient.

without the consent of the owner must be alleged.<sup>98</sup> But the value of the timber cut down, or property removed need not be alleged,<sup>99</sup> unless made an element of the offense,<sup>1</sup> or a basis for the computation of damages.<sup>2</sup>

**Indorsements and Formal Requisites.**—Some statutes require that the name of the prosecutor shall be indorsed on indictments for trespass, or that a statement, that it is founded on the testimony of witnesses other than the person injured, shall be made at the end thereof.<sup>3</sup>

**D. ISSUES, PROOF AND VARIANCE.**—The general rules as to issues, proof and variance in criminal cases apply to prosecutions for trespass.<sup>4</sup>

[a] Under a statute prohibiting the cutting "down" of trees, (1) an indictment charging the cutting of a tree merely is insufficient. *Maskill v. State*, 8 Blackf. (Ind.) 299. (2) But an allegation of cutting down timber sufficiently shows it to have been standing or growing. *Boarman v. State*, 66 Ark. 65, 48 S. W. 899.

[b] Severance by defendant of fruit carried away need not be alleged. *Long v. State*, 42 Fla. 509, 28 So. 775.

[c] A charge of cutting down and carrying away is not duplicitous if it is one transaction. *State v. Paul*, 81 Iowa 596, 47 N. W. 773; *State v. Myers*, 20 Mo. 409.

[d] The specific injury to the property need not be alleged, cutting down and destroying being sufficiently specific. *State v. Watrous*, 13 Iowa 489.

[e] Omission of words "then and there" does not render indictment insufficient. *Mettler v. People*, 36 Ill. App. 324.

98. *Com. v. Moore*, 17 Ky. L. Rep. 212, 30 S. W. 873. But see *Long v. State*, 42 Fla. 509, 28 So. 775, holding an allegation of wilfulness precludes the idea of consent.

[a] Under a statute forbidding hunting on land without the consent of the owner, or the person in charge of the inclosure, want of consent of the person in charge as well as of the owner must be alleged, unless the owner is alleged to be in charge. *State v. Sparrow*, 52 Mo. App. 374; *Holtzgraft v. State*, 23 Tex. App. 404, 5 S. W. 117.

99. *Boarman v. State*, 66 Ark. 65, 48 S. W. 899.

1. *McQueen v. State*, 10 Ala. App. 244, 65 So. 310, value of property to the owner "before being detached from the freehold" must be stated.

2. *State v. Grewell*, 19 Kan. 189.

[a] Damage to owner need not be alleged where statute makes value of tree the basis of the penalty and the value is stated. *State v. Shadley*, 16 Ind. 230.

3. See the statutes and *State v. Scott*, 25 Ark. 107; *State v. Brown*, 10 Ark. 104; and 12 STANDARD PROC. 225, 233, et seq.

[a] Prosecutions for trespasses on state property are not within the statute. This exception applies to trespasses on Sixteenth sections. *State v. Brown*, 10 Ark. 104; *State v. Roberts*, 11 Mo. 510.

4. See the titles, "Arraignment and Plea;" "Trial;" "Variance and Failure of Proof."

[a] Issue as to Title.—In prosecutions for trespass after warning, the question of title or ownership of the property cannot ordinarily be inquired into. *Withers v. State*, 120 Ala. 394, 25 So. 568.

[b] A variance as to the location of the premises is fatal. *Martin v. State*, 89 Miss. 633, 42 So. 601.

[c] Ownership.—Where the land is alleged to be owned by two or more, proof of a trespass on the lands of either is insufficient. *Eubank v. State*, 105 Ga. 612, 31 S. E. 741.

[d] An indictment for trespass by entering after warning is not supported by proof of refusing to leave after warning. *Brunson v. State*, 140 Ala. 201, 37 So. 197.

[e] "Cutting down" and "Carrying Away."—An indictment for cutting down timber is not sustained by proof of carrying away only. *State v. McConkey*, 20 Iowa 574.



E. TRIAL AND JUDGMENT. — So too, the verdict and judgment follow the general principles treated elsewhere in this work.\*

5. See the titles, "Verdict;" "Sentence and Judgment." son v. State, 70 Ark. 19, 65 S. W. 932.  
 [a] Verdict is required to show But see State v. Gigher, 23 Iowa 313,  
 value of timber cut, the grade of the property does not fix amount or kind  
 offense being dependent thereon. Simp- of punishment.

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TRESPASSERS, INJURIES TO. — See Injuries to Persons and Property; Railroads; Street Railroads.

Vol. XXIV

# TRESPASSING ANIMALS

By the Editorial Staff.

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Estrays;

Railroads:  
Trespass.

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For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. CIVIL PROCEEDINGS.** — A. **IN GENERAL.** — The common law permitted a recovery for trespassing of animals whether the land was cultivated or uncultivated, closed or uninclosed.<sup>1</sup> This rule has

1. **U. S.**—*Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. ed. 618. **Mass.**—*McDonnell v. Pittsfield, & N. A. R. Corp.*, 115 Mass. 564. **Neb.**—*Lorance v. Hillyer*, 57 Neb. 266, 77 N. W. 755. **N. Y.**—*Wood v. Snider*, 187 N. Y. 28, 79 N. E. 858, 12 L. R. A. (N. S.) 912; *Clark v. Brown*, 18 Wend. 213.

been adopted in some states,<sup>2</sup> but not in others.<sup>3</sup> The subject is regulated in many jurisdictions, by statute,<sup>4</sup> which, in general, require the owner to protect his land against trespassing animals by an adequate fence, and, except where the trespass results from the negligence,<sup>5</sup> or wilful or intentional conduct<sup>6</sup> of the defendant, the owner of unfenced lands cannot, under such statutes, maintain the action where the animals are lawfully at large.<sup>7</sup>

**2. Ind.**—See the following cases: *Vandalia R. Co. v. Duling*, 60 Ind. App. 332, 109 N. E. 70. **Me.**—*Briggs v. Lake A. C. Ice Co.*, 112 Me. 344, 92 Atl. 185. **Mass.**—*Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121. **Mich.**—*Collins v. Lundquist*, 154 Mich. 658, 118 N. W. 596. **Mo.**—*Evans v. McLalin*, 189 Mo. App. 310, 175 S. W. 294. **N. Y.**—*Wood v. Snider*, 187 N. Y. 28, 79 N. E. 858, 12 L. R. A. (N. S.) 912.

[a] **Except as to adjoining land-owners** required by statute to construct partition fences. *Walters v. Stacey*, 122 Ill. App. 658. See also *Kobayashi v. Strangeway*, 64 Wash. 36, 116 Pac. 461.

**3 Ala.**—*Savage v. Wallace*, 165 Ala. 572, 51 So. 605. **Ark.**—*St. Louis, I. M. & S. R. Co. v. Newman*, 94 Ark. 458, 127 S. W. 735, 140 Am. St. Rep. 138, 28 L. R. A. (N. S.) 83. **Colo.**—See *Richards v. Sanderson*, 39 Colo. 270, 89 Pac. 769, 121 Am. St. Rep. 167. **Fla.**—*Dutton Phosphate Co. v. Priest*, 67 Fla. 370, 65 So. 282. **Ia.**—*Kimple v. Schafer*, 161 Iowa 659, 143 N. W. 505, Ann. Cas. 1916A, 244, 48 L. R. A. (N. S.) 179. **N. M.**—*Hill v. Winkler*, 21 N. M. 5, 151 Pac. 1014. **N. C.**—*State v. Mathis*, 149 N. C. 546, 63 S. E. 99. **Tex.**—*Texas C. R. Co. v. Pruitt*, 49 Tex. Civ. App. 370, 110 S. W. 966.

**4. Cal.**—*Hicks v. Butterworth*, 30 Cal. App. 562, 159 Pac. 224; *Blevins v. Mullally*, 22 Cal. App. 519, 135 Pac. 307; *Fisch v. Nice*, 12 Cal. App. 60, 106 Pac. 598. **Fla.**—*Dutton Phosphate Co. v. Priest*, 67 Fla. 370, 65 So. 282. **Idaho.**—*Denney v. Arritola*, 31 Idaho 428, 174 Pac. 135; *Chandler v. Little*, 30 Idaho 119, 163 Pac. 299. **Ill.**—*Schulz v. Kaiser*, 198 Ill. App. 637. **Ia.**—*Little v. Laubach*, 183 Iowa 1370, 168 N. W. 155. **Kan.**—*Smith v. Ott*, 100 Kan. 136, 163 Pac. 918. **Mo.**—*Bowles v. Prentice*, 186 Mo. App. 560, 172 S. W. 429. **Mont.**—*Coburn Cattle Co. v. Hensen*, 52 Mont. 252, 157 Pac. 177. **Neb.**—*Randall v. Gross*, 67 Neb. 255, 93 N.

**W. 223. Nev.**—*Wheeler v. O'Brien Bros.*, 40 Nev. 414, 165 Pac. 339. **N. M.**—*State v. Coppinger*, 21 N. M. 435, 155 Pac. 732. **N. D.**—*Johnson v. Rickford*, 18 N. D. 268, 122 N. W. 386; *Ely v. Rosholt*, 11 N. D. 559, 93 N. W. 864. **Okla.**—*Harris v. Gray*, 165 Pac. 1148. **Ore.**—*Boyd v. Grove*, 89 Ore. 80, 173 Pac. 310. **Pa.**—*Hall v. Kreider*, 55 Pa. Super. 483. **S. C.**—*Kirby v. Mathis*, 89 S. C. 252, 71 S. E. 862. **S. D.**—*Holmberg v. Dunkelberger*, 39 S. D. 283, 164 N. W. 72; *Bradey v. Mueller*, 22 S. D. 534, 118 N. W. 1035; *Moore v. Persson*, 21 S. D. 290, 111 N. W. 633. **Utah.**—*Naylor v. Floor*, 170 Pac. 971; *Hall v. Bartholomew*, 169 Pac. 943; *Mower v. Olsen*, 49 Utah 373, 164 Pac. 482. **Wyo.**—*Henderson v. Coleman*, 19 Wyo. 183, 115 Pac. 439, 1136.

[a] **Application of Statute.**—A statute relating to trespass by animals running at large does not apply to trespass by animals of an adjoining proprietor under a common inclosure, and, unless there is a particular statute, plaintiff's right of action is at common law. *Jackson v. Fulton*, 87 Mo. App. 228.

**5. Chilcott v. Rea**, 52 Mont. 134, 155 Pac. 1114.

**6. Colo.**—*Bell v. Gonzales*, 35 Colo. 138, 83 Pac. 639, 117 Am. St. Rep. 179; *Sweetman v. Cooper*, 20 Colo. App. 5, 76 Pac. 925. **Idaho.**—*Swanson v. Groat*, 12 Idaho 148, 85 Pac. 384. **N. M.**—*Vanderford v. Wagner*, 24 N. M. 467, 174 Pac. 426. **Utah.**—*Hall v. Bartholomew*, 169 Pac. 943; *Mower v. Olsen*, 49 Utah 373, 164 Pac. 482.

[a] **Where defendant permits a servant to drive his cattle on plaintiff's land**, defendant having knowledge of its location, an action for damage against him is maintainable. *Hall v. Bartholomew (Utah)*, 169 Pac. 943.

**7. Ala.**—See *Moore v. Levert*, 24 Ala. 310. **Colo.**—*Sweetman v. Cooper*, 20 Colo. App. 5, 76 Pac. 925. **Ia.**—See *Foster v. Bussey*, 132 Iowa 640, 109 N.



**B. NATURE AND FORM OF REMEDY. — 1. Distress. — a. As Remedy of Landowner.** — At common law, cattle damage feasant, that is doing damage, or trespassing upon land, could be distrained therefor,<sup>8</sup> and in some jurisdictions the proceeding, within certain limitations, is authorized by statute.<sup>9</sup>

**b. Remedies for Wrongful Distress. — (I.) In General.** A wrongful or illegal distraint of animals is remediable at the instance of the owner or other person injured thereby. The animals themselves<sup>10</sup> may

W. 1105. **Mont.**—Herrin v. Sieben, 46 Mont. 226, 127 Pac. 323. **Ore.**—Ball v. Croisan, 68 Ore. 455, 137 Pac. 225. **Tex.** Gest v. Dube (Tex. Civ. App.), 142 S. W. 965.

[a] **Animals in charge of a herder,** statute does not apply. Herrin v. Sieben, 46 Mont. 226, 127 Pac. 323.

[b] **During part of the year** there is an "open season" for grazing or running at large. Johnson v. Rickford, 18 N. D. 268, 122 N. W. 386

**8. Ga.**—Bonner v. De Loach, 78 Ga. 50, 2 S. E. 546. **Ia.**—Wagner v. Bissell, 3 Iowa 396. **Pa.**—Stewart v. Benninger, 138 Pa. 437, 21 Atl. 159.

[a] **Nature of Remedy.**—Cattle thus distrained were simply taken as a pledge or security for the damage done. The distrainer could not work, use, or sell them, but could only hold them as security, and in the meantime must feed and otherwise provide for them. If the owner proved obdurate, the distrainer had no means of enforcing his demand. 3 Bl. Com. 10.

**9. Cal.**—Wigmore v. Buell, 122 Cal. 144, 54 Pac. 600; Triscony v. Brandenstein, 66 Cal. 514, 6 Pac. 384. **Ga.** Bonner v. De Loach, 78 Ga. 50, 2 S. E. 546. **Kan.**—Prather v. Reeve, 23 Kan. 627. **Pa.**—Stewart v. Benninger, 138 Pa. 437, 21 Atl. 159

[a] **The distress is auxiliary** to proper legal proceedings on the part of the injured party to enforce his lien or claim for damages caused by the trespass. **Cal.**—Wigmore v. Buell, 122 Cal. 144, 54 Pac. 600. **Ky.**—Linn v. Hagan's Adm., 28 Ky. L. Rep. 1292, 92 S. W. 11. **Ohio.**—Rudi v. Lang, 12 Ohio C. C. 529, 5 Ohio Cir. Dec. 482.

[b] **Execution against trespassing animals** may be issued by a justice of the peace, upon failure of the owner to pay the damage or arbitrate within two days after written notice of the distress, and upon the distrainer filing

with the justice notice and proof of damage. Randall v. Gross, 67 Neb. 255, 93 N. W. 223.

**10. Conn.**—Loomis v. Tyler, 4 Day 141. **Del.**—Hill v. Ginn, 2 Penne. 174, 43 Atl. 608. **Ga.**—Dew v. Smith, 130 Ga. 564, 61 S. E. 232. **Ind.**—Clark v. Stipp, 75 Ind. 114. **Ia.**—Howard v. Burke, 176 Iowa 123, 157 N. W. 744, L. R. A. 1916E, 524; Holaman v. Marsh, 116 Iowa 483, 90 N. W. 82. **Kan.** Johns v. Head, 41 Kan. 282, 21 Pac. 236. **Mich.**—Spiegel v. Straw, 196 Mich. 576, 163 N. W. 2; Parks v. Kerstetter, 113 Mich. 520, 71 N. W. 865; Pistorius v. Swarthout, 67 Mich. 186, 34 N. W. 547. **Miss.**—Dent v. Ross, 52 Miss. 188. **N. H.**—McIntire v. Marden, 9 N. H. 288. **N. Y.**—Lynch v. Ford, 72 App. Div. 536, 76 N. Y. Supp. 546; Cropsy v. Perry, 1 How. Pr. (N. S.) 40. **Okla.**—Sharrock v. Pryor, 36 Okla. 305, 128 Pac. 243. **R. I.**—Angell v. Simmons, 10 R. I. 418. **Tex.**—Whitaker v. Miller (Tex. Civ. App.), 117 S. W. 882. **Vt.**—Davis v. Mudgett, 81 Vt. 252, 69 Atl. 762, Howard v. Black, 49 Vt. 9; Eddy v. Davis, 35 Vt. 247. **Eng.** Lindon v. Hooper, 1 Cowp. 414, 98 Eng. Reprint 1160.

See generally the title "Replevin."

[a] **Tender of amount of damages** is required by some statutes. **Ark.** Phelan v. Bonham, 9 Ark. 389. **Ill.** Holcomb v. Davis, 56 Ill. 413; Walsh v. Hertzog, 154 Ill. App. 503. **Me.** Morse v. Reed, 28 Me. 481. **Neb.**—McAllister v. Wrede, 5 Neb. (Unof.) 82, 97 N. W. 318. **N. H.**—Osgood v. Green, 33 N. H. 318. **N. Y.**—Armbruster v. Wilson, 43 Hun 261, 4 N. Y. St. 351. **Okla.**—Gilbert v. Stephens, 6 Okla. 673, 55 Pac. 1070.

[b] **That a justice of the peace has jurisdiction of replevin for animals,** see Pistorius v. Swarthout, 67 Mich. 186, 34 N. W. 547. And see generally 17 STANDARD PROC. 945.

be replevied, or recovery had in trover for their conversion,<sup>11</sup> or the injured party may prosecute an ordinary action for damages for the distraint.<sup>12</sup>

(II.) **Pleading.**—The declaration in an action for damages based on wrongful distraint of trespassing animals, as in other civil actions, must state the necessary substantive facts of the plaintiff's cause of action,<sup>13</sup> and when a penalty is sought must be drawn under the statute which grants it.<sup>14</sup>

The plea of justification that the animals were taken damage feasant need not describe the land on which they were taken with particularity.<sup>15</sup> When the defendant justifies as an officer, he should aver his official character.<sup>16</sup> Notice to the plaintiff should be pleaded,<sup>17</sup> but not necessarily the manner in which it was given.<sup>18</sup>

(III.) **Trial.**<sup>19</sup>—**Questions of Law and Fact.**—The reasonable diligence of the defendant in the distress proceedings is, under conflicting evidence, for the jury.<sup>20</sup>

**Instructions.**—The charge in such cases, as in other civil actions, should be based on the law applicable to the case,<sup>21</sup> and an instruction is erroneous which assumes a right to distrain when such right is disputed.<sup>22</sup>

(IV.) **Judgment.**—In replevin or the action for possession of animals wrongfully distrained, the judgment, as a rule, should dispose

[c] **A distrainor cannot replevy** animals distrained, which have been forcibly retaken by the owner. *Taylor v. Welbey*, 36 Wis. 42.

[d] **Against Poundkeeper.**—(1) Replevin cannot be maintained against a poundkeeper acting within the law (*McJunkin v. Mathers*, 158 Pa. 137, 27 Atl. 873), but may (2) when he acts wrongfully, as when he refuses to deliver the animals to the owner upon tender of the amount for which they are held. *Wilhelm v. Scott*, 14 Ind. App. 275, 40 N. E. 537, 42 N. E. 827; *Mellen v. Moody*, 23 Vt. 674.

11. *Dew v. Smith*, 130 Ga. 564, 61 S. E. 232; *Spiegel v. Straw*, 196 Mich. 576, 163 N. W. 2.

See generally the title "**Trover and Conversion.**"

12. **Ga.**—*Dew v. Smith*, 130 Ga. 564, 61 S. E. 232. **Ill.**—*Case v. Hall*, 21 Ill. 632. **Me.**—*Heath v. Ricker*, 2 Me. 72. **Mich.**—*Spiegel v. Straw*, 196 Mich. 576, 163 N. W. 2. **R. I.**—*Angell v. Simmons*, 10 R. I. 418. **Vt.**—*Carpenter v. Cook*, 67 Vt. 102, 30 Atl. 998; *Porter v. Aldrich*, 39 Vt. 326.

13. See generally the title "**Declaration and Complaint**" and *infra*, this section.

[a] **Want of a lawful fence** should be alleged when the defendant's lia-

bility is based on such fact. *Lee v. Nelms*, 57 Ga. 253.

14. *Tankersly v. Wedgworth*, 22 Ala. 677. See the title "**Penalties, Forfeitures and Fines.**"

[a] **To recover treble damages** the declaration must show that the plaintiff is entitled to such damages and demand them. *Lee v. Nelms*, 57 Ga. 253.

15. *Loomis v. Tyler*, 4 Day (Conn.) 141; *McIntire v. Marden*, 9 N. H. 288.

[a] **The use of the word "close"** for "**inclosure**" is erroneous and the plea insufficient. *Porter v. Aldrich*, 39 Vt. 326.

16. *Case v. Hall*, 21 Ill. 632.

17. *Porter v. Aldrich*, 39 Vt. 326.

18. *Keith v. Bradford*, 39 Vt. 34.

19. See generally the title "**Trial.**"

20. *Drew v. Spaulding*, 45 N. H. 472; *Angell v. Simmons*, 10 R. I. 418. See generally the title "**Province of Judge and Jury.**"

21. **Conn.**—*Simmonds v. Holmes*, 61 Conn. 1, 23 Atl. 702, 15 L. R. A. 253. **Ill.**—*Lipe v. Blackwelder*, 25 Ill. App.

119. **Mo.**—*Early v. Fleming*, 16 Mo.

154. **Neb.**—*Shroaf v. Allen*, 12 Neb.

109, 10 N. W. 551. **N. Y.**—*Cropsy v. Perry*, 1 How. Pr. (N. S.) 40.

See generally the title "**Instructions.**"

22. *Ruter v. Foy*, 46 Iowa 132.

of the defendant's claim arising out of the distress proceedings.<sup>23</sup> A judgment in damages for the plaintiff should compensate him for being deprived of his property.<sup>24</sup>

**2. Attachment.**<sup>25</sup> — The statute may authorize attachment of the animals in aid of an action for damages for the trespass,<sup>26</sup> or, where the owner is unknown, may authorize such attachment in a proceeding in rem against the animals.<sup>27</sup> The right to proceed in rem is not exclusive of the right to sue for the trespass,<sup>28</sup> or to adopt any other summary,<sup>29</sup> or special remedy provided by statute.<sup>30</sup>

**3. Ordinary Civil Actions.** — Damages resulting from trespassing animals are recoverable in an action in trespass,<sup>31</sup> or, under appropriate circumstances, trespass on the case.<sup>32</sup> Assumpsit may, also, in certain cases, be an appropriate remedy.<sup>33</sup>

**4. Injunction.** — In cases where the legal remedy would be inadequate or incomplete,<sup>34</sup> a court of equity may restrain a single act<sup>35</sup> or

**23. Mich.**—*Sterner v. Hodgson*, 63 Mich. 419, 30 N. W. 77; *Marx v. Woodruff*, 50 Mich. 361, 15 N. W. 510. **Tex.** *Whitaker v. Miller* (Tex. Civ. App.), 117 S. W. 882. **Vt.**—*Holden v. Torrey*, 31 Vt. 690.

See generally the title "Judgments."

**24. Hill v. Ginn**, 2 Penne. (Del.) 174, 43 Atl. 608.

**25.** See generally the title "Attachment."

**26. Cal.**—*Wigmore v. Buell*, 122 Cal. 144, 54 Pac. 600. **Idaho.**—*Cleveland v. Wallace*, 23 Idaho 570, 131 Pac. 10. **Utah.**—*Smith v. Fisher*, 24 Utah 506, 68 Pac. 849.

Ordinary actions for damages, see *infra*, I, B, 3.

[a] **Attachment Without Affidavit.** Attachment issues on filing verified complaint without the usual affidavit in attachment proceedings. *Wigmore v. Buell*, 122 Cal. 144, 54 Pac. 600.

**27. Wigmore v. Buell**, 122 Cal. 144, 54 Pac. 600; *Hanley v. Sixteen Horses & Thirteen H. Cattle*, 97 Cal. 182, 32 Pac. 10.

**28. Ala.**—*Ryall v. Allen*, 143 Ala. 222, 38 So. 851. **Cal.**—*Triscony v. Brandenstein*, 66 Cal. 514, 6 Pac. 384. **Del.**—*Hill v. Ginn*, 2 Penne. 174, 43 Atl. 608. **Neb.**—*Lorance v. Hillyer*, 57 Neb. 266, 77 N. W. 755. **N. Y.**—*Stafford v. Ingersol*, 3 Hill 38. **S. C.**—*Kirby v. Mathis*, 89 S. C. 252, 71 S. E. 862.

**29. Ryall v. Allen**, 143 Ala. 222, 38 So. 851.

**30. Burch v. Samples** (Tex. Civ. App.), 74 S. W. 81.

**31.** See the title "Trespass."

[a] **The common law form of action** in such cases is trespass quare clausum fregit. **Kan.**—*Davis v. Wilson*, 11 Kan. 74. **Mich.**—*Collins v. Lundquist*, 154 Mich. 658, 118 N. W. 596. **Mo.**—*Moore v. White*, 45 Mo. 206. **Pa.** *Stewart v. Benninger*, 138 Pa. 437, 21 Atl. 159; *Mitchell v. Wolf*, 46 Pa. 147. **Vt.**—*Carpenter v. Cook*, 67 Vt. 102, 30 Atl. 998.

**32. Taylor v. Granger** (R. I.), 37 Atl. 13, when trespass or damage regarded as consequential, not direct, as injury caused by a flock of pigeons.

See the title "Case (The Action of Trespass on the)".

**33. Monroe v. Cannon**, 24 Mont. 316, 61 Pac. 863, 81 Am. St. Rep. 439, as when an action will lie for use and occupation of the land.

**34.** See the title "Legal Remedy."

**35.** See *Blevins v. Mullally*, 22 Cal. App. 519, 135 Pac. 307.

[a] **Irreparable Injury.**—If the trespass, although a single act, is or would be destructive, if the injury is or would be irreparable—that is, if the injury done or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced, by means of compensation in money—then the wrong will be prevented or stopped by injunction. *Blevins v. Mullally*, 22 Cal. App. 519, 135 Pac. 307.



repeated acts<sup>36</sup> of trespass by animals, as in other similar cases.

C. JURISDICTION. — The general rules relating to jurisdiction are applicable to actions for trespass by animals.<sup>37</sup> As a general rule they may be brought in a justice's court.<sup>38</sup>

D. PARTIES. — An action for damages by trespassing animals may be maintained by the owner of the land, or party in lawful possession, who is injured by such trespass,<sup>39</sup> and will lie against the owner of the animals,<sup>40</sup> or party in possession and control.<sup>41</sup>

Joinder of Parties. — All parties interested in the property damaged by the trespass may be joined as plaintiffs.<sup>42</sup> Joint owners of the trespassing animals may,<sup>43</sup> but need not<sup>44</sup> be joined as parties defendant. As a general rule owners in severalty<sup>45</sup> of the trespassing

36. *Blevins v. Mullally*, 22 Cal. App. 519, 135 Pac. 307; *Jastro v. Francis*, 24 N. M. 127, 172 Pac. 1139.

[a] **Multiplicity of Suits.**—Repeated acts of trespass necessitating a multiplicity of actions at law for damages will justify an injunction. *Blevins v. Mullally*, 22 Cal. App. 519, 135 Pac. 307. See the title "Multiplicity of Suits."

[b] **Depasturing uninclosed grazing land**, neighboring proprietors may be enjoined. *Traver v. Dodd*, 24 Colo. App. 273, 133 Pac. 1117.

[c] **Private land surrounded by public domain** may be protected by injunction against the owner of cattle, who threatens to drive over it, when the statute requiring its boundaries to be conspicuously marked has been complied with. *Jastro v. Francis*, 24 N. M. 127, 172 Pac. 1139.

37. See the title "Jurisdiction."

**Jurisdiction to enjoin trespass by animals**, see *supra*, I, B, 4.

38. *Cleveland v. Wallace*, 23 Idaho 570, 131 Pac. 10. See 17 STANDARD PROC. 957.

39. *Risse v. Collins*, 12 Idaho 689, 87 Pac. 1006. See also cases cited *infra*, this section.

[a] **Where it is a trespass to herd sheep within two miles of the house of the owner of a possessory claim**, that is, one in possession by virtue of a right or title to the land, mere naked ownership of the house, without such an interest in the land, will not support an action for damages based on such a trespass. *Denney v. Arritola*, 31 Idaho 428, 174 Pac. 135.

40. *Cleveland v. Wallace*, 23 Idaho 570, 131 Pac. 10.

41. *Coburn Cattle Co. v. Hensen*, 52 Mont. 252, 157 Pac. 177.

[a] **Against an adjoining land owner** where (1) the trespass is the result of his neglect of duty to keep a certain portion of a partition fence in repair (*Little v. Laubach*, 183 Iowa 1370, 168 N. W. 155), irrespective (2) of default by the other. *Smith v. Ott*, 100 Kan. 136, 163 Pac. 918. (3) But not when trespassing animals on land of an adjoining owner wander upon plaintiff's land. *Cook v. Morea*, 33 Ind. 497; *Hanson v. Northern Pac. R. Co.*, 90 Wash. 516, 156 Pac. 553.

42. *Washburn v. Case*, 1 Wash. Ter. 253.

43. *Sickles v. Gould*, 51 How. Pr. (N. Y.) 22.

44. *Brady v. Ball*, 14 Ind. 317.

45. *Cal.*—*Dooley v.* 17,500 Head Sheep, 101 Cal. xvii, 35 Pac. 1011. *Ill.* *Westgate v. Carr*, 43 Ill. 450; *Flansburg v. Basin*, 3 Ill. App. 531. *Ia.* *Cogswell v. Murphy*, 46 Iowa 44. *Kan.* *Powers v. Kindt*, 13 Kan. 74. *N. J.* *Nierenberg v. Wood*, 59 N. J. L. 112, 35 Atl. 654. *N. Y.*—*Partenheimer v. Van Order*, 20 Barb. 479. *Ore.*—*Pacific Livestock Co. v. Murray*, 45 Ore. 103, 76 Pac. 1079. *Tenn.*—*Dyer v. Hutchins*, 87 Tenn. 198, 10 S. W. 194. *Vt.*—*Adams v. Hall*, 2 Vt. 9, 19 Am. Dec. 690.

See 1 STANDARD PROC. 954, note 67, et seq.

[a] **Joint Control.**—But they may be joined when the animals owned in severalty are in one herd under their owners' joint control. *Conn.*—*Smith v. Jaques*, 6 Conn. 530. *Ill.*—*Ozburn v. Adams*, 70 Ill. 291. *Neb.*—*Wilson v. White*, 77 Neb. 351, 109 N. W. 367, 124

animals cannot be joined as defendants, unless the statute permits it.<sup>46</sup>

**E. PLEADING. — 1. Declaration or Complaint.**<sup>47</sup> — The declaration or complaint in an action for damages caused by trespassing animals should state the material substantive facts on which the action is based,<sup>48</sup> but when drawn under a statute authorizing the action a substantial compliance therewith is generally sufficient.<sup>49</sup> The act of trespass and when it occurred should be alleged,<sup>50</sup> also the ownership or lawful possession of the land in the plaintiff,<sup>51</sup> and a description of it.<sup>52</sup> When the action is based on a statute applicable only to certain districts,<sup>53</sup> or to lands inclosed by a lawful fence,<sup>54</sup> or when the defendant's liability springs from the fact that the animals were unlawfully at large,<sup>55</sup> or that the trespass was wilful,<sup>56</sup> or that it re-

Am. St. Rep. 852. **Ohio.**—Hayes v. Smith, 62 Ohio St. 161, 56 N. E. 879; Jack v. Hudnall, 25 Ohio St. 255, 18 Am. Rep. 298.

46. See the statutes and 1 STAND-ARD PROC. 955, note 70.

47. See generally the title "Declara-tion and Complaint."

48. Voorheis v. Perrine, 16 N. J. L. 359.

[a] **The Defense of Contributory Negligence Need Not Be Negatived.** Atkinson v. Mott, 102 Ind. 431, 26 N. E. 217; Ward v. Perry, 60 Ind. App. 1, 109 N. E. 936.

49. **Ala.**—Ryall v. Allen, 143 Ala. 222, 38 So. 851. **Kan.**—Davis v. Wil-son, 11 Kan. 74. **Mo.**—Hannibal & St. J. R. Co. v. Kenney, 41 Mo. 271. **Mont.** Chilcott v. Rea, 52 Mont. 134, 155 Pac. 1114. **Neb.**—Meyers v. Menter, 63 Neb. 427, 88 N. W. 662. **Ore.**—Boyd v. Grove, 89 Ore. 80, 173 Pac. 310. **Tex.** Burch v. Samples (Tex. Civ. App.), 74 S. W. 81. **Utah.**—Mower v. Olsen, 49 Utah 373, 164 Pac. 482. **Wyo.**—Minter v. Gose, 13 Wyo. 178, 78 Pac. 948.

[a] **Complaint Held Insufficient.** Fry v. Hubner, 35 Ore. 184, 57 Pac. 420; Walker v. Bloomingcamp, 34 Ore. 391, 43 Pac. 175.

[b] **"Trespass" implies wilfulness** and a complaint is good as against a general demurrer which does not al-lege specifically that the trespass was wilful and intentional. Mower v. Ol-son, 49 Utah 373, 164 Pac. 482.

[c] **That the land was injured for grazing purposes** is sufficient without alleging any particular kind of graz-ing, it being unnecessary to plead specially, for example, damage based on the land's value for grazing pur-

poses during the lambing season. Wheeler v. O'Brien Bros., 40 Nev. 414, 165 Pac. 339.

50. Richardson v. Northrup, 66 Barb. (N. Y.) 85.

51. Voorheis v. Perrine, 16 N. J. L. 359.

See generally the titles "Trespass;" "Title."

52. See the title "Trespass."

[a] **A general description** is suffi-cient. Jean v. Sandiford, 39 Ala. 317.

53. Ryall v. Allen, 143 Ala. 222, 38 So. 851; White v. Steele, 5 Ala. App. 532, 59 So. 713; Jones v. Duncan, 4 Ala. App. 388, 58 So. 972.

54. **Ala.**—White v. Steele, 5 Ala. App. 532, 59 So. 713. **Cal.**—Merritt v. Hill, 104 Cal. 184, 37 Pac. 893. **Ill.** Seeley v. Peters, 10 Ill. 130. **Ia.** Heath v. Coltenback, 5 Iowa 490; Wag-ner v. Bissell, 3 Iowa 396. **Mo.**—Han-nibal & St. J. R. Co. v. Kenney, 41 Mo. 271. **Mont.**—Nichols v. Dobbins, 2 Mont. 540. **Ore.**—Walker v. Bloom-ingcamp, 34 Ore. 391, 43 Pac. 175; Campbell v. Bridwell, 5 Ore. 311. **Tex.** Posey v. Coleman (Tex. Civ. App.), 133 S. W. 937.

[a] **A sufficient allegation of a law-ful fence** is that the premises were in-closed by a good, substantial fence, eight or nine rails high. Nichols v. Dobbins, 2 Mont. 540.

55. White v. Steele, 5 Ala. App. 532, 59 So. 713.

56. Merritt v. Hill, 104 Cal. 184, 37 Pac. 893; Moore v. Persson, 21 S. D. 290, 111 N. W. 633.

[a] **Where inexcusable negligence is shown** on defendant's part, wilfulness need not be alleged. Chilcott v. Rea, 52 Mont. 134, 155 Pac. 1114.

sulted from the defendant's negligence,<sup>57</sup> appropriate and pertinent allegations must be made.

**2. Plea or Answer.**—A defense to the common law action of trespass *quare clausum fregit* in the nature of an excuse, as a defect in fences which the plaintiff was bound to repair, must be specially pleaded.<sup>58</sup> Where the trespass results from the removal of a partition fence, of which plaintiff was entitled to notice, that such notice was duly given should be pleaded.<sup>59</sup> Where the common law rule as to fences prevails and the trespassing animals enter from the highway, the defendant's plea should show they were unlawfully on the highway and escaped without fault of the defendant.<sup>60</sup>

**F. TRIAL.**—It is not a variance to allege destruction of plaintiff's fence by the defendant and prove that it was destroyed by the defendant's cattle.<sup>61</sup>

**Province of Judge and Jury.**<sup>62</sup>—It is for the court to say what constitutes a lawful fence,<sup>63</sup> and for the jury, where the facts are in dispute, to pass upon the sufficiency of the particular fence in question,<sup>64</sup> and other questions of fact,<sup>65</sup> including the amount of damages sustained.<sup>66</sup>

**Instructions.**<sup>67</sup>—The charge must be in harmony with the law<sup>68</sup>

[b] Where a stock law has been adopted by a certain district or county, prohibiting live stock running at large, the question of wilfulness is not material. *Scarborough v. Wooten*, 23 N. M. 616, 170 Pac. 743.

57. *Hannibal & St. J. R. Co. v. Kenney*, 41 Mo. 271.

[a] Pleading facts which constitute the negligence charged is unnecessary. *Hannibal & St. J. R. Co. v. Kenney*, 41 Mo. 271. See, however, the title "Negligence."

[b] Where a good cause of action is otherwise alleged by averring that entry was made by breaking through a partition fence, negligence of the defendant is not a necessary allegation. *Atkinson v. Mott*, 102 Ind. 431, 26 N. E. 217.

58. *Sturman v. Colon*, 48 Ill. 463. See generally the title "Trespass."

59. *McCormick v. Tate*, 20 Ill. 334.

60. *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121.

61. *Perry v. Cobb*, 4 Ind. Ter. 717, 76 S. W. 289.

62. See generally the title "Province of Judge and Jury."

63. *State v. Lamb*, 30 N. C. 229, what is a "sufficient" fence under the statute.

Compare 22 STANDARD PROC. 272.

64. Ill.—*Scott v. Wirshing*, 64 Ill. 102. Ia.—*Peterson v. Lacey*, 102 N. W. 153. Okla.—*Sharrock v. Pryor*, 36 Okla. 305, 128 Pac. 243. Tex.—*Moore v. Pierson* (Tex. Civ. App.), 93 S. W. 1007.

Compare 22 STANDARD PROC. 272.

[a] If a fence is temporary and insufficient on defendant's own showing, in a state where animals must be restrained, the sufficiency of the fence is not a question for the jury. *Hall v. Kreider*, 55 Pa. Super. 483.

65. See *infra*, this note.

[a] Whether or not an animal is breachy, is for the jury. *Sharrock v. Pryor*, 36 Okla. 305, 128 Pac. 243.

66. N. Y.—*Richardson v. Northrup*, 66 Barb. 85. Ore.—*Pacific Livestock Co. v. Murray*, 45 Ore. 103, 76 Pac. 1079. Wyo.—*Painter & Co. v. Stahley Bros.*, 15 Wyo. 510, 90 Pac. 375.

67. See generally the title "Instructions."

68. Cal.—*Van Valkenburg v. McCauley*, 53 Cal. 706. Ill.—*Scott v. Wirshing*, 64 Ill. 102; *Schulz v. Kaiser*, 193 Ill. App. 637. Ind.—*Hinshaw v. Gilpin*, 64 Ind. 116. Ia.—*Erbes v. Wehmeyer*, 69 Iowa 85, 23 N. W. 447; *Little v. McGuire*, 38 Iowa 560; *McManus v. Finan*, 4 Iowa 283. Mich.—*Aylesworth v. Herrington*, 17 Mich.



applicable to the case, and the evidence,<sup>69</sup> and not be ambiguous,<sup>70</sup> misleading,<sup>71</sup> nor prejudicial.<sup>72</sup> In accordance with the general rules relating to instructions, it is not error in such cases to refuse an instruction covered by one already given.<sup>73</sup>

G. JUDGMENT OR DECREE.<sup>74</sup>—1. **In General.**—In a proceeding against the animals the judgment is in rem and binds only the animals.<sup>75</sup> At common law single damages only were allowed,<sup>76</sup> but under some statutes, where the trespass is wilful, wanton, or malicious, exemplary damages may be recovered.<sup>77</sup> Ordinarily, the plaintiff is entitled to nominal damages where there is no proof of damage.<sup>78</sup>

2. **Costs.**—Where by statute the fees to be charged in an action for trespass by certain animals are separately defined, the statute must be followed in such cases, and it is error to assess costs as in other civil cases.<sup>79</sup>

II. **CRIMINAL PROSECUTIONS.**—A. **IN GENERAL.**—Aside from the proceedings available to the owner of lands injured by trespassing animals, the owner of the animals in certain cases is subject to a criminal prosecution,<sup>80</sup> as when he drives them upon the land, or into an inclosure, belonging to another without his consent.<sup>81</sup>

117. **Tex.**—*Moore v. Pierson* (Tex. Civ. App.), 93 S. W. 1007; *Clarendon L. I. & A. Co. v. McClelland* (Tex. Civ. App.), 31 S. W. 1088. **Utah.** *Naylor v. Floor*, 170 Pac. 971.

[a] **As to instruction for exemplary damages** for trespass by grazing sheep, see *Cosgriff v. Miller*, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 977.

[b] **A fence must comply with the statute**, and where a lawful fence is four feet high it is error to charge that a fence is sufficient if it merely averages four feet. *Prather v. Reeve*, 23 Kan. 627.

69. **Ind.**—*Perry v. Cobb*, 4 Ind. Ter. 717, 76 S. W. 289. **Tex.**—*Tippett v. Corder* (Tex. Civ. App.), 117 S. W. 186. **Utah.**—*Hall v. Bartholomew*, 169 Pac. 943.

70. *Stewart v. Demming*, 54 Neb. 7, 74 N. W. 265.

71. *Tippett v. Corder* (Tex. Civ. App.), 117 S. W. 186.

72. *Sorenberger v. Houghton*, 40 Vt. 150.

73. *Perry v. Cobb*, 4 Ind. Ter. 717, 76 S. W. 289; *Chileott v. Rea*, 52 Mont. 134, 155 Pac. 1114.

74. See generally the titles "Judgments;" "Decrees."

75. *Cleveland v. Wallace*, 23 Idaho 570, 131 Pac. 10. See generally the title "Proceedings in Rem."

76. *Moore v. White*, 45 Mo. 206.

77. **Kan.**—*Hefley v. Baker*, 19 Kan. 9. **Mich.**—*Sherman v. Kilpatrick*, 58

**Mich.** 310, 25 N. W. 298. **Wyo.**—*Henderson v. Coleman*, 19 Wyo. 183, 115 Pac. 439, 1136.

**Pleading exemplary damages**, see 13 STANDARD PROC. 366.

78. *Cole v. Thompson*, 134 Iowa 685, 112 N. W. 178.

79. *Smith v. Valentine*, 23 Utah 539, 66 Pac. 295. See generally the title "Costs."

80. See the statutes and the cases *infra*, this section.

81. See the following notes and cases:

[a] **Indictment will lie against an adverse claimant** for turning cattle into an inclosure while in possession of the other claimant or his agent. *Barber v. State*, 42 Tex. Crim. 626, 63 S. W. 323.

[b] **Not against one who acts in good faith** (1) on authority of persons in possession of the land (*Franks v. State* [Tex. Crim.], 68 S. W. 985), nor (2) in the absence of a notice of sale, when the owner of the animals had authority from the former owner. *Kimmons v. State* (Tex. Crim.), 71 S. W. 283.

[c] **An indictment will not lie against a tenant** (1) on the complaint of a landlord who has reserved no control over the land in question (*Thornton v. State*, 70 Tex. Crim. 45, 156 S. W. 210), or (2) when the landlord leaves crops in the inclosure which the tenant takes due measures

B. INDICTMENT. — An indictment in such cases is generally sufficient when drawn in substantial compliance with the statute creating the offense.<sup>82</sup> It should show that the accused was not the owner, nor entitled to the possession of the land trespassed upon,<sup>83</sup> but need not aver who owned the land;<sup>84</sup> and it should state, when the degree of punishment is regulated thereby, the number of hours the owner of the animals delayed their removal.<sup>85</sup>

to protect (*Thornton v. State*, 70 Tex. Crim. 45, 156 S. W. 210), but (3) when the tenant turns his stock into the rented inclosure after the landlord has resumed possession thereof the indictment will lie (*Gartrell v. State* [Tex. Civ. App.], 61 S. W. 487), even when (4) the landlord takes possession because of a breach of the rental contract. *Gartrell v. State* (Tex. Civ. App.), 61 S. W. 487.

82. See generally 12 STANDARD PROC. 437, 447.

[a] "A drove" of cattle is sufficiently indicated by the terms "fifty head." *Caldwell v. State*, 2 Tex. App. 53.

83. See *Caldwell v. State*, 2 Tex. App. 53.

84. *Caldwell v. State*, 2 Tex. App. 53.

85. *Linney v. State*, 5 Tex. App. 344.

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TRESPASS ON THE CASE. — See Case (The Action of Trespass on the).

# TRESPASS TO TRY TITLE

By the Editorial Staff.

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## CROSS-REFERENCES:

Ejectment;  
Title;

Trespass.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. NATURE AND SCOPE.** — A. **IN GENERAL.** — Trespass to try title is a statutory remedy<sup>1</sup> to recover the possession of land unlawfully withheld from the owner and to which he has the right of immediate possession,<sup>2</sup> and also to determine the title to land<sup>3</sup> without regard to who has actual possession thereof.<sup>4</sup> It is essentially a legal action,<sup>5</sup> though the right to the land in controversy may rest upon a legal or an equitable title.<sup>6</sup>

1. *Meade v. Logan* (Tex. Civ. App.), 110 S. W. 188.

[a] **Peculiar to the State of Texas.** *Bird v. Montgomery*, 34 Tex. 713.

2. *Hays v. Texas & P. Ry. Co.*, 62 Tex. 397; *Grimes v. Hobson*, 46 Tex. 416; *Dangerfield v. Paschal*, 20 Tex. 536; *English v. Hutchins*, 2 Posey (Tex.) 407.

[a] **Condemnation proceedings** in favor of a railroad company are not exclusive of a landowner's right to bring an action of trespass to try title when the company has taken possession of his land without resorting to that summary proceeding. *Hays v. Texas & P. Ry. Co.*, 62 Tex. 397. See 22 STANDARD PROC. 114.

3. *Thomson v. Locke*, 66 Tex. 383, 1 S. W. 112; *Johnson v. Bryan*, 62 Tex. 623; *Word v. Drouthett*, 44 Tex. 365; *Fisk v. Miller*, 20 Tex. 572; *Emerson v. Pate* (Tex. Civ. App.), 165 S. W. 469.

[a] "An action involving a title to land, whatever its form, is in effect an action of trespass to try title. *Grimes v. Hobson*, 46 Tex. 416; *Johnson v. Foster*, 34 S. W. 821." *Lester v. Hutson* (Tex. Civ. App.), 167 S. W. 321, 326.

[b] "A suit, the object of which is to recover title to land, whether upon legal or equitable grounds, is an action

of trespass to try title. *Johnson v. Bryan*, 62 Tex. 623." *Lester v. Hutson* (Tex. Civ. App.), 167 S. W. 321, 326.

4. *Thomson v. Locke*, 66 Tex. 383, 1 S. W. 112.

[a] **The plaintiff may be in possession** and the defendant be claiming adversely. *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324; *Mann v. Wallis*, 75 Tex. 611, 12 S. W. 1123; *Titus v. Johnson*, 50 Tex. 224; *Edrington v. Butler* (Tex. Civ. App.), 33 S. W. 143.

[b] **Defendant Never In Possession.** (1) The action may be maintained against one who never has occupied the premises, if he claims title thereto. *Day Land & C. Co. v. State*, 68 Tex. 526, 4 S. W. 865; *Titus v. Johnson*, 50 Tex. 224; *Moody v. Holcomb*, 26 Tex. 714. (2) If defendant is not in possession, he must be asserting a claim to it in order to justify the proceeding. *Hays v. Texas & P. Ry. Co.*, 62 Tex. 397.

5. *New York & T. Land Co. v. Hyland*, 8 Tex. Civ. App. 601, 28 S. W. 206.

6. *Gilmore v. O'Neil*, 107 Tex. 18, 173 S. W. 203 (*reversing* 139 S. W. 1162); *Browning's Exx. v. Atkinson*, 46 Tex. 605; *Lester v. Hutson* (Tex. Civ. App.), 167 S. W. 321; *New York*

**B. OTHER REMEDIES COMPARED AND DISTINGUISHED.**—In its possessory aspect, trespass to try title serves all the purposes of ejectment,<sup>7</sup> and, in so far as it may be used as a remedy to try title to land, it practically supersedes suits to quiet title.<sup>8</sup> It is distinguishable from a proceeding the sole purpose of which is to remove a cloud,<sup>9</sup> specific performance,<sup>10</sup> partition,<sup>11</sup> and boundary contests,<sup>12</sup> yet any of such remedies may be incidentally involved in an action of trespass to try title.<sup>13</sup>

**C. APPLICATIONS OF REMEDY.**—The action will lie to determine the title and right to public lands,<sup>14</sup> to a right of way,<sup>15</sup> to recover lands upon rescission of an executory contract of sale,<sup>16</sup> and to recover possession from tenants holding wrongfully,<sup>17</sup> but not to recover school

& T. Land Co. v. Hyland, 8 Tex. Civ. App. 601, 28 S. W. 206.

[a] The plaintiff can recover only on the strength of his own title, and not on the weakness of his opponent's. Webster v. International etc. R. Co. (Tex. Civ. App.), 193 S. W. 179.

7. Thomson v. Locke, 66 Tex. 383, 1 S. W. 112; Hays v. Texas P. Ry. Co., 62 Tex. 397; Thurber & Co. v. Conners, 57 Tex. 96; Spence v. McGowan, 53 Tex. 30; Evans v. Womack, 48 Tex. 230; Peevy v. Hurt, 32 Tex. 146. See the title "Ejectment."

[a] Whenever ejectment will lie at common law, trespass to try title may be used under the statute. Hays v. Texas & P. Ry. Co., 62 Tex. 397.

[b] The Principles Applicable To Ejectment Are Retained.—Tyler v. Davis, 61 Tex. 674; Hough v. Hammond, 36 Tex. 657; Berry v. Jagoe, 45 Tex. Civ. App. 6, 100 S. W. 815.

8. Thomson v. Locke, 66 Tex. 383, 1 S. W. 112. See the title "Quieting Title."

9. See Johnson v. Bryan, 62 Tex. 623.

10. Mason v. Bender (Tex. Civ. App.), 97 S. W. 715; Turner v. Cochran, 30 Tex. Civ. App. 549, 70 S. W. 1024. See generally the title "Specific Performance."

[a] A suit for specific performance of a contract of sale of land is not for the recovery of land within the meaning of the statute under which an action of trespass to try title will lie. Hearst's Heirs v. Kuykendall's Heirs, 16 Tex. 327.

11. Peterson v. Fowler, 73 Tex. 524, 11 S. W. 534; Watson v. Hewitt, 45 Tex. 472. See generally the title "Partition."

[a] Partition becomes trespass to try title when one party asserts superior title in himself to the entire property. De La Vega v. League, 64 Tex. 205; Smith v. Davis, 18 Tex. Civ. App. 563, 47 S. W. 101.

12. Nye v. Hawkins, 65 Tex. 600; Spence v. McGowan, 53 Tex. 30; Morrow v. Fleming, 29 Tex. Civ. App. 547, 69 S. W. 244. See the title "Lands and Land Transfers."

13. See the following notes and cases.

[a] Suit to Remove Cloud.—Shepard v. Cummings' Heirs, 44 Tex. 502; Lynch v. Pittman, 31 Tex. Civ. App. 553, 73 S. W. 862.

[b] Specific Performance.—Lester v. Hutson (Tex. Civ. App.), 167 S. W. 321.

[c] Partition.—McLean v. Moore (Tex. Civ. App.), 145 S. W. 1074.

[d] Boundary Disputes.—Carley v. Parton, 75 Tex. 98, 12 S. W. 950; Bird v. Montgomery, 34 Tex. 713. See 18 STANDARD PROC. 652.

14. Hardy v. Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80. Compare Thomson v. Locke, 66 Tex. 383, 1 S. W. 112.

15. Hays v. Texas & P. Ry. Co., 62 Tex. 397; Chicago, R. I. & G. Ry. Co. v. Clark (Tex. Civ. App.), 146 S. W. 989; Galveston & W. Ry. Co. v. Kinkead (Tex. Civ. App.), 60 S. W. 468, affirming 94 Tex. 690.

16. Curran v. Tex. Land & M. Co., 24 Tex. Civ. App. 499, 60 S. W. 466, affirming 94 Tex. 709.

To recover possession on breach of condition subsequent in a deed, see 18 STANDARD PROC. 704.

17. Hall v. Haywood, 77 Tex. 4, 13 S. W. 612; Edrington v. Newland, 57

lands held under a lease valid on its face,<sup>18</sup> nor to foreclose a mortgage,<sup>19</sup> nor to enforce a right to redeem.<sup>20</sup>

**II. JURISDICTION AND VENUE.**—Jurisdiction of an action of trespass to try title is determined by the statute governing a suit of that character.<sup>21</sup> Its venue is in the county where the land, or a part thereof, is situated,<sup>22</sup> irrespective of where the defendant may reside.<sup>23</sup>

**III. JOINDER OF ACTIONS.**—This subject is treated elsewhere in this work.<sup>24</sup>

**IV. PARTIES.**—A. PLAINTIFF.—An action of trespass to try title should, in accordance with the general rules,<sup>25</sup> be prosecuted in the name of the real party in interest.<sup>26</sup>

Tex. 627; *Thurber & Co. v. Conners*, 57 Tex. 96. See 18 STANDARD PROC. 558.

18. *Midland County v. Slaughter*, 61 Tex. Civ. App. 328, 130 S. W. 612.

19. *Edrington v. Newland*, 57 Tex. 627.

20. *Groesbeeck v. Crow*, 85 Tex. 200, 20 S. W. 49; *Pierce v. Moreman*, 84 Tex. 596, 20 S. W. 821; *Parks v. Worthington*, 39 Tex. Civ. App. 421, 87 S. W. 720.

21. *Peterson v. Fowler*, 73 Tex. 524, 11 S. W. 534.

[a] A court of equity (1) has no jurisdiction of trespass to try title. *Gregg v. Cole*, 5 Tex. 417. (2) But where equities are involved, the courts of Texas, which exercise both law and equity jurisdiction, may grant equitable relief. *Hunt v. Turner*, 9 Tex. 385, 60 Am. Dec. 167; *Altgelt v. Escalera*, 51 Tex. Civ. App. 108, 110 S. W. 989.

[b] Amount in Controversy.—The action of trespass to try title may be brought in the district court irrespective of the amount in controversy. *Thurber & Co. v. Conners*, 57 Tex. 96.

[c] Justice's courts have no jurisdiction in trespass to try title. *Vernon Sayles Civ. Stats. (Tex.)*, 1914, art. 2296.

22. *Tevis' Heirs v. Armstrong*, 71 Tex. 59, 9 S. W. 134; *Thomson v. Locke*, 66 Tex. 383, 1 S. W. 112; *Lester v. Hutson* (Tex. Civ. App.), 167 S. W. 321. See generally the title "Venue."

[a] Waiver.—This rule is a personal privilege which may be waived and the issues submitted to a court in another county in which neither the land nor the defendant's residence is lo-

cated. *De La Vega v. League*, 64 Tex. 205; *State v. Patterson*, 17 Tex. Civ. App. 231, 42 S. W. 369.

23. *Johns v. Hardin*, 81 Tex. 37, 16 S. W. 623; *Murrell v. Wright*, 78 Tex. 519, 15 S. W. 156; *Herrington v. Williams*, 31 Tex. 448.

24. See the title "Joinder of Actions" and particularly 14 STANDARD PROC. 694, 722.

25. See the title "Parties."

26. *Browning's Exx. v. Atkinson*, 46 Tex. 605; *Hooper v. Hall*, 30 Tex. 154.

[a] A trustee claiming title and right to possession, may maintain the action. *Rhodes v. Maret*, 102 Tex. 519, 119 S. W. 1139; *Aldridge v. Pardee*, 24 Tex. Civ. App. 254, 60 S. W. 789, affirming 94 Tex. 709.

[b] An executor or administrator, may be the real party in interest with in the rule. *Cassidy v. Kluge*, 73 Tex. 154, 12 S. W. 13; *Barrett v. Barrett's Admr.*, 31 Tex. 344; *Terry v. Cutler*, 4 Tex. Civ. App. 570, 23 S. W. 539.

[c] Trespass (1) to try title by one tenant in common against another (*St. Louis, A. & T. Ry. Co. v. Prather*, 75 Tex. 53, 12 S. W. 969. See *Cartmell v. Gammage* [Tex. Civ. App.], 64 S. W. 315), or (2) by tenants in common or joint tenants against a third party. *Powers v. Minor*, 87 Tex. 83, 26 S. W. 1071; *Bounds v. Little*, 75 Tex. 316, 12 S. W. 1109; *Croft v. Rains*, 10 Tex. 520. See 14 STANDARD PROC. 742 and the title "Tenants in Common."

[d] A sale pendente lite does not change the responsibilities of the parties, but if the plaintiff recover the judgment should be for the benefit of his vendee. *Smith v. Olsen*, 92 Tex. 181, 46 S. W. 631; *Dwyer v. Rippetoe*, 72 Tex. 520, 10 S. W. 668; *Hearne v. Erhard*, 33 Tex. 60.



B. DEFENDANT.—The defendant in trespass to try title must be the person in possession of, or claiming title to, the premises,<sup>27</sup> and as a general rule the plaintiff is not required to make any other party a defendant,<sup>28</sup> unless necessary to a proper adjudication of the issues involved.<sup>29</sup>

C. JOINDER OF PARTIES.—As a general rule only those parties whose rights and interest in the property in controversy may be affected by the judgment need be joined as plaintiff.<sup>30</sup>

The plaintiff may join as a defendant with the person in possession, any other person who, as landlord, remainderman, reversioner or otherwise, may claim title to the premises or any part thereof adversely to the plaintiff.<sup>31</sup>

D. INTERVENTION AND INTERPLEADER.<sup>32</sup>—Third persons who have an interest in the object of the action, or an interest adverse to both parties, may intervene to protect their rights,<sup>33</sup> and the real owner or warrantor may be brought in to defend the suit.<sup>34</sup>

27. *Read v. Allen*, 56 Tex. 176.

28. *Miller v. Rogers*, 49 Tex. 398.

[a] A purchaser from the defendant pendente lite (1) need not be made a party defendant (*Busk v. Manghum*, 14 Tex. Civ. App. 621, 37 S. W. 459), unless (2) he goes into actual possession of the land. *Clay County L. & C. Co. v. Wood*, 71 Tex. 468, 12 S. W. 66.

29. *Clay County L. & C. Co. v. Earle*, 71 Tex. 468, 12 S. W. 66; *Andrews v. Spear's Heirs*, 48 Tex. 567; *Boles v. Linthicum*, 48 Tex. 220; *Loring v. Heidenheimer*, 6 Tex. Civ. App. 560, 26 S. W. 99. See *infra*, IV, C.

30. *Lufkin v. Galveston*, 73 Tex. 340, 11 S. W. 340.

[a] The remainderman may be joined in an action by the life tenant. *Combest v. Wall* (Tex. Civ. App.), 102 S. W. 147.

[b] Tenants in common need not join. *Hess v. Webb*, 103 Tex. 46, 123 S. W. 111; *Leland v. Eckert*, 81 Tex. 226, 16 S. W. 897. See the title "Tenants in Common."

[c] Heirs need not be joined in an action by an executor or administrator. *Bogges v. Brownson*, 59 Tex. 417; *Gunter v. Fox*, 51 Tex. 383, explaining and distinguishing *Barrett v. Barrett's Admr.*, 31 Tex. 344.

[d] Joinder of Vendor.—See *Andrews v. Spear's Heirs*, 48 Tex. 567; *Cox v. Shropshire*, 25 Tex. 113.

31. *Dangerfield v. Paschal*, 20 Tex. 536; 4 Vernon Sayles Civ. Stats. (Tex.), art. 7738.

[a] One who has conveyed his interest in the land sued for is improv-

erly joined as defendant. *Herrington v. Williams*, 31 Tex. 448.

32. See generally the titles "Interpleader;" "Intervention."

33. *McPherson v. Johnson*, 69 Tex. 484, 6 S. W. 798; *De La Vega v. League*, 64 Tex. 205; *Butts v. Caffall* (Tex. Civ. App.), 24 S. W. 373.

[a] By a Landlord In Action Against Tenant.—*Hough v. Hammond*, 36 Tex. 657.

[b] By a Purchaser At Invalid Sheriff's Sale.—*Jones v. Smith*, 55 Tex. 383.

[c] By a Vendor Retaining Title as Security.—*Galan v. Goliad*, 32 Tex. 776.

[d] Leave of Court Necessary. *Riviere v. Wilkens*, 31 Tex. Civ. App. 454, 72 S. W. 608.

[e] By Oral Motion.—*Caldwell v. Fraim*, 32 Tex. 310.

34. *Johns v. Hardin*, 81 Tex. 37, 16 S. W. 623; *Kirby v. Estill*, 75 Tex. 484, 12 S. W. 807; *Crain v. Wright*, 60 Tex. 515; *Village Mills Co. v. Houston Oil Co.* (Tex. Civ. App.), 186 S. W. 785; *McLean v. Moore* (Tex. Civ. App.), 145 S. W. 1074.

[a] The plaintiff or defendant may cite his warrantor to come into court and defend. *Norton v. Collins*, 1 Tex. Civ. App. 272, 20 S. W. 1113.

[b] The warrantor's residence in a county other than that in which the suit is pending is not a material objection. *Meade v. Jones*, 13 Tex. Civ. App. 320, 35 S. W. 310.

[c] Delay of Trial.—The right to implead a warrantor must be exercised with reasonable diligence, so as not to

**V. PLEADING.—A. PETITION.—1. In General.**—The petition should set forth with certainty<sup>35</sup> the necessary elements of the cause of action,<sup>36</sup> such as the names of the parties and their residence, if known;<sup>37</sup> the location and description of the premises,<sup>38</sup> the plaintiff's interest in the premises,<sup>39</sup> that he was in possession, or entitled to possession,<sup>40</sup> and that he was unlawfully dispossessed by

delay unreasonably the trial of the case. *Kirby v. Estill*, 75 Tex. 484, 12 S. W. 807; *Houston Oil Co. v. Davis*, 62 Tex. Civ. App. 658, 132 S. W. 808.

35. *Evans v. Womack*, 48 Tex. 230.

[a] **Degree of Certainty.**—The petition in trespass to try title is not a pleading that is required to be "certain, to a certain intent, in every particular," as those terms are understood at common law. *Evans v. Womack*, 48 Tex. 230. See generally the title "Certainty in Pleading."

[a] **Evidentiary facts not to be pleaded.** *Edwards v. Barwise*, 69 Tex. 84, 6 S. W. 677; *Parks v. Caudle*, 58 Tex. 216; *Berry v. Jagoe*, 45 Tex. Civ. App. 6, 100 S. W. 815 (*affirming* 102 Tex. 578); *Benavides v. Molino* (Tex. Civ. App.), 60 S. W. 260.

36. *Bender v. Damon*, 72 Tex. 92, 9 S. W. 747; *Simon v. Stearns*, 17 Tex. Civ. App. 13, 43 S. W. 50 (*affirming* 93 Tex. 649); *Leigh v. De Ganahl* (Tex.), 16 S. W. 1037.

[a] **Actual trespass and ouster are not essential allegations.** *English v. Hutchins*, 2 Posey (Tex.) 407.

[b] **Petitions Held Sufficient.** *Houston v. Calahan* (Tex.), 10 S. W. 97; *Ufford v. Wells*, 52 Tex. 612; *Burdett v. Haley*, 51 Tex. 540; *Edgar v. Galveston C. Co.*, 46 Tex. 421; *Bridges v. Cundiff*, 45 Tex. 440; *Dye v. Livingston Lumb. Co.* (Tex. Civ. App.), 161 S. W. 53; *Bull v. Bearden* (Tex. Civ. App.), 159 S. W. 1177; *Hildebrandt v. Hoffman* (Tex. Civ. App.), 113 S. W. 785; *McCurry v. McCurry* (Tex. Civ. App.), 95 S. W. 35; *Sanders v. Rawlings* (Tex. Civ. App.), 77 S. W. 41 (*affirming* 97 Tex. 646); *Byrn v. Kleas*, 15 Tex. Civ. App. 205, 39 S. W. 980.

[c] **Petition Held Insufficient.** *Woodhouse v. Cocke* (Tex. Civ. App.), 39 S. W. 948.

37. *Houston v. Calahan* (Tex.), 10 S. W. 97.

38. *Woodhouse v. Cocke* (Tex. Civ. App.), 39 S. W. 948. See generally the title "Title."

[a] **The county or counties in which**

the premises are situated must be averred. *Woodhouse v. Cocke* (Tex. Civ. App.), 39 S. W. 948; *King v. Maxey* (Tex. Civ. App.), 28 S. W. 401.

[b] **The land should be described, either by metes and bounds or otherwise, provided that from such description it may be identified and possession thereof delivered.** *Converse v. Langshaw*, 81 Tex. 275, 16 S. W. 1031; *Roche v. Lovell*, 74 Tex. 191, 11 S. W. 1079; *Halley v. Fontaine* (Tex. Civ. App.), 33 S. W. 260.

[c] **Reference to Maps and Surveys Sufficient.**—*Croft v. Rains*, 10 Tex. 520. See also *Harbinson v. Cottle County* (Tex. Civ. App.), 147 S. W. 719.

[d] **Reference to exhibits containing a description by metes and bounds is sufficient.** *Louisiana & T. Lumb. Co. v. Kennedy* (Tex. Civ. App.), 142 S. W. 989.

39. *Sowers v. Peterson*, 59 Tex. 216; *Keys v. Mason*, 44 Tex. 140. See generally the title "Title."

[a] **Evidence of title need not be alleged.** *Hughes v. Lane*, 6 Tex. 289; *Blumenthal v. Nussbaum* (Tex. Civ. App.), 195 S. W. 275.

[b] **Defects in title are more properly matters of defense than of necessary affirmative allegation in the petition.** *Ufford v. Wells*, 52 Tex. 612.

[c] **If he claims an undivided interest he must allege the same and the amount thereof.** *Baldwin v. Goldfrank*, 88 Tex. 249, 31 S. W. 1064; *Stovall v. Carmichael*, 52 Tex. 383; *Uhl v. Musquez*, 1 Posey Unrep. Cas. (Tex.) 650.

40. *State v. Dayton Lumb. Co.*, 106 Tex. 41, 155 S. W. 1178; *Stephens v. Motl*, 82 Tex. 81, 18 S. W. 99; *O'Connor v. Luna*, 75 Tex. 592, 12 S. W. 1125; *Nye v. Hawkins*, 65 Tex. 600; *Heath v. First Nat. Bank* (Tex. Civ. App.), 32 S. W. 778. See the title, "Title."

[a] **That one held possession under a tax deed is equivalent to alleging that he was in possession.** *Hammons v. Clwer*, 59 Tex. Civ. App. 610, 127 S. W. 889.

the defendant, who now withholds such possession.<sup>41</sup>

**Rents, Profits or Damages.** — When the plaintiff claims rents and profits or damages, facts showing that he is entitled thereto, and the amount of same, must be alleged.<sup>42</sup>

**2. Indorsement.** — The indorsement required by statute<sup>43</sup> must state that the action is brought as well to try the title as for damages,<sup>44</sup> but its omission does not change the nature of the action, when the plaintiff's title is necessarily involved,<sup>45</sup> and is waived if not excepted to.<sup>46</sup>

**3. Prayer for Relief.** — The petition must conclude with a prayer for the relief sought.<sup>47</sup>

**B. PLEA OR ANSWER. — 1. In General.** — The defendant in trespass to try title need file only the plea of not guilty, stating in substance that he is not guilty<sup>48</sup> of the injury complained of in the plain-

[b] **Allegation of possession of part,** where recovery depends upon possession alone, is an insufficient allegation of possession in trespass to try title to recover a railway extending over many miles. *Sulphur Springs & M. P. R. Co. v. St. Louis, A. & T. R. Co.*, 2 Tex. Civ. App. 650, 22 S. W. 107, 23 S. W. 1012, *affirmed* 93 Tex. 672.

41. *Keys v. Mason*, 44 Tex. 140.

[a] **Actual possession** by the defendant is not necessary to be averred unless the relief sought be based on that fact. *Day L. & C. Co. v. State*, 68 Tex. 526, 4 S. W. 865; *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324; *Seay v. Fennell*, 15 Tex. Civ. App. 261, 39 S. W. 181, *affirmed* 93 Tex. 719.

[b] **A direct allegation of possession** is not necessary when the facts averred in the petition show a present possession in the defendant. *American Cement P. Co. v. Acme Cement Plaster Co.* (Tex. Civ. App.), 181 S. W. 257.

[c] **The date of the ouster** should be alleged. *Ballard v. Carmichael* (Tex.), 17 S. W. 393; *Schmidt v. Huff*, 7 Tex. Civ. App. 593, 28 S. W. 1053.

42. *Rogers v. Bracken's Admr.*, 15 Tex. 564; *Foster v. Eoff*, 19 Tex. Civ. App. 405, 47 S. W. 399, *affirmed* 93 Tex. 683.

43. *Keys v. Mason*, 44 Tex. 140; *Carnes v. Carnes*, 26 Tex. Civ. App. 610, 64 S. W. 877.

44. *Evans v. Womack*, 48 Tex. 230; *Shepard v. Cummings' Heirs*, 44 Tex. 502; *Williamson v. Williamson*, 53 Tex. Civ. App. 503, 116 S. W. 370.

45. *Dangerfield v. Paschal*, 20 Tex. 536.

46. *Ammons v. Dwyer*, 78 Tex. 639,

15 S. W. 1049; *Wade v. Converse*, 18 Tex. 233; *Shannon v. Taylor*, 16 Tex. 413; *Bone v. Walters*, 14 Tex. 564.

**As to nature of exception**, see *infra*, VI, D.

47. See the statute and the title "Prayer."

[a] **Prayer for recovery or restitution** generally, see *Bassett v. Martin*, 83 Tex. 339, 18 S. W. 587; *Russell v. Oliver*, 78 Tex. 11, 14 S. W. 264.

[b] **Prayer for partition** is necessary in order to obtain a judgment for partition. *Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. 734; *Murrell v. Wright*, 78 Tex. 519, 15 S. W. 156.

[c] **Alternative relief** will not be granted unless prayed for. *Moreland v. Barnhart*, 44 Tex. 275; *Mann's Exx. v. Faleon*, 25 Tex. 271. See *Von Roeder v. Robson*, 20 Tex. 754, and *Elliott v. Morris*, 49 Tex. Civ. App. 527, 121 S. W. 209.

[d] **A prayer for general relief** will support a judgment for rents and profits or damages, if there be any. *Cravens v. Wilson*, 48 Tex. 324.

48. *Hill v. Newman*, 67 Tex. 265, 3 S. W. 271; *Shields v. Hunt*, 45 Tex. 424.

[a] **Effect.**—(1) The plea of not guilty puts in issue plaintiff's title to all land sued for (*Dunn v. Land* [Tex. Civ. App.], 193 S. W. 698), (2) and also defendant's possession. *Stroud v. Springfield*, 28 Tex. 649.

[b] **A plea of not guilty (1)** is abandoned when the defendant follows it with a special plea of title (*Hensley v. Pena* [Tex. Civ. App.], 200 S. W. 427; *Hadnot v. Hicks* [Tex. Civ. App.], 198 S. W. 359), or (2) with a disclaimer



tiff's petition, and under such plea any lawful defense,<sup>49</sup> except that of limitation,<sup>50</sup> is available.

**2. Claim for Improvements.**—If the defendant desires to make a claim for improvements he should state the facts entitling him thereto.<sup>51</sup> He should allege a bona fide adverse possession on his part,<sup>52</sup> the making of improvements,<sup>53</sup> and the time when made.<sup>54</sup>

**3 Affirmative Relief.**—The defendant in trespass to try title, by plea of reconvention, may set forth his own right and claim to the land in controversy and demand affirmative relief against the plaintiff.<sup>55</sup>

**4. Disclaimer.**<sup>56</sup>—The defendant may disclaim as to all<sup>57</sup> or a

of all the land sued for. *Herring v. Swain*, 84 Tex. 523, 19 S. W. 774; *Kendey Pasture Co. v. State* (Tex. Civ. App.), 196 S. W. 287.

49. *Ryan v. Lofton* (Tex. Civ. App.), 190 S. W. 752.

[a] Laches may be shown under a plea of not guilty. *Mensing v. Fidelity Lumb. Co.* (Tex. Civ. App.), 194 S. W. 208.

[b] Equities need be pleaded specially only when the defendant seeks affirmative relief. *Mensing v. Fidelity Lumb. Co.* (Tex. Civ. App.), 194 S. W. 208. See also *Glenn v. Rhine*, 53 Tex. Civ. App. 291, 115 S. W. 91; *Black v. Garner* (Tex. Civ. App.), 63 S. W. 918.

50. *Miller v. Gist*, 91 Tex. 335, 43 S. W. 263 (affirming 16 Tex. Civ. App. 274, 41 S. W. 396); *Burk v. Turner*, 79 Tex. 276, 15 S. W. 256; *Ryan v. Lofton* (Tex. Civ. App.), 190 S. W. 752.

[a] Title in a third party by limitation must be pleaded to be available as a defense. *Campbell v. Castle* (Tex. Civ. App.), 204 S. W. 484.

51. *Patrick v. Roach*, 21 Tex. 251; *Powell v. Davis*, 19 Tex. 380; *Saunders v. Wilson*, 19 Tex. 194; *Scott v. Mather*, 14 Tex. 235. See 4 Vern. Sayles Civ. St. (Tex.), art. 7760.

Compare 18 STANDARD PROC. 681, 682, et seq.

52. *Campbell v. McCaleb* (Tex. Civ. App.), 99 S. W. 129.

53. *Rogers v. Bracken's Admr.*, 15 Tex. 564.

54. *Crumbley v. Busse*, 11 Tex. Civ. App. 319, 32 S. W. 438.

55. *Short v. Hepburn*, 89 Tex. 622, 35 S. W. 1056; *Schmidt v. Talbert*, 74 Tex. 451, 12 S. W. 284; *De La Vega v. League*, 64 Tex. 205; *Egery v. Power*, 5 Tex. 501; *Haile v. Johnson*, 63 Tex.

Civ. App. 199, 133 S. W. 1088; *Brin v. Anderson*, 25 Tex. Civ. App. 323, 60 S. W. 778.

[a] Affirmative relief cannot be obtained on a plea of not guilty; it will be granted only on a special answer with appropriate prayer. *St. Louis, A. & T. Ry. Co. v. Prather*, 75 Tex. 53, 12 S. W. 969; *Matthews v. Moses*, 21 Tex. Civ. App. 494, 52 S. W. 113, affirming 93 Tex. 714.

[b] Possession, or claim of part of the premises should be set forth in the answer, otherwise the plea of not guilty will be regarded as an admission of possession or claim of title to the entire tract at the commencement of the action. *Sellman v. Lee*, 55 Tex. 319.

56. See generally the title "Disclaimer."

Effect on Costs, see *infra*, VII, B.

57. *Havard v. Carter-Kelley Lumb. Co.* (Tex. Civ. App.), 162 S. W. 922; *Elwood v. Copeland*, 61 Tex. Civ. App. 238, 129 S. W. 146.

[a] Disclaimer is an admission upon the record of the plaintiff's right and a denial of the assertion of title by the defendant. *Herring v. Swain*, 84 Tex. 523, 19 S. W. 774.

[b] The effect of a disclaimer is (1) to entitle the plaintiff to a judgment awarding him title to the premises, but leaves the issue of damages to be determined. *Coombes v. Bradford*, 62 Tex. Civ. App. 294, 132 S. W. 849. (2) As to parties, its effect, unless damages are also demanded, is to make the defendant who disclaims no longer a party to the action. *Williams v. Neill* (Tex. Civ. App.), 152 S. W. 693.

[c] A disclaimer may be filed as a part of the answer or as an amendment thereto. *Whitehead v. Foley*, 28 Tex. 1.

part<sup>58</sup> of the premises. The court may upon motion<sup>59</sup> permit the disclaimer to be amended<sup>60</sup> or withdrawn.<sup>61</sup>

C. REPLICATION OR REPLY. — In trespass to try title, matter in avoidance of defendant's special plea of title and demand for affirmative relief, must be specially pleaded in replication.<sup>62</sup>

D. DEMURRER. — In trespass to try title the general rules relating to demurrers are applicable.<sup>63</sup> Misjoinder of actions is ground for a general demurrer.<sup>64</sup> A special demurrer will lie for uncertainty, irrelevancy and inconsistency,<sup>65</sup> for pleading matter of evidence,<sup>66</sup> for failure to state the county in which the land is located,<sup>67</sup> for insufficient description of the land in controversy,<sup>68</sup> and for failure to indorse the petition as required by statute.<sup>69</sup>

E. AMENDMENT. — The general rules relating to amendment of pleadings are applicable to actions of trespass to try title.<sup>70</sup>

VI. TRIAL. — A. IN GENERAL. — The trial of an action of trespass to try title is conducted according to the practice in other cases

58. *McBee v. Johnson*, 45 Tex. 634; *Cox v. Finks* (Tex. Civ. App.), 41 S. W. 95; *Willburn v. Tow* (Tex. Civ. App.), 23 S. W. 853.

[a] A partial disclaimer should describe the land excepted. *Herring v. Swain*, 84 Tex. 523, 19 S. W. 774.

[b] An answer which claims for the defendant a part only of the land in dispute is a disclaimer as to the balance. *Keyser v. Meusebach*, 77 Tex. 64, 13 S. W. 967; *Kenedy Pasture Co. v. State* (Tex. Civ. App.), 196 S. W. 287; *Stipe v. Shirley*, 33 Tex. Civ. App. 223, 7 S. W. 307.

59. *Baker v. Tom*, 4 Tex. 5; *Scanlan v. Hitchler*, 19 Tex. Civ. App. 689, 48 S. W. 762.

60. *Jolley v. Oliver* (Tex. Civ. App. 106 S. W. 1151).

61. *Scanlan v. Hitchler*, 19 Tex. Civ. App. 689, 48 S. W. 762.

62. *McSween v. Yett*, 60 Tex. 183; *Rivers v. Foote*, 11 Tex. 662; *Paul v. Perez*, 7 Tex. 338; *Lybrand v. Fuller*, 24 Tex. Civ. App. 296, 59 S. W. 50; *Fields v. Rye*, 24 Tex. Civ. App. 272, 59 S. W. 306. See generally the title "Replication and Reply."

[a] This does not include facts in rebuttal, or facts which contradict, explain, or disprove the defendant's special pleas. *Hollingsworth v. Holschousen*, 17 Tex. 41.

[b] The object of pleading matter in avoidance is to give notice. *Hollingsworth v. Holschousen*, 17 Tex. 41.

63. See the title "Demurrer."

[a] Effect.—It is improper to admit evidence of matters pleaded in an amended petition in trespass to try title to which general exceptions have been sustained. *Masterson v. Bockel*, 20 Tex. Civ. App. 416, 51 S. W. 39.

64. *Frey v. Fort Worth & R. G. R. Co.*, 86 Tex. 465, 25 S. W. 609, *affirming* 6 Tex. Civ. App. 29, 24 S. W. 950.

65. *Blue v. Chandler*, 17 Tex. 126.

66. *Runge v. Schleicher* (Tex. Civ. App.), 21 S. W. 423.

67. *King v. Maxey* (Tex. Civ. App.), 28 S. W. 401.

68. *Thomas v. Tompkins*, 47 Tex. Civ. App. 592, 105 S. W. 1175.

69. *Perkins v. Davidson*, 23 Tex. Civ. App. 31, 56 S. W. 121.

[a] Failure to indorse must be objected to by a special, not a general demurrer. *Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S. W. 865; *Echols v. Jacobs Merc. Co.*, 38 Tex. Civ. App. 65, 84 S. W. 1082, *affirming* 101 Tex. 634.

70. See generally the titles "Amendments and Jeofails;" "New Cause of Action or Defense;" "Parties."

Amendment of disclaimer, see *supra*, V, B, 4.

[a] It is within the discretion of the trial court, after the trial has proceeded for ten days, to permit the defendant to amend a special plea of legal title to one of equitable title. *Kenedy Pasture Co. v. State* (Tex. Civ. App.), 196 S. W. 287.

in the district court, and conformably to the principles of trial by ejectment.<sup>71</sup>

B. **DISMISSAL, DISCONTINUANCE AND NONSUIT.**—The right of the plaintiff, as in other cases, to take a nonsuit at any time before a decision is announced, is applicable to an action of trespass to try title,<sup>72</sup> but such right cannot be exercised, as a general rule, after the defendant files a counterclaim for affirmative relief.<sup>73</sup>

C. **QUESTIONS OF LAW AND FACT.**—Questions of fact on conflicting evidence are for the jury's determination,<sup>74</sup> *e. g.*, the location of a disputed boundary,<sup>75</sup> and the determination of title to the property involved.<sup>76</sup>

D. **INSTRUCTIONS.**—The rules relating to instructions generally are applicable to actions of trespass to try title.<sup>77</sup> The instructions must be based on the law applicable to the case,<sup>78</sup> the issues,<sup>79</sup> and the evidence.<sup>80</sup> They should not be misleading,<sup>81</sup> nor invade the province of the jury.<sup>82</sup>

E. **VERDICT AND FINDINGS.**—The verdict<sup>83</sup> in an action of trespass

71. *Word v. Drouthett*, 44 Tex. 365; *Chambers v. Fisk*, 15 Tex. 335. See 4 *Vernon Sayles Civ. Stat. (Tex.)*, art. 7732.

72. *Hoodless v. Winter*, 80 Tex. 638, 16 S. W. 427; *Peck v. McKellar*, 33 Tex. 234. See generally the title "**Dismissal, Discontinuance and Nonsuit.**"

[a] **Dismissal As To Some of Defendants.**—*Curtis v. Wilson*, 2 Tex. Civ. App. 646, 21 S. W. 787.

73. *Schmidt v. Talbert*, 74 Tex. 451, 12 S. W. 284; *Block & Co. v. Weiller*, 61 Tex. 692; *Midkiff v. Stephens*, 9 Tex. Civ. App. 411, 29 S. W. 54. See the title "**Dismissal, Discontinuance and Nonsuit.**"

74. *Villalva v. Brown* (Tex. Civ. App.), 148 S. W. 1124; *Gosch v. Vrana* (Tex. Civ. App.), 145 S. W. 253; *Leckie v. Texas Land etc. Co.* (Tex. Civ. App.), 129 S. W. 1147; *Uvalde County v. Oppenheimer*, 53 Tex. Civ. App. 137, 115 S. W. 904; *McMahon v. McDonald*, 51 Tex. Civ. App. 613, 113 S. W. 322. See generally the title "**Province of Judge and Jury.**"

75. *Dunn v. Land* (Tex. Civ. App.), 193 S. W. 698; *Crosby v. Stevens* (Tex. Civ. App.), 184 S. W. 705.

76. *Hodges v. Moore* (Tex. Civ. App.), 186 S. W. 415; *Crosby v. Stevens* (Tex. Civ. App.), 184 S. W. 705.

77. See generally the title "**Instructions.**"

78. *Massingill v. Moody* (Tex. Civ. App.), 201 S. W. 265; *Houston Oil Co. v. Ragley-Saner Lumb. Co.* (Tex. Civ. App.), 196 S. W. 338; *Brown v. Fisher*

(Tex. Civ. App.), 193 S. W. 357; *Houston Oil Co. v. Ainsworth* (Tex. Civ. App.), 192 S. W. 614.

[a] **Charge on burden of proof** (1) is proper in trespass to try title. *Moore v. Dunn*, 16 Tex. Civ. App. 371, 41 S. W. 530. (2) As to particular charges on the burden of proof, see *Irvin v. Johnson*, 56 Tex. Civ. App. 492, 120 S. W. 1085; *McCollum v. Buckner's Orphans' Home*, 54 Tex. Civ. App. 348, 117 S. W. 886; *Frugia v. Trueheart*, 48 Tex. Civ. App. 513, 106 S. W. 736; *Willoughby v. Townsend*, 18 Tex. Civ. App. 724, 45 S. W. 861.

79. *Crosby v. Stevens* (Tex. Civ. App.), 184 S. W. 705; *Driggs v. Grant-ham* (Tex. Civ. App.), 41 S. W. 408, *affirmed* 93 Tex. 728.

80. *Dunn v. Land* (Tex. Civ. App.); 193 S. W. 698; *Buchanan v. Houston & T. C. R. Co.* (Tex. Civ. App.), 180 S. W. 625.

81. *Dunn v. Land* (Tex. Civ. App.), 193 S. W. 698.

82. *Cox v. Shropshire*, 25 Tex. 113; *Ft. Worth & N. O. Ry. Co. v. Sweatt*, 20 Tex. Civ. App. 543, 50 S. W. 162.

83. *Lumpkin v. Draper* (Tex.), 18 S. W. 1058; *Van Valkenburg v. Ruby*, 68 Tex. 139, 3 S. W. 746; *Jones v. Leath*, 32 Tex. 329; *Eastham v. Sims*, 11 Tex. Civ. App. 133, 32 S. W. 359. See generally the title "**Verdict.**"

[a] **The premises** (1) must be described with sufficient certainty to allow a judgment thereon. *Wood v. Wel-der*, 42 Tex. 396. (2) But when described in the pleadings, a verdict may be aided by a reference to the plead-



to try title must be sufficiently consistent and certain to support a judgment thereon. It must conform to the pleadings and proof,<sup>84</sup> and be responsive to the issues and the instructions.<sup>85</sup>

A directed verdict is proper when the undisputed evidence shows in which party the title or right to recover lies.<sup>86</sup> So a directed verdict for the plaintiff is proper, on the issue of title, when he makes out a prima facie paper title, and the defendant fails to prove title in himself;<sup>87</sup> or when the defendant admits title in the plaintiff without pleading facts in his answer constituting a good defense.<sup>88</sup> On the other hand, when the plaintiff fails to prove the title upon which he relies, the jury should be charged to find for the defendant.<sup>89</sup>

The findings of the court, on an issue of improvements relating to two tracts of land, in the absence of a request, need not be separate;<sup>90</sup> they may be made complete by reference to a map filed therewith,<sup>91</sup> but must be in accordance with and sustained by the evidence.<sup>92</sup>

**VII. JUDGMENT.** — A. IN GENERAL. — In accordance with the general rules relating to judgments, a judgment cannot ordinarily be given against a party not served with citation, or who has not voluntarily appeared.<sup>93</sup> The judgment must conform to the pleadings and proof,<sup>94</sup> and be warranted by the verdict.<sup>95</sup>

A judgment for the plaintiff should be that he recover of the defendant the title or possession, or both, as the case may be,<sup>96</sup> of the prem-

ings. *Reed v. Phillips* (Tex. Civ. App.), 33 S. W. 986.

84. *Crain v. Huntington*, 81 Tex. 614, 17 S. W. 243; *Payton v. Love*, 20 Tex. Civ. App. 613, 49 S. W. 1109; *Niemann v. Silber* (Tex. Civ. App.), 41 S. W. 712.

85. *Collins v. Kay*, 69 Tex. 365, 6 S. W. 313; *Harkey v. Cain*, 69 Tex. 146, 6 S. W. 637.

86. *Jobe v. Ollre*, 80 Tex. 185, 15 S. W. 1042; *Howard v. Stubblefield*, 79 Tex. 1, 14 S. W. 1044; *Stipe v. Shirley*, 27 Tex. Civ. App. 97, 64 S. W. 1012. See generally the title "Verdict."

87. *Montgomery v. Carlton*, 56 Tex. 361; *Christy v. Romero* (Tex. Civ. App.), 140 S. W. 516; *Benson v. Cahill* (Tex. Civ. App.), 37 S. W. 1088, affirmed, 93 Tex. 725.

88. *Meade v. Logan* (Tex. Civ. App.), 110 S. W. 188.

89. *Gulf, W. T. & P. Ry. Co. v. Cornell*, 84 Tex. 541, 19 S. W. 703; *Greenlee v. Taylor*, 79 Tex. 149, 14 S. W. 1056; *Steddum v. Kirby Lumb. Co.* (Tex. Civ. App.), 154 S. W. 273; *Boston v. McMenamy*, 29 Tex. Civ. App. 272, 68 S. W. 201.

90. *Cahill v. Benson*, 19 Tex. Civ. App. 30, 46 S. W. 888.

91. *Scott v. Weisburg*, 3 Tex. Civ. App. 46, 21 S. W. 769.

92. *State v. Tex. Land & C. Co.*, 34 Tex. Civ. App. 460, 78 S. W. 957; *Schoellkopf v. Cameron* (Tex. Civ. App.), 40 S. W. 1072. See generally the title "Findings and Conclusions."

93. *Greening v. Keel*, 84 Tex. 326, 19 S. W. 435; *Williams v. Ball*, 52 Tex. 603, 36 Am. Rep. 730; *Dallas O. & R. Co. v. Portwood* (Tex. Civ. App.), 68 S. W. 1017; *Maury v. Keller* (Tex. Civ. App.), 53 S. W. 59.

94. *Roche v. Lovell*, 74 Tex. 191, 11 S. W. 1079; *Throckmorton v. Davenport*, 55 Tex. 236; *Matador Land & C. Co. v. State* (Tex. Civ. App.), 54 S. W. 256.

95. *Musselman v. Strohl*, 83 Tex. 473, 18 S. W. 857; *Nichols v. Nichols*, 79 Tex. 332, 15 S. W. 272; *Campbell v. Everts*, 47 Tex. 102.

96. *Coombes v. Bradford*, 62 Tex. Civ. App. 294, 132 S. W. 849. See *Vernon Sayles Civ. Stat. (Tex.)*, art. 7755.

[a] The fact that plaintiff sues for more land than the defendant claims

ises, describing them,<sup>97</sup> together with the amount of rents and profits or damages assessed,<sup>98</sup> and where he recovers possession, that he have his writ of possession.<sup>99</sup>

**Judgment for Defendant.** — If the plaintiff is not successful, the judgment should be that he take nothing, which is equivalent to a judgment that the defendant recover the land.<sup>1</sup> If defendant is awarded affirmative relief the judgment should, of course, correspond to relief awarded.

**B. Costs.** — Costs in trespass to try title, in accordance with the general rule, go to the prevailing party.<sup>2</sup> though for good cause shown the court may adjudge otherwise.<sup>3</sup> When the defendant claims all the land in controversy and the plaintiff recovers a part, the latter is entitled to costs.<sup>4</sup> A disclaimer may relieve a defendant of costs,<sup>5</sup> but not when he retains possession,<sup>6</sup> or when liable for the detention.<sup>7</sup>

**C. MODIFYING AND VACATING.**<sup>8</sup> — The judgment may, upon a proper

will not prevent him from recovering that which defendant claims and to which plaintiff proves title. *Dunn v. Land* (Tex. Civ. App.), 193 S. W. 698.

[b] **The owner of an undivided interest** in a tract of land may recover the entire tract in an action against a naked trespasser. *Hennegan v. Nona Mills* (Tex. Civ. App.), 195 S. W. 664.

[c] **In the absence of a claim for improvements** by the defendant, they are properly included in the judgment for the plaintiff. *American Cement P. Co. v. Acme Cement Plaster Co.* (Tex. Civ. App.), 181 S. W. 257.

97. *Devine v. Keller*, 73 Tex. 364, 11 S. W. 379; *Hearne v. Erhard*, 33 Tex. 60; *Riley v. Pool*, 5 Tex. Civ. App. 346, 24 S. W. 85.

[a] **Where the judgment (1) is for the defendant** on a plea of the statute of limitations, and a holding under a larger survey, the decree should describe the defendant's land by metes and bounds (*Patterson v. Bryant* [Tex. Civ. App.], 191 S. W. 771), but (2) not when unnecessary to an enforcement of the judgment between the parties to the action. *Dunn v. Land* (Tex. Civ. App.), 193 S. W. 698.

98. *Whitaker v. Allday*, 71 Tex. 623, 9 S. W. 483; *Illeg v. De La Luz Garcia* (Tex. Civ. App.), 45 S. W. 857.

[a] **Judgment Against Married Woman.** — Where a woman is codefendant with her husband, and her interest in the property is a community interest, and nothing in the record justifies the subjection of her separate estate to liability for rents, profits or damages, a personal judgment for use

and occupation cannot be rendered against her. *Cooke v. Avery*, 147 U. S. 375, 13 Sup. Ct. 340, 37 L. ed. 209.

99. *Willburn v. Tow* (Tex. Civ. App.), 23 S. W. 853.

1. *Houston & T. C. R. Co. v. McGehee*, 49 Tex. 481; *Dunn v. Land* (Tex. Civ. App.), 193 S. W. 698.

2. *Frank v. Zigmond*, 22 Tex. Civ. App. 161, 54 S. W. 271 (*affirmed*, 93 Tex. 705); *Brown v. Reed*, 20 Tex. Civ. App. 74, 48 S. W. 537 (*affirmed*, 93 Tex. 680); *King v. Berryman*, 15 Tex. Civ. App. 487, 40 S. W. 33. See generally the title "Costs."

3. *Perry v. Rogers*, 52 Tex. Civ. App. 594, 114 S. W. 897.

4. *Dupont v. Texas & N. O. R. Co.* (Tex. Civ. App.), 158 S. W. 195; *Lumpkin v. Williams*, 56 Tex. Civ. App. 160, 119 S. W. 917; *Perry v. Rogers*, 52 Tex. Civ. App. 594, 114 S. W. 897.

[a] **Where defendant disclaims as to a part** of the land, but defends as to part, and the plaintiff recovers a part of the land remaining in controversy, the plaintiff is entitled to costs. *Fewell v. Kinsella* (Tex. Civ. App.), 144 S. W. 1174.

5. *McDaniel v. Martin* (Tex. Civ. App.), 25 S. W. 1041.

[a] **Unnecessary defendants** who disclaim are not liable for costs. *Johnson v. First Nat. Bank* (Tex. Civ. App.), 198 S. W. 990.

6. *Willburn v. Tow* (Tex. Civ. App.), 23 S. W. 853.

7. *Durst v. Mann* (Tex. Civ. App.), 35 S. W. 949.

8. See the title "Judgments."

showing, and permission granted, be opened,<sup>9</sup> set aside,<sup>10</sup> arrested,<sup>11</sup> remitted,<sup>12</sup> or reformed.<sup>13</sup>

D. CONCLUSIVENESS. — A final determination upon the merits in trespass to try title enjoys the same degree of conclusiveness as *res judicata* as do other judgments generally.<sup>14</sup>

VIII. REVIEW. — An action of trespass to try title may be reviewed either by appeal or writ of error,<sup>15</sup> and the rules as to review are the same as in other civil cases.<sup>16</sup>

9. *Dallas O. & R. Co. v. Portwood* (Tex. Civ. App.), 68 S. W. 1017.

10. *Hough v. Hammond*, 36 Tex. 357.

11. *Halsell v. Belcher*, 6 Tex. Civ. App. 322, 25 S. W. 156.

12. *Jones v. Andrews*, 72 Tex. 5, 9 S. W. 170.

13. *McDaniel v. Martin* (Tex. Civ. App.), 25 S. W. 1041.

14. *Cassidy v. Kluge*, 73 Tex. 154, 12 S. W. 13; *Lanier v. Perryman*, 59 Tex. 104; *Corporation of San Patricio v. Mathis*, 58 Tex. 242; *Hall v. Wooters*, 54 Tex. 231. See the titles "Judgments;" "Res Judicata."

[a] Formerly a judgment against the plaintiff did not conclude him, but he was permitted to bring a second action within a year thereafter. *Conolly v. Hammond*, 58 Tex. 11.

15. *Magee v. Chadin's Exr.*, 44 Tex. 488.

16. See generally the titles "Appeals;" "Writ of Error."

[b] Same Theory to Prevail.—*Saxton v. Corbett* (Tex. Civ. App.), 122 S. W. 75.

[c] Review of Questions of Fact. *Slaughter v. Rainwater* (Tex. Civ. App.), 25 S. W. 133.

[d] Objections not made below cannot be entertained in the appellate court. *Gaither v. Hanrick*, 69 Tex. 92, 6 S. W. 619.

[e] Harmless errors will be disregarded. *Kennedy Pasture Co. v. State* (Tex. Civ. App.), 196 S. W. 287; *Brown v. Fisher* (Tex. Civ. App.), 193 S. W. 357.

[f] Presumptions in Absence of Findings.—*Tuggle v. Wakefield I. & C. Imp. Co.*, 30 Tex. Civ. App. 393, 70 S. W. 555.

[g] Parties not appealing or not injured or affected by the decision appealed from have no right to complain thereof on appeal. *Hough v. Hill*, 47 Tex. 148.

[h] Affirmance in Part and Reversal in Part.—Where defendants establish a good defense to part of the land sued for, a judgment in their favor will be affirmed as to such part, but reversed as to the other parts of the land. *Wylie v. Posey*, 71 Tex. 34, 9 S. W. 87.



# TRIAL

By the Editorial Staff.

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  - 6. *Effect of Misconduct and Cure*, 1089
- S. *Conduct of Jury*, 1090
- T. *Conduct of Parties*, 1090
- U. *Conduct of Counsel*, 1090
- V. *Conduct of Bystanders*, 1091
- W. *Mistrial and New Trial*, 1093



## CROSS-REFERENCES:

Arguments;	Objections and Exceptions;
Consolidation of Actions;	Opening and Closing;
Continuances;	Privilege;
Courts;	Province of Judge and Jury;
Demurrer to Evidence;	References,
Dismissal, Discontinuance and	Separate Trials;
Nonsuit;	Severance;
Findings and Conclusions;	Special Interrogatories to Juries;
Hearing;	Statement by Accused;
Instructions;	Stenographers;
Issues in Pleading and Practice;	Stipulations;
Judicial Officers;	Transfer of Causes;
Juries and Jurors;	Variance and Failure of Proof;
Justices of the Peace;	Verdict;
Mandate and Proceedings There-	View;
after;	Withdrawal of Juror;
New Trial;	Witnesses.

In particular actions or proceedings, see the specific titles.

For forms, see 9 STANDARD PROC. 1222.

Trial practice in connection with evidence and witnesses, see the ENCYCLOPEDIA OF EVIDENCE and index thereto.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

**I. DEFINITION AND NATURE.**—A trial is a judicial examination of the issues, whether of law or fact, in an action or proceeding.<sup>1</sup> In its general sense "trial" means the investigation and de-

1. *Babbitt v. Clark*, 103 U. S. 606, 26 L. ed. 507 (quoting Ohio statute); *First Nat. Bank v. Swan*, 3 Wyo. 356, 23 Pac. 743. See also the following cases: **U. S.**—*United States v. Curtis*, 4 Mason 232, 25 Fed. Cas. No. 14,905; *Lewis v. Smythe*, 2 Woods 117, 15 Fed. Cas. No. 8,333. **Cal.**—*Anderson v. Pen-*  
*nie*, 32 Cal. 265. **Fla.**—*Darden v. Lines*, 2 Fla. 569. **Kan.**—*State v. Clifton*, 57 Kan. 448, 46 Pac. 715; *Brookover v. Esterly*, 12 Kan. 149. **Ky.**—*Vertree's Admr. v. Newport News & M. V. Co.*, 95 Ky. 314, 25 S. W. 1; *National Bank v. Bryant*, 13 Bush 419. **Mo.**—*Cross-*  
*land v. Admire*, 118 Mo. 87, 24 S. W. 154. **Neb.**—*Spencer v. Thistle*, 13 Neb. 227, 13 N. W. 214. **N. Y.**—*In re Chauncey*, 32 Hun 429. **N. D.**—*Second Nat. Bank v. First Nat. Bank*, 8 N. D. 50, 76 N. W. 504. **Ohio.**—*Swan v. McClannahan*, 53 Ohio St. 403, 42 N. E. 34. **S. C.**—*Meetze v. Charlotte*, etc. R. Co., 23 S. C. 1; *State v. Starling*, 15 Rich. L. 120. **Utah.**—*Gibbs v. Gibbs*, 26 Utah 382, 73 Pac. 641. **Wash.**—*J. F.*

*Hart Lumb. Co. v. Rucker*, 17 Wash. 600, 50 Pac. 484.

[a] **Other Definitions.**—(1) A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. *Finn v. Spagnoli*, 67 Cal. 330, 7 Pac. 746; *Tregambo v. Comanche M. & M. Co.*, 57 Cal. 501. (2) An examination of a cause before a judge who has jurisdiction of it according to the laws of the land. *Bullard v. Kuhl*, 54 Wis. 544, 11 N. W. 801. (3) A judicial examination of the issues. *Ind.*—*Stewart v. Stewart*, 28 Ind. App. 378, 62 N. E. 1023. **Neb.**—*Tingley v. Dolby*, 13 Neb. 371, 14 N. W. 146. **N. Y.**—*Miller v. King*, 32 App. Div. 349, 52 N. Y. Supp. 1041. **Wis.**—*North Hudson Mut. B. & L. Assn. v. Childs*, 82 Wis. 460, 52 N. W. 600, 33 Am. St. Rep. 57. (4) The process of determining the issues in an action at law. *Doughty v. West, B. & C. Mfg. Co.*, 8 Blatchf. 107, 7 Fed. Cas. No. 4,030.

cision of a matter in issue between parties before a competent tribunal.<sup>2</sup> How the issue arises is immaterial, so long as there is a judicial examination.<sup>3</sup> It may arise upon demurrer,<sup>4</sup> except where, as in some

(5) The judicial examination of the issues between the parties, whether they be of law or fact. *State v. Brown*, 63 Mo. 439. (6) The determination of issues of fact, not issues of law. *Winet v. Berryhill*, 55 Iowa 411, 7 N. W. 681.

**[b] Trial and Hearing Distinguished.**

"Trial" is a common law term, to denote that step in a case by which the facts are ascertained, and is always final, unless the matter is set aside for cause. "Hearing" is an equity term, and may denote the argument and consideration of a case at more than one stage of its progress; but when it results in an absolute disposition of the case it is called "final." But the term "trial," as used in the act on the removal of causes to the federal courts comprehends that step or proceeding in a cause at law or in equity which results in a final judgment or decree, whether the trial be of an issue or question of law or fact. *Miller v. Tobin*, 9 Sawy. 401, 18 Fed. 609, 616. See also *Mass.—Galpin v. Critchlow*, 112 Mass. 339, 343, 17 Am. Rep. 176. *Mich.—Crane v. Reeder*, 28 Mich. 527, 15 Am. Rep. 223. *N. H.—Chandler v. Coe*, 56 N. H. 184, 22 Am. Rep. 437. See the title "Hearing."

2. *Ga.—Castellaw v. Blanchard*, 106 Ga. 97, 31 S. E. 801. *Ind.—Jenks v. State*, 39 Ind. 1. *Tex.—Schintz v. Morris*, 13 Tex. Civ. App. 580, 35 S. W. 516, 825, 36 S. W. 292.

[a] An inquest is a trial, as the term is used in speaking of proceedings in the cause at circuit, which is but a trial of an issue of fact, where the plaintiff alone introduces testimony. *Haines v. Davis*, 6 How. Pr. (N. Y.) 118, 1 Code Rep. (N. S.) 407.

[b] The Taking of Proofs Before a Master in Chancery Is Not a Trial. *Doughty v. West B. & C. Mfg. Co.*, 8 Blatchf. 107, 7 Fed. Cas. No. 4,030.

[c] The hearing and determining of a motion to discharge an attachment is not in a strictly legal sense a trial; such action of the court may therefore be reviewed on appeal without a motion for a new trial. *First Nat. Bank v. Swan*, 3 Wyo. 356, 23 Pac. 743. See 20 STANDARD PROC. 427.

[d] A motion for a new trial is not a trial within the code definition. *McDermott v. Halleck*, 65 Kan. 403, 69 Pac. 335.

[e] A hearing before a mayor for the removal of a city official is not a trial. *Avery v. Studley*, 74 Conn. 272, 50 Atl. 752.

[f] Granting allowance in divorce action is not an examination of the issues, not a trial. *Stewart v. Stewart*, 28 Ind. App. 378, 62 N. E. 1023.

[g] A default judgment is not a trial in an action to recover real estate and damages for its detention. *Hall v. Sanders*, 25 Kan. 538.

[h] A hearing before an auditor is not a trial within the statute giving a right of removal from a state to a federal court. *Stone v. Sargent*, 129 Mass. 503.

[i] A decision is necessary before it can be said that a cause has been tried. *Hastings v. Hastings*, 31 Cal. 95.

[j] The term "trial" is used in a restricted sense in a statute which provides that a sick juror may be discharged, another sworn, and "the trial begin anew," referring to the investigation of facts commencing after a jury is sworn and ending with the charge of the court. *State v. Hasledahl*, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150.

3. See the note immediately following.

[a] At common law the seven species of civil trials were by record, inspection or examination, certificate, witnesses, wager of battle, wager of law, and by jury. III Blackstone 329. Criminal trials based on indictments, after the abolition of trial by ordeal (*ordeal of fire, water, battle, corsned*), were "by jury, per pais, or by the country." IV Blackstone 341.

4. *U. S.—Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. ed. 491; *Lookout Mt. R. Co. v. Houston & Co.*, 32 Fed. 711; *Boyd v. Gill*, 21 Blatchf. 543, 19 Fed. 145. *Cal.—See Goldtree v. Spreckels*, 135 Cal. 666, 67 Pac. 1091. *Ind.—Louisville N. A. & C. R. Co. v. Reynolds*, 118 Ind. 170, 20 N. E. 711. *N. Y.—People v. Bissert*, 71 App. Div. 118, 75 N. Y. Supp. 630, 16 N. Y. Cr.

cases under a statute, the term is used in a restricted sense, *e. g.*, with reference to issues of fact, not issues of law.<sup>5</sup>

A "trial according to the course of the common law" is a trial before a jury under right rulings made by the trial judge in the presence of the jury.<sup>6</sup>

**II. WHEN TRIAL COMMENCES AND TERMINATES.**—The decisions as to the precise point at which a trial is deemed to have begun are influenced by the particular matter or statute under consideration and the supposed intent of the legislature in enacting the statute.<sup>7</sup> Under the common acceptance of the terms "trial" and "hearing," the trial is commenced when all dilatory proceedings have been disposed of, and when all ordinary efforts to prevent a trial have been ineffectually exhausted, and when the cause is called for trial and nothing remains to be done but to proceed therein.<sup>8</sup> Within this rule, the trial is begun just as soon as, but not before, the court enters upon the impaneling of a jury for the trial of the matters of fact presented by the pleadings.<sup>9</sup> It has been held that the trial begins when the jurors are called and placed in the jury box for examination on their *voir dire*,<sup>10</sup> or when the case is called for trial, unless the trial be then postponed.<sup>11</sup> Under some statutes, particularly those relating to appeal and error, a trial does not commence until an issue of fact is joined,<sup>12</sup> or when the jury is sworn in,<sup>13</sup> but in

409; *Small v. Ludlow*, 1 Hilt. 307. **Wis.** *Pratt v. Lincoln*, 61 Wis. 62, 20 N. W. 726.

5. *Winet v. Berryhill*, 55 Iowa 411, 7 N. W. 681. See *Mechanics' Sav. Bank v. Harding*, 65 Kan. 655, 70 Pac. 655.

6. *Mutual Reserve L. Ins. Co. v. Heidel*, 161 Fed. 535, 88 C. C. A. 477.

7. See *Lipscomb v. State*, 76 Miss. 223, 252, 25 So. 158; *State v. Johnson*, 24 S. D. 590, 124 N. W. 847.

As affecting time to move for a change of venue, see 4 STANDARD PROC. 984.

Under statute as to removal of causes, see 22 STANDARD PROC. 823, note 14.

8. *Lipscomb v. State*, 76 Miss. 223, 253, 25 So. 158.

[a] The mere summoning of a special venire, even after the overruling of an application for a continuance in a criminal case is not the commencement of a trial within the ordinary acceptance of the term. *Lipscomb v. State*, 76 Miss. 223, 254, 25 So. 158.

9. *Lipscomb v. State*, 76 Miss. 223, 254, 25 So. 158.

10. **Neb.**—*Anglo-American Provision Co. v. Evans*, 34 Neb. 44, 51 N. W. 310. **N. M.**—*Territory v. Kelly*, 2 N. M. 292. **Okl.**—*Ward v. Territory*, 8 Okla.

12, 56 Pac. 704; *Simmons v. State*, 4 Okla. Crim. 490, 114 Pac. 752; *Caples v. State*, 3 Okla. Crim. 72, 104 Pac. 493, 26 L. R. A. (N. S.) 1033. **S. D.** *State v. Johnson*, 24 S. D. 590, 124 N. W. 847.

See also 7 STANDARD PROC. 922, note 89.

[a] The trial of a criminal case begins at the commencement of the impaneling of the jury. *Ward v. Territory*, 8 Okla. 12, 56 Pac. 704.

[b] The calling of the jury is a part of the trial. *St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co.*, 23 Minn. 186, 23 Am. Rep. 682.

11. *People v. Stewart*, 64 Cal. 60, 28 Pac. 112.

12. *Mechanics' Sav. Bank v. Harding*, 65 Kan. 655, 70 Pac. 655.

[a] Under statutes relating to costs plaintiff is not entitled to an extra allowance where no issue is joined. *Randolph v. Foster*, 3 E. D. Smith (N. Y.) 648, 4 Abb. Pr. 262.

13. **Ill.**—*Skakel v. People*, 111 Ill. App. 509. **Ind.**—*Hunnell v. State*, 86 Ind. 431, holding motion for change of venue after the selection of ten jurors was in time. **Ky.**—*Willis v. Com.*, 85 Ky. 68, 2 S. W. 654. **Md.**—*Price v.*



criminal cases generally the trial begins with the proceedings in open court after the pleadings are finished and the case is otherwise ready,<sup>14</sup> *i. e.*, the instant the court enters upon the impaneling of a jury,<sup>15</sup> though for the purpose of determining when jeopardy attaches or other questions based thereon a trial is said to begin at the moment a full jury is impaneled and sworn,<sup>16</sup> not including a preliminary examination,<sup>17</sup> nor arraignment,<sup>18</sup> nor judgment on a plea of guilty.<sup>19</sup>

A trial terminates with the termination of the investigation of the facts,<sup>20</sup> and with the rendition of the verdict,<sup>21</sup> and the discharge of the jury.<sup>22</sup>

### III. DOCKETS, LISTS, AND CALENDARS. — A. GENERALLY.<sup>23</sup>

State, 8 Gill 295. **Nev.**—*State v. Jackman*, 31 Nev. 511, 104 Pac. 13. **N. D.** *State v. Kent*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518 (under statute as to change of venue); *State v. Hasledahl*, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150. **Ohio.**—*Columbus, etc. R. Co. v. Thurstin*, 44 Ohio St. 525, 9 N. E. 232.

[a] When the jurors are merely called and excused until the next term, the trial is not commenced, within the meaning of the statute requiring the defendant to be tried at a given time. *Skakel v. People*, 111 Ill. App. 509.

14. *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026.

[a] While jeopardy does not begin until after the jury has been selected and sworn, yet for all other purposes the trial of a criminal prosecution begins when the jury are called into the box for examination as to their qualifications. *Simmons v. State*, 4 Okla. Crim. 490, 114 Pac. 752; *Caples v. State*, 3 Okla. Crim. 72, 104 Pac. 493, 26 L. R. A. (N. S.) 1033. As to jeopardy, see 14 STANDARD PROC. 606.

[b] When several jurors have been declared competent by the court, although none have been accepted by the state or accused, the trial has begun. *Lipscomb v. State*, 76 Miss. 223, 248, 25 So. 153.

15. **Miss.**—*Lipscomb v. State*, 76 Miss. 223, 25 So. 153. **Ohio.**—*Palmer v. State*, 42 Ohio St. 596. **Okla.**—*Simmons v. State*, 4 Okla. Crim. 490, 114 Pac. 752.

16. **Ky.**—*Willis v. Com.*, 85 Ky. 68, 2 S. W. 654. **Nev.**—*State v. Jackman*, 31 Nev. 511, 104 Pac. 13. **Okla.**—*Caples v. State*, 3 Okla. Crim. 72, 104 Pac. 493, 26 L. R. A. (N. S.) 1033. **Pa.**

*Alexander v. Com.*, 105 Pa. 1. **S. C.** See *State v. Burket*, 2 Mill Const. 155, 12 Am. Dec. 662, and 14 STANDARD PROC. 555, 607.

17. **Kan.**—*State v. Goetz*, 65 Kan. 125, 69 Pac. 187. **Minn.**—*State v. Bergman*, 37 Minn. 407, 34 N. W. 737. **N. H.** *State v. Gerry*, 68 N. H. 495, 38 Atl. 272, 38 L. R. A. 228.

18. **U. S.**—*United States v. Curtis*, 4 Mason 232, 25 Fed. Cas. No. 14,905. **Ala.**—*Byers v. State*, 105 Ala. 31, 16 So. 716. **Dak.**—*McCall v. United States*, 1 Dak. 320, 46 N. W. 608. **Ind.**—*Hunnel v. State*, 86 Ind. 431. **Mass.**—*Com. v. Soderquest*, 183 Mass. 199, 66 N. E. 801.

See 14 STANDARD PROC. 555.

19. *Orear v. State*, 22 Ind. App. 553, 53 N. E. 249; *Wheeler v. Clinton*, 92 Iowa 44, 60 N. W. 207. See 14 STANDARD PROC. 556.

20. *State v. Hasledahl*, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150.

[a] Decision of the facts is part of trial. *State v. Spores*, 4 Ore. 198.

[b] Trial Terminates With Judgment.—*Hotsenpiller v. State*, 144 Ind. 9, 43 N. E. 234; *Jenks v. State*, 39 Ind. 1; *Nichols v. State*, 23 Ind. App. 674, 63 N. E. 783; *Herron v. State*, 17 Ind. App. 161, 46 N. E. 540.

[c] Pronouncing sentence is not part of the trial. *Reed v. State*, 147 Ind. 41, 46 N. E. 135.

21. **Ala.**—*Hirschfelder v. State*, 19 Ala. 534. **Mont.**—*State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026. **Ohio.** *Wagner v. State*, 42 Ohio St. 537.

22. *Ward v. Territory*, 8 Okla. 12, 25, 56 Pac. 704.

23. Justice's docket, see the title "Justices of the Peace."

Some statutes provide that the clerk must enter causes upon the calendar of the court according to the date of issue.<sup>24</sup>

**B. STRIKING CAUSE FROM DOCKET OR CALENDAR.** — A cause may be stricken from the docket or calendar, on motion,<sup>25</sup> on notice,<sup>26</sup> when for any reason the cause is not properly on the docket or calendar,<sup>27</sup> or if it is not ready when reached on the trial call,<sup>28</sup> or when counsel, having answered ready at the call of the calendar in the morning without reservation, is absent on another engagement, at the time when the case is reached.<sup>29</sup> But such a motion is not a proper remedy by which to raise objections relating to parties and service of process,<sup>30</sup> or to try the merits of the case,<sup>31</sup> or to raise the question that the note of issue is defective in form.<sup>32</sup>

**When Application Made.** — It has been held that the party may wait until the cause is reached on the day calendar to make the motion to strike,<sup>33</sup> but some courts hold otherwise.<sup>34</sup>

24. Cal. Code Civ. Proc., §593.

As to calendars and dockets generally, see 6 STANDARD PROC. 48, et seq.

As to causes preferred on the calendar, see *infra*, IV, C.

25. *Odell v. Cowles*, 76 Conn. 293, 56 Atl. 519.

26. *Frost v. Lawler*, 33 Mich. 348.

Form of notice of motion to strike cause from calendar, and orders thereon, see 9 STANDARD PROC. 1223.

27. *Levy v. Robinson*, 1 Marv. (Del.) 108, 40 Atl. 661; *Joyce v. Eastman Kodak Co.*, 163 N. Y. Supp. 623.

[a] When action is not revived within one year from time it should have been revived. *Hayden v. Huff*, 62 Neb. 375, 87 N. W. 184. But compare *First Nat. Bank v. Wright*, 38 App. Div. 2, 56 N. Y. Supp. 308.

[b] Where the issue represented on the calendar has been superseded by a new issue created by amended pleadings and the party has not served a new notice of trial and filed a new note of issue. *Romaine v. Bowdoin*, 70 Hun 366, 24 N. Y. Supp. 67, 54 N. Y. St. 115; *Poindexter v. Carlton*, 30 Misc. 202, 61 N. Y. Supp. 1116; *Gair v. Birmingham & Co.*, 20 N. Y. Civ. Proc. 233, 15 N. Y. Supp. 147.

28. See 6 STANDARD PROC. 54, note 14.

29. *Mayer v. McWalters*, 17 App. Div. 291, 45 N. Y. Supp. 243. But compare *Kyle v. Chase*, 14 Neb. 528, 16 N. W. 821.

[a] But the court may restore the cause in its discretion upon subsequent motion. *Mayer v. McWalters*, 17 App. Div. 291, 45 N. Y. Supp. 243.

Passing case pending engagement of counsel, see *infra*, VI, H.

Trying cause in absence of counsel, see *infra*, VII, 1, 1.

30. See *infra*, this note.

[a] Where it was objected that all the joint defendants were not within the jurisdiction of the court. *Stanfield v. Stanfield*, 21 Misc. 409, 47 N. Y. Supp. 1010.

[b] Where It Was Objected That One of the Several Tort Feasors Was Not Served.—*Rappaport v. Werner*, 34 App. Div. 525, 54 N. Y. Supp. 481.

31. *United States Glass Co. v. Levett*, 24 App. Div. 624, 48 N. Y. Supp. 887.

32. *Moody v. Lambert*, 18 S. D. 572, 101 N. W. 717.

[a] Clerical errors in the note of issue as to the name of a party are not grounds for striking the cause from the calendar. *Homberger v. Brandenberg*, 35 Minn. 401, 29 N. W. 123.

33. *Poindexter v. Carlton*, 30 Misc. 202, 61 N. Y. Supp. 1116.

34. *McDonald v. People*, 123 Ill. App. 346; *Marvin v. Bowlby*, 135 Mich. 640, 98 N. W. 399.

[a] On the first day of the term, the party should make his motion. *Marvin v. Bowlby*, 135 Mich. 640, 98 N. W. 399.

[b] A motion made several weeks after a cause is placed on the calendar and on the day the cause is called for trial is not in apt time. *McDonald v. People*, 123 Ill. App. 346; *Freund v. Huylers*, 102 Ill. App. 480; *Winterburn v. Parlow*, 102 Ill. App. 368.

**Effect of Order.** — An order striking a civil cause from the docket is not equivalent to a dismissal.<sup>35</sup> Its legal effect is to suspend further proceedings until some other steps are taken by which a final disposition can be had.<sup>36</sup> The case is temporarily abated but remains in the court in which it is pending.<sup>37</sup> But the striking of a criminal case from the docket unconditionally is equivalent to a *nolle prosequi*.<sup>38</sup>

**C. REINSTATEMENT OF CAUSE.** — The court ordinarily has discretionary power, for good cause shown to reinstate causes dismissed or stricken from the docket.<sup>39</sup>

**IV. TIME OF TRIAL AND ADJOURNMENTS.** — **A. IN CIVIL ACTIONS.** — The time of the trial of civil causes is generally regulated by statute,<sup>40</sup> and rules of court,<sup>41</sup> which vary in the different states. And it is sometimes fixed by stipulation of the parties.<sup>42</sup> A typical statute provides for the trial of the action at the first term of court following the service of process or completion of the issues, if the service of process or the joinder of issue was had a specified time before the commencement of the term.<sup>43</sup> In some jurisdictions, a large discretion is reposed in the trial court as to the particular day at which a cause shall be tried.<sup>44</sup> It is reversible error to force a defendant to go to trial at a term prior to that at which the action first became triable.<sup>45</sup> Of course, it is error to call a case for trial before it is at issue,<sup>46</sup> and ground for new trial,<sup>47</sup> to compel a party over his objection to go to trial at a term when it is not triable.

**B. IN CRIMINAL PROSECUTIONS.** — **1. Generally.** — The trial of criminal cases must be had at the time prescribed by law for holding

35. *Hayden v. Huff*, 62 Neb. 375, 381, 87 N. W. 184.

36. *Hayden v. Huff*, 62 Neb. 375, 87 N. W. 184.

37. *Hayden v. Huff*, 62 Neb. 375, 281, 87 N. W. 184.

38. See 20 STANDARD PROC. 656.

39. See 6 STANDARD PROC. 54 note 15.

40. See the statutes and *Noren v. Wood*, 72 Conn. 96, 43 Atl. 649; *Childs v. Cook* (Okla.), 174 Pac. 274; *Swope v. Burnham*, 6 Okla. 736, 52 Pac. 924.

Continuance for want of time to prepare for trial, see 5 STANDARD PROC. 468.

As to adjournments, see *infra*, IV, D. Time for preliminary examination, see 21 STANDARD PROC. 502.

41. See the rules of court.

42. *Cal.*—*Schultz v. McLean*, 109 Cal. 437, 42 Pac. 557. *N. Y.*—*Baldwin v. Tillson*, 1 Denio 621, 1 How. Pr. 173; *Jacobs v. Hooker*, 1 Barb. 71. *Tenn.* *Jones v. Kimbro*, 6 Humph. 319.

See the title "Stipulations."

43. See the following cases: *Kan.* *Dougherty v. Porter*, 18 Kan. 206. See

*Butler v. McMillen*, 13 Kan. 385. *Ky.* *Civ. Code*, §367a, sub. 4 and 5. See *Cincinnati Southern R. Co. v. Hogan*, 7 Ky. L. Rep. 820. *Miss.*—*Oglesby v. Stribling*, 67 Miss. 666, 7 So. 463. *Mo.* *Carpenter v. Meyers*, 32 Mo. 213; *Armstrong v. Johnson*, 27 Mo. 420; *Finney v. Brant*, 19 Mo. 42. *Neb.*—*Osgood v. Grant*, 44 Neb. 350, 62 N. W. 894. *Tex.*—*Huffman v. Hardeman*, 1 S. W. 575.

[a] A statute providing that equitable actions shall stand for trial at any term if the pleadings have been completed sixty days before its commencement, applies only where there is an issue of fact. *Hazlewood v. Webster*, 25 Ky. L. Rep. 1388, 78 S. W. 123.

44. *Foster v. Hinson*, 76 Iowa 714, 39 N. W. 682.

45. *Gapen v. Stephenson*, 18 Kan. 140.

46. *Beamesderfer v. Cermak*, 203 Ill. App. 294.

Notice of trial cannot be given before issue joined. See *infra*, VI, F, 1, c, (III).

47. See 20 STANDARD PROC. 441.



court. If held at an unauthorized time, the conviction is void.<sup>48</sup> Unless statute provides otherwise,<sup>49</sup> the trial may take place at any time after the arrest of the accused,<sup>50</sup> even at the same term of court at which the indictment is found.<sup>51</sup> Some statutes require the state to try the defendant at the term at which the defendant's demand for trial is entered or the next succeeding term.<sup>52</sup>

**Special Term.**—The court may, in some states, call a special term for the trial of criminal prosecutions,<sup>53</sup> in which it may take any action that could have been taken at a regular term in reference to the trial of persons accused of crime.<sup>54</sup>

48. *White v. State*, 142 Ala. 42, 39 So. 82; *Walker v. State*, 142 Ala. 7, 39 So. 242. See *Haselhuhn v. Macomb Cir. Judge* (Mich.), 168 N. W. 416, construing statute.

[a] **A trial and conviction at an unauthorized term of court is invalid** and should be treated as a nullity. *State v. Roberts*, 8 Nev. 239; *Ex parte Thompson*, 57 Tex. Crim. 437, 123 S. W. 612.

[b] **Prisoner will be discharged on habeas corpus** in such case. *Ex parte Thompson*, 57 Tex. Crim. 437, 123 S. W. 612.

**Trials on Sundays and holidays**, see the title "Sunday and Holidays."

**Time for preliminary examination**, see 21 STANDARD PROC. 502.

**Trial pending imprisonment for other offenses**, see 21 STANDARD PROC. 606.

49. *Heywood v. State*, 125 Ga. 262, 54 S. E. 187, construing §27 of the act creating the city court of Camilla, Acts 1905, p. 189.

[a] **In Alabama**.—Under a statute providing that no defendant shall be put on trial for a capital offense within five months from its commission, unless he consent in writing to a trial in a shorter time, it is of no consequence that he is arraigned and his case is set for trial before his consent is entered and filed in the cause. *Sudduth v. State*, 124 Ala. 32, 27 So. 487.

50. *Murphy v. State*, 131 Wis. 420, 111 N. W. 511.

51. **Ark.**—*Shipley v. State*, 50 Ark. 49, 6 S. W. 226. **Fla.**—*Moore v. State*, 59 Fla. 23, 33, 52 So. 971. See *Roberts v. State*, 72 Fla. 132, 72 So. 649. **Kan.** *State v. Asbell*, 57 Kan. 398, 46 Pac. 770.

[a] **Statute Construed.**—A statute providing that "if the defendant is in custody, or on bail, when the indictment is found, the trial may take place at the same term of the court, on a day to be fixed by the court," does not prohibit the trial at that term of a defendant not in custody or on bail when the indictment is found. The only object of the statute is to give defendants in custody or on bail priority over all other defendants and litigants. *Shipley v. State*, 50 Ark. 49, 6 S. W. 226.

52. *Carter v. State*, 14 Ga. App. 242, 80 S. E. 533; *Nix v. State*, 5 Ga. App. 835, 63 S. E. 926. See *Critser v. State*, 87 Neb. 727, 127 N. W. 1073. And see *supra*, IV, B, 2.

[a] **An adjourned term is a mere prolongation** of a regular session, and the accused may be tried at an adjourned session of the next succeeding term after the demand for trial. *Carter v. State*, 14 Ga. App. 242, 80 S. E. 533.

53. **Ark.**—See *Hill v. State*, 100 Ark. 373, 140 S. W. 576 (as to notice of special term); *Collier v. State*, 20 Ark. 36. **Ky.**—*Ellis v. Com.*, 146 Ky. 715, 143 S. W. 425; *Penman v. Com.*, 141 Ky. 660, 133 S. W. 540. **Miss.**—*Dees v. State*, 78 Miss. 250, 23 So. 849. **Mo.**—See *State v. Kavanaugh*, 133 Mo. 452, 23 S. W. 33, 34 S. W. 842. **Tex.**—*Chant v. State*, 73 Tex. Crim. 345, 166 S. W. 513; *Elliott v. State*, 58 Tex. Crim. 200, 125 S. W. 568.

See 6 STANDARD PROC. 37, note 96.

[a] **The power of the court does not depend upon the petition or desire of the prisoner to be tried.** *Collier v. State*, 20 Ark. 36, 43.

54. *Ellis v. Com.*, 146 Ky. 715, 143 S. W. 425.

**As to manner of calling special terms**, see 6 STANDARD PROC. 38.

**At What Day in Term.** — Statutes sometimes authorize the trial court to set any day of the term for the trial of criminal cases.<sup>55</sup>

**2. Speedy Trial.** — a. *In General.* — Both at common law, by the magna charta,<sup>56</sup> and in modern practice under constitutional provision,<sup>57</sup> a person accused of crime has a right to a speedy trial, whether he is in custody or at large on bail.<sup>58</sup> Pursuant to such provision, statutes have been enacted which provide that if persons accused of crime are not tried within a specified time after indictment found or information filed, the prosecution must be dismissed and the defendant discharged or his bail exonerated,<sup>59</sup> unless good cause

55. *Gaines v. State*, 38 Tex. Crim. 202, 42 S. W. 385, statute relates to capital cases.

[a] The trial court is authorized to set capital cases down for trial on (1) some particular day. It is not required to set them according to their file numbers, that is to set those which have the earliest file number first, but in calling the docket the court must set or dispose of cases as they may be reached. *Hardin v. State*, 40 Tex. Crim. 208, 214, 49 S. W. 607. (2) It can set a day during the term prior to the day set for taking up the criminal docket. *Gaines v. State*, 38 Tex. Crim. 202, 42 S. W. 385.

56. See *Ex parte Stanley*, 4 Nev. 113; *State v. Webb*, 155 N. C. 426, 70 S. E. 1064.

57. See the constitutions and U. S. *Beavers v. Haubert*, 198 U. S. 77, 25 Sup. Ct. 573, 49 L. ed. 950. *Ala.*—*Ex parte State*, 76 Ala. 482. *Ark.*—*Burnett v. State*, 76 Ark. 295, 88 S. W. 956, 113 Am. St. Rep. 94. *Fla.*—*Grißwold v. State*, 82 So. 44. *Ga.*—*Carter v. State*, 14 Ga. App. 242, 80 S. E. 533. *Haw.*—*United States v. Kojima*, 3 Hawaii U. S. Dist. Ct. 381. *Mich.* *Haselhuhn v. Macomb Cir. Judge*, 168 N. W. 416. *Mont.*—*State ex rel. Northrup v. Conrow*, 13 Mont. 552, 35 Pac. 240. *Nev.*—*Ex parte Stanley*, 4 Nev. 113. *N. C.*—*State v. Webb*, 155 N. C. 426, 70 S. E. 1064. *Okla.*—*Eubanks v. Cole*, 4 Okla. Crim. 25, 109 Pac. 736. *S. D.*—*State v. Lamphere*, 20 S. D. 98, 104 N. W. 1038. *Tex.*—*Ex parte Turman*, 26 Tex. 708, 84 Am. Dec. 598. *Va.*—*Com. v. Adecock*, 8 Gratt. (49 Va.) 661, 680; *Ex parte Santee*, 2 Va. Cas. (4 Va.) 363. *Wash.*—*State v. Miller*, 72 Wash. 154, 129 Pac. 1100. *W. Va.* *Denham v. Robinson*, 72 W. Va. 243, 77 S. E. 970, Ann. Cas. 1915D, 997, 45 L. R. A. (N. S.) 1123. *Can.*—*In re*

*British Columbia Co. Cts.*, 21 Can. Sup. Ct. 446.

**Persons imprisoned for other offenses** are within scope of provision. See 21 STANDARD PROC. 607, note 79.

[a] *In Oregon*, although the constitution does not expressly assure a "speedy trial," its command that justice be administered "without delay" is practically synonymous. *State v. Clark*, 86 Ore. 464, 168 Pac. 944.

58. *Ex parte Miller (Colo.)*, 180 Pac. 749.

59. See the statutes and *Cal.*—*People v. Lundin*, 120 Cal. 308, 52 Pac. 807. *Colo.*—*Cummins v. People*, 4 Colo. App. 71, 34 Pac. 734. *Ga.*—*Thornton v. State*, 7 Ga. App. 752, 67 S. E. 1055. *Ill.*—*Skakel v. People*, 111 Ill. App. 509. *Kan.*—*State v. Braden*, 78 Kan. 576, 96 Pac. 840. *Mo.*—*State v. Taylor*, 190 S. W. 330. *S. C.*—*State v. Williams*, 35 S. C. 160, 14 S. E. 309; *State v. Buyck*, 2 Bay 563, 1 Brev. 460, holding statute inapplicable to persons not in custody. *Wash.*—*State v. Brodie*, 7 Wash. 442, 35 Pac. 137. *W. Va.*—*Ex parte Chalfant*, 81 W. Va. 93, 93 S. E. 1032.

[a] **Statute Is Imperative.**—*Durham v. State*, 9 Ga. 306; *State v. Miller*, 72 Wash. 154, 129 Pac. 1100.

[b] **Statute Should Be Construed Liberally.**—*People v. Matson*, 129 Ill. 591, 22 N. E. 456.

**Persons under confinement** are within application of statute. See 21 STANDARD PROC. 607.

**Discharge on failure to file an indictment in time**, see 12 STANDARD PROC. 94 and 95, note 27.

[c] **But proceedings in justice's court** not on indictment or information are not within the scope of the statute. *Albers v. Superior Court*, 30 Cal. App. 772, 159 Pac. 453.

to the contrary is shown,<sup>60</sup> as where the delay is caused by the defendant himself,<sup>61</sup> or is occasioned by a want of time to try the case,<sup>62</sup> or by a mistrial.<sup>63</sup> And even if there is no statute upon the subject, the court has a right to intervene where the delay, oppression and wrong are palpable.<sup>64</sup>

Provisions guaranteeing the right to a speedy trial must receive a reasonable interpretation.<sup>65</sup> The right guaranteed is necessarily relative,<sup>66</sup> and is consistent with delays, and depends upon circumstances.<sup>67</sup> It requires merely that the trial shall take place as soon after indictment as the prosecution can, with reasonable diligence, prepare for it, without needless, vexatious or oppressive delay, having in view, however, the delays which may be incident to the fixed rules which regulate judicial proceedings.<sup>68</sup>

[d] **Computation of Time.**—Under a statute entitling a defendant to a discharge if not brought to trial before the end of the third term after the indictment is found, the term at which the indictment is found is not counted. *State v. Schyhart* (Mo.), 199 S. W. 205. To similar effect see *Gillespie v. People*, 176 Ill. 238, 52 N. E. 250; *State v. Breaw*, 45 Ore. 586, 78 Pac. 896.

60. *People v. Holmes*, 13 Cal. App. 212, 109 Pac. 489.

61. Cal.—*People v. Lundin*, 120 Cal. 308, 52 Pac. 807. Ill.—*People v. Hotz*, 261 Ill. 239, 103 N. E. 1007; *People v. Economac*, 243 Ill. 107, 90 N. E. 302; *Dougherty v. People*, 124 Ill. 557, 16 N. E. 852. Kan.—*State v. Lewis*, 85 Kan. 586, 118 Pac. 59. Pa.—*Com. v. Zec*, 262 Pa. 251, 105 Atl. 279.

[a] **By Writ of Error or Appeal of Accused.**—*People v. Lundin*, 120 Cal. 308, 52 Pac. 807; *Marzen v. People*, 190 Ill. 81, 60 N. E. 102.

62. Ala.—*Sample v. State*, 138 Ala. 259, 36 So. 367. Kan.—*State v. Hecht*, 90 Kan. 802, 136 Pac. 251. Mo.—See *In the Matter of Spreadlind*, 38 Mo. 547.

63. *People v. Maupins*, 30 Cal. App. 392, 158 Pac. 502. See *infra*, this section, catchline "New and Second Trials."

64. *Ex parte Donaldson*, 44 Mo. 149.

65. *Ex parte Turman*, 26 Tex. 708, 84 Am. Dec. 598.

66. *Beavers v. Haubert*, 198 U. S. 77, 25 Sup. Ct. 573, 49 L. ed. 950.

67. U. S.—*Beavers v. Haubert*, 198 U. S. 77, 25 Sup. Ct. 573, 49 L. ed. 950. Ala.—*Sample v. State*, 138 Ala. 259, 36 So. 367. Okla.—*State ex rel. Figlos v. Cole*, 4 Okla. Crim. 25, 109 Pac. 736.

[a] **Continuances in the discretion of the presiding judge, or delay occasioned by want of time to try, or any like necessitating circumstances do not contravene the right to a speedy trial.** *Ex parte State*, 76 Ala. 482.

68. Nev.—*Ex parte Stanley*, 4 Nev. 113. Ore.—*State v. Clark*, 86 Ore. 464, 168 Pac. 944. Tenn.—*Arrowsmith v. State*, 131 Tenn. 480, 175 S. W. 545, L. R. A. 1915E, 363. Tex.—*Ex parte Turman*, 26 Tex. 708, 84 Am. Dec. 598. Wyo.—*State v. Keefe*, 17 Wyo. 227, 98 Pac. 122, 22 L. R. A. (N. S.) 896.

[a] "The speedy trial, to which a person charged with crime is entitled under the constitution, then is, a trial at such a time after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by the fair and honest exercise of reasonable diligence, to prepare for a trial." *United States v. Fox*, 3 Mont. 512, quoted in *Ex parte Miller* (Colo.), 180 Pac. 749, 750.

[b] **Immediate Trial.**—The constitution does not require that the trial take place immediately upon presentation of the indictment or the arrest upon it. *Beavers v. Haubert*, 198 U. S. 77, 25 Sup. Ct. 573, 49 L. ed. 950; *Ex parte Stanley*, 4 Nev. 113.

[c] It prohibits the trial court from arbitrarily and without cause, or by reason of passion, prejudice or personal hostility denying the accused the right to a speedy trial. *Eubanks v. Cole*, 4 Okla. Crim. 25, 109 Pac. 736; *State v. Clark*, 86 Ore. 464, 168 Pac. 944.

[d] This provision has no other function than to protect those accused of crime against possible delay, caused either by wilful oppression, or the



**New and Second Trials.**—The constitutional provision applies to all times during which the accused is subject to trial. It applies to new trials on motion, or after remand of a cause after disposition of an appeal, and to a trial after a mistrial.<sup>69</sup> But a statute requiring a discharge of the defendant if not brought to trial within a given time after indictment found or information filed does not apply to such a case.<sup>70</sup>

b. *Assertion of Right, and Discharge for Delay.*—(I.) **Necessity of Invoking Statute and Waiver.**—The right to a speedy trial may be waived by the accused,<sup>71</sup> even in a capital case.<sup>72</sup> And as a general rule the defendant must invoke the statute directing his discharge if not brought to trial in a specified time, in some appropriate manner, or he will be deemed to have waived his right.<sup>73</sup>

(II.) **Demand of Trial.**—In some states, sometimes by express statute,<sup>74</sup> the accused, to be entitled to a discharge on the ground that he

neglect of the state or its officers. *In re Begerow*, 133 Cal. 349, 355, 65 Pac. 828, 85 Am. St. Rep. 178, 56 L. R. A. 513.

69. *State v. Lamphere*, 20 S. D. 98, 104 N. W. 1038; *State v. Miller*, 72 Wash. 154, 129 Pac. 1100.

70. Cal.—*People v. Maupins*, 30 Cal. App. 392, 158 Pac. 502. Mass.—*In re Glover*, 109 Mass. 340. N. J.—*State v. Dilts*, 76 N. J. L. 410, 69 Atl. 255. Pa. Com. ex rel. *McGurk v. Superintendent of County Prison*, 97 Pa. 211. S. D. *State v. Lamphere*, 20 S. D. 98, 104 N. W. 1038. Wash.—*State v. Miller*, 72 Wash. 154, 161, 129 Pac. 1100.

*Contra*, *In re Begerow*, 133 Cal. 349, 65 Pac. 828, 85 Am. St. Rep. 178, 56 L. R. A. 513. Compare *People v. Lundin*, 120 Cal. 308, 52 Pac. 807.

[a] Consequently, the time of retrial is left to the judicial discretion of the trial court, as the constitution fixes no time. *State v. Clark*, 86 Ore. 464, 168 Pac. 944; *State v. Miller*, 72 Wash. 154, 161, 129 Pac. 1100.

[b] What is reasonable speed depends upon the circumstances surrounding the particular case. *State v. Lamphere*, 20 S. D. 98, 104 N. W. 1038. See *infra*, VII, W.

71. Me.—*State v. Slorah*, 106 Atl. 768. Okla.—*Parker v. State*, 7 Okla. Crim. 238, 122 Pac. 1116, 124 Pac. 80. Wash.—*State v. Miller*, 72 Wash. 154, 129 Pac. 1100.

72. *State v. Slorah* (Me.), 106 Atl. 768.

73. *People v. Hawkins*, 127 Cal. 372, 59 Pac. 697; *State v. Chapin*, 74 Ore. 346, 144 Pac. 1187.

74. See the statutes.

[a] In Georgia, the statute provides in effect that the accused may demand a trial at the term at which the indictment is found or at the next succeeding term thereafter. If not tried then he shall be absolutely discharged. This statute does not require him to make any further motion or demand at the second term, he may sit mute. *Gordon v. State*, 106 Ga. 121, 32 S. E. 32; *Flagg v. State*, 11 Ga. App. 37, 74 S. E. 562.

[b] The indictment must be pending when the demand for trial is made. No one can foresee whether future indictments, even for the same offense, may or may not be returned. If the defendant desires a demand for trial, he must enter such demand as to each indictment returned against him whether they be for the same transaction or even for the same offense. *Clay v. State*, 4 Ga. App. 142, 60 S. E. 1028.

[c] Where Made.—(1) The demand must be made in the court where the case is pending. *Hunley v. State*, 105 Ga. 636, 31 S. E. 543. (2) After a transfer of the cause to another court, the demand should be made in that court. *Hunley v. State*, 105 Ga. 636, 31 S. E. 543. (3) But a demand made before a transfer of the cause in the court in which the case is then pending may be insisted upon in the court to which the case is subsequently transferred. *Gordon v. State*, 106 Ga. 121, 32 S. E. 32.

[d] The demand may be waived by affirmative act of the defendant, but mere silence at the second term and failure to bring the court's attention to the demand does not amount to a waiver. Voluntary absence from the

was not given a speedy trial, must have placed himself on record in the attitude of demanding a trial, or at least of resisting a postponement,<sup>75</sup> especially when the accused has been tried, and there has been either a mistrial, or a reversal and remand for new trial.<sup>76</sup> In other states no demand of trial need be made,<sup>77</sup> or at least a demand for trial will be presumed if necessary to support an order of discharge.<sup>78</sup>

(III.) Application for and Order of Discharge. — In some states, an accused desiring to avail himself of the statute, must, before trial,<sup>79</sup> apply to the trial court<sup>80</sup> by motion for an order dismissing the prosecution and discharging him,<sup>81</sup> or, it has been held, he may apply to the trial court for a discharge on habeas corpus.<sup>82</sup> In some states, the accused,

court operates as a waiver but an involuntary absence does not. *Flagg v. State*, 11 Ga. App. 37, 74 S. E. 562.

[e] **New Demand.**—A demand for trial is exhausted and *functus officio* where the defendant is tried at the second term and convicted. Even if the case thereafter be reinstated upon the docket, if it be by the grant of the defendant's motion for new trial, another demand is necessary before he can claim the benefits arising from the right to demand a trial. *Clay v. State*, 4 Ga. App. 142, 60 S. E., 1028.

75. **Ark.**—*Fox v. State*, 102 Ark. 393, 144 S. W. 516; *Dillard v. State*, 65 Ark. 404, 46 S. W. 533. **Del.**—*State v. Tyre*, 6 Penne. 343, 67 Atl. 199. **Ill.** *People v. Fox*, 269 Ill. 300, 110 N. E. 26; *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 991, 54 Am. St. Rep. 447, 35 L. R. A. 176 (where accused is admitted to bail); *Skakel v. People*, 111 Ill. App. 509. **La.**—*State v. Banks*, 111 La. 22, 35 So. 370. **Nev.**—*Ex parte Tranner*, 35 Nev. 56, 126 Pac. 337, 41 L. R. A. (N. S.) 1095. **Okla.**—*Head v. State*, 9 Okla. Crim. 356, 131 Pac. 937, 44 L. R. A. (N. S.) 871; *Parker v. State*, 7 Okla. Crim. 238, 122 Pac. 1116, 124 Pac. 80. **R. I.**—*Ex parte Deslovers*, 35 R. I. 248, 256, 86 Atl. 657, sufficient demand.

[a] A failure to demand a trial and to object to a postponement or continuance of the cause is in law a waiver of the right to demand a dismissal on the ground of such postponements. *Parker v. State*, 7 Okla. Crim. 238, 122 Pac. 1116, 124 Pac. 80.

76. *State v. Lamphere*, 20 S. D. 98, 104 N. W. 1038 (demand for trial after mistrial); *State v. Miller*, 72 Wash. 154, 129 Pac. 1100, demand for new trial after reversal.

[a] **Statute Construed.**—A statute, requiring the dismissal of the prosecution if the defendant is not brought to trial within a given time after indictment found or information filed, imposes no initiative action on the defendant. The trial must be offered by the state within the statutory period or good cause for delay shown. But after a trial the statute is satisfied, the time for retrial is within the discretion of the court, and it is therefore incumbent upon the accused to at least manifest a desire for another trial before he is entitled to a dismissal on the ground of delay. *State v. Miller*, 72 Wash. 154, 163, 129 Pac. 1100.

77. *State v. Wear*, 145 Mo. 162, 198, 46 S. W. 1099; *Ex parte Chalfant*, 81 W. Va. 93, 93 S. E. 1032. See *State v. Miller*, 72 Wash. 154, 163, 129 Pac. 1100.

78. *State v. Wear*, 145 Mo. 162, 198, 46 S. W. 1099.

79. *People v. Hawkins*, 127 Cal. 372, 59 Pac. 697.

80. *In the Matter of Spradlend*, 38 Mo. 547.

81. **Cal.**—*Matter of Ford*, 160 Cal. 334, 116 Pac. 757, Ann. Cas. 1912D, 1267, 35 L. R. A. (N. S.) 882. **Ill.** *People v. Economac*, 243 Ill. 107, 90 N. E. 302; *Newlin v. People*, 221 Ill. 166, 175, 77 N. E. 529; *People v. Murphy*, 212 Ill. 584, 72 N. E. 902. **N. Y.** *McGowan v. Warden*, 155 App. Div. 484, 140 N. Y. Supp. 864. **Ore.**—*State v. Chapin*, 74 Ore. 346, 144 Pac. 1187.

82. See the following cases: *Cummins v. People*, 4 Colo. App. 71, 34 Pac. 734; *State v. Brodie*, 7 Wash. 442, 35 Pac. 137.

[a] **Contra.**—*In the Matter of Spradlend*, 38 Mo. 547, 548, in which the supreme court in denying a petition

having made a demand for trial, need not make any further demand or motion at the next succeeding term. If not brought to trial then, an acquittal results automatically by operation of law after the adjournment of the second term. No order of discharge is necessary.<sup>83</sup>

**Showing Required.** — In some states the accused seeking to be discharged for delay need only show that the time fixed by statute after information filed has expired,<sup>84</sup> and that the case has not been postponed on his application.<sup>85</sup> In others he must also show he is in custody,<sup>86</sup> or that he was ready for and demanded a trial, and objected to a postponement of the case.<sup>87</sup>

**Hearing.** — The trial court has no discretionary power to deny the motion for discharge on this ground. It must order the prosecution dismissed, unless good cause is shown to the contrary by the prosecution.<sup>88</sup>

**(IV.) Review.** — If the application for discharge is denied, the accused may have the action of the court reviewed on writ of error or appeal from the judgment in the case,<sup>89</sup> or he may, according to some authorities, apply to the appellate court for a discharge on habeas corpus,<sup>90</sup> or he may procure a writ of mandamus, if, for any reason,

for habeas corpus holds the application should be made to the trial court, and "moreover, no person can be discharged under the habeas corpus act who is imprisoned on an indictment, or by virtue of process or commitment to enforce such indictment."

83. *Mager v. State*, 21 Ga. App. 139, 94 S. E. 82; *Bishop v. State*, 11 Ga. App. 296, 75 S. E. 165; *Flagg v. State*, 11 Ga. App. 37, 74 S. E. 562; *Thornton v. State*, 7 Ga. App. 752, 67 S. E. 1055; *Nix v. State*, 5 Ga. App. 835, 63 S. E. 926.

[a] When a demand for trial is entered, (1) the state is bound to try the accused at the term when the demand is entered or at the next succeeding term. *Mager v. State*, 21 Ga. App. 139, 94 S. E. 82. (2) The fact that a mistrial is declared at the next term after the defendant had made his demand for trial is not a reason for refusing his discharge. The trial court could try the defendant before another jury at the same term of court. *Mager v. State*, 21 Ga. App. 139, 94 S. E. 82.

[b] Although the accused is absent from court at the second term because he is imprisoned on another charge, neither he nor his attorney are under duty to call the court's attention to his imprisonment. It was the duty of the court to send for him and put him on trial. Failure to do so operates to discharge him absolutely. *Flagg v. State*, 11 Ga. App. 37, 74 S. E. 562.

84. *People v. Morino*, 85 Cal. 515, 24 Pac. 892.

85. *People v. Morino*, 85 Cal. 515, 24 Pac. 892.

86. *State v. Williams*, 35 S. C. 160, 14 S. E. 309.

87. *Parker v. State*, 7 Okla. Crim. 233, 122 Pac. 1116, 124 Pac. 80.

88. *In re Begerow*, 133 Cal. 349, 65 Pac. 828, 85 Am. St. Rep. 178, 56 L. R. A. 513; *People v. Morino*, 85 Cal. 515, 24 Pac. 892.

89. *People v. Murphy*, 212 Ill. 584, 72 N. E. 902. But see *Com. v. Fisher*, 226 Pa. 189, 75 Atl. 204, 134 Am. St. Rep. 1027, 26 L. R. A. (N. S.) 1009. Compare *Matter of Ford*, 160 Cal. 334, 116 Pac. 757, Ann. Cas. 1912D, 1267, 35 L. R. A. (N. S.) 882, an appeal is no remedy precluding mandamus or habeas corpus, for the accused cannot appeal until after trial, and he may never be brought to trial.

90. Cal.—*Matter of Ford*, 160 Cal. 334, 116 Pac. 757, Ann. Cas. 1912D, 1267, 35 L. R. A. (N. S.) 882; *In re Begerow*, 133 Cal. 349, 65 Pac. 828, 85 Am. St. Rep. 178, 56 L. R. A. 513. Kan.—*In re McMicken*, 39 Kan. 406, 18 Pac. 473. Mo.—See *State v. Wear*, 145 Mo. 162, 195, 46 S. W. 1099. Mont.—*United States v. Fox*, 3 Mont. 512. Okla.—*Eubanks v. Cole*, 4 Okla. Crim. 25, 109 Pac. 736.

*Contra*, *People v. Murphy*, 212 Ill. 584, 72 N. E. 902; *Ex parte McGehan*, 22 Ohio St. 442.



he cannot proceed by habeas corpus.<sup>91</sup> But the order overruling a motion to discharge the defendant is not a final and appealable judgment.<sup>92</sup>

(V.) **Effect of Discharge.** — A discharge of an accused for delay in bringing him to trial is equivalent to a verdict of acquittal with a judgment thereon under some statutes,<sup>93</sup> but not under others.<sup>94</sup>

**3. Time for Preparation for Trial.** — An accused and his attorney are entitled to a reasonable time to prepare for trial.<sup>95</sup> Some statutes specifically prescribe the shortest time that may be allowed him for this purpose.<sup>96</sup> This right is absolute if a request therefor is made

[a] **A defendant out on bail who voluntarily submits himself to imprisonment cannot invoke writ.** *Matter of Ford*, 160 Cal. 334, 116 Pac. 757, Ann. Cas. 1912D, 1267, 35 L. R. A. (N. S.) 882. See also 10 STANDARD PROC. 921, note 86.

91. *Matter of Ford*, 160 Cal. 334, 116 Pac. 757, Ann. Cas. 1912D, 1267, 35 L. R. A. (N. S.) 882, *disapproving* *Strong v. Grant*, 99 Cal. 100, 33 Pac. 733; *Eubanks v. Cole*, 4 Okla. Crim. 25, 109 Pac. 736.

[a] **Where Defendant Is on Bail.** *Eubanks v. Cole*, 4 Okla. Crim. 25, 109 Pac. 736.

92. *Hensley v. State*, 175 Ind. 16, 93 N. E. 211.

93. *Ind.*—*McGuire v. Wallace*, 109 Ind. 284, 10 N. E. 111. *Mo.*—*State v. Wear*, 145 Mo. 162, 46 S. W. 1099. *Ohio.* *Johnson v. State*, 42 Ohio St. 207; *Erwin v. State*, 29 Ohio St. 186, 23 Am. Rep. 733.

94. *Seiwald v. People*, 182 Pac. 20; *In re Garvey*, 7 Colo. 502, 4 Pac. 758; *State v. Garthwaite*, 23 N. J. L. 143.

95. *Ariz.*—*Shaffer v. Terr.*, 14 Ariz. 329, 127 Pac. 746. *Colo.*—*Powers v. People*, 53 Colo. 43, 123 Pac. 642. *Fla.* *Moore v. State*, 59 Fla. 23, 52 So. 971. *Ga.*—*Hunt v. State*, 102 Ga. 569, 27 S. E. 670; *Hall v. State*, 22 Ga. App. 112, 95 S. E. 936. *Ill.*—*People v. Bopp*, 279 Ill. 184, 116 N. E. 679; *People v. Scigliano*, 194 Ill. App. 345. *Ky.*—*McDaniel v. Com.*, 181 Ky. 766, 205 S. W. 915.

*La.*—*State v. Scott*, 110 La. 369, 34 So. 479; *State v. Collins*, 104 La. 629, 29 So. 180, 81 Am. St. Rep. 150; *State v. Pool*, 50 La. Ann. 449, 23 So. 503. *Okla.* *Harrison v. State*, 9 Okla. Crim. 658, 132 Pac. 1121; *State ex rel. Tucker v. Davis*, 9 Okla. Crim. 94, 130 Pac. 962, 44 L. R. A. (N. S.) 1083. *Pa.*—*Com. v. Jester*, 256 Pa. 441, 100 Atl. 993. *Phil.* *Isl.*—*Schiels v. McMicking*, 23 Phil. Isl. 526, 535. *Tex.*—*Jones v. State* (Tex.

*Crim.*), 204 S. W. 437. *Wis.*—*Murphy v. State*, 131 Wis. 420, 111 N. W. 511.

[a] **A denial to the defendant's counsel of sufficient time in which to prepare the case for trial is a denial of a substantial right and renders the right to counsel a meaningless formality and a barren right.** *Shaffer v. Territory*, 14 Ariz. 329, 127 Pac. 746. See also *State v. Bridges*, 109 La. 530, 33 So. 589.

[b] **What is a reasonable time is to be determined from all the facts and circumstances of the case.** *Moore v. State*, 59 Fla. 23, 52 So. 971, six days after preceding mistrial is not unreasonable.

[c] **It is within the sound discretion of the court that time shall be allowed counsel to prepare for trial.** *Charlton v. State*, 106 Ga. 400, 32 S. E. 347; *State v. Wilson*, 33 La. Ann. 261. See *Morris v. State*, 193 Ala. 1, 68 So. 1003, holding that the discretion of the trial court is not shown to be abused by an arraignment of the defendant on the night the indictment was found and by setting the case for trial within 48 hours after indictment found, when he made no application for process for witness or offer of showings for absent witness, and when he examined no witness on the trial except himself.

**Continuance for want of time to prepare for trial**, see 5 STANDARD PROC. 468.

**Time allowed defendant to plead to indictment**, see 2 STANDARD PROC. 879.

**Time of trial after mistrial**, see *infra*, VII, W.

96. See the statutes and *Ia.*—*State v. King*, 97 Iowa 440, 66 N. W. 735. *N. Y.*—*People v. Harper*, 139 App. Div. 344, 124 N. Y. Supp. 12. *Tex.*—*Templeton v. State*, 66 Tex. Crim. 369, 146 S. W. 933; *Keener v. State*, 51 Tex. Crim. 590, 103 S. W. 904; *Evans v. State*, 36 Tex. Crim. 32, 35 S. W. 169.

in time,<sup>97</sup> but is waived by a failure to make a seasonable request,<sup>98</sup> or by requesting a trial at an earlier date.<sup>99</sup>

**4. Trial Before Regular Hour for Opening Court.**—The trial court may, in its discretion, begin the trial of a criminal case before the regular hour for opening court.<sup>1</sup>

**5. Trial at Night.**—The trial court has a wide discretion as to holding of night sessions of criminal trials,<sup>2</sup> subject to the limitation, that the defendant's right to a fair trial must not be prejudiced.<sup>3</sup>

**C. PREFERRED CAUSES.**—By statute,<sup>4</sup> and rule of court,<sup>5</sup> certain specified causes are entitled to preference or precedence in the trial or hearing thereof. In the absence of statute or rule of court, the court has inherent power over its calendar and may give preferences to causes upon a proper showing.<sup>6</sup>

[a] Under a statute allowing the accused two days after arrest in which to file written pleadings, it is not necessary that the accused, to protect himself in the guaranty, make known to the court what pleadings he desires to present, or that he desires to present any pleadings. *Evans v. State*, 36 Tex. Crim. 32, 35 S. W. 169.

97. *State v. Chase*, 17 N. D. 429, 117 N. W. 537. See *Parks v. Com.*, 145 Ky. 364, 140 S. W. 544.

98. *State v. Chase*, 17 N. D. 429, 117 N. W. 537.

[a] The time or the stage of the proceedings when the request must be made is not prescribed by statute, but a reasonable construction is that the request must ordinarily be made immediately after plea, and before any other step preliminary to or preparatory to trial is taken. But particular circumstances may control as to whether the request is made in time, or whether it should be granted although not made in time. *State v. Chase*, 17 N. D. 429, 117 N. W. 537.

99. *State v. King*, 97 Iowa 440, 66 N. W. 735.

1. *State v. Bethune*, 86 S. C. 143, 67 S. E. 466.

2. Ark.—*Jones v. State*, 61 Ark. 88, 100, 32 S. W. 81. Ga.—*Tiller v. State*, 110 Ga. 250, 34 S. E. 204. Ind.—*Wartena v. State*, 105 Ind. 445, 5 N. E. 20. Wash.—*State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216. W. Va.—*State v. Belknap*, 39 W. Va. 427, 19 S. E. 507.

3. *State v. Belknap*, 39 W. Va. 427, 19 S. E. 507.

[a] Illness of defendant's leading

counsel, necessitating his absence from the night session, does not render the holding of a night session erroneous, if the defendant has other counsel. *Jones v. State*, 61 Ark. 88, 100, 32 S. W. 81.

4. See the statutes.

[a] **Suits Relating to Taxes or Licenses.**—*Morgan's L. & T. R. & S. S. Co. v. Pecot*, 50 La. Ann. 737, 23 So. 948.

[b] **Actions in which executors, trustees or receivers, etc., are sole parties.** *Jackson v. Jackson*, 44 Misc. 44, 89 N. Y. Supp. 715; *Ahern v. Ahern*, 29 Misc. 421, 61 N. Y. Supp. 931.

[c] **Action by and against sheriff in official capacity.** *Walker v. Tamsen*, 18 Misc. 734, 43 N. Y. Supp. 507.

5. See the rules of court.

[a] **Actions in Which a Defendant Is Imprisoned.**—(1) *Knox v. Dubroff*, 17 App. Div. 290, 45 N. Y. Supp. 271, 4 N. Y. Ann. Cas. 251. (2) But a rule of court giving preference to an action in which a defendant is imprisoned under an order of arrest does not apply when the defendant has been released on bail. *Boeger v. Hoffman*, 58 App. Div. 540, 69 N. Y. Supp. 258.

6. *In re Wincox's Estate*, 85 Ill. App. 613; *Honeywell v. Shaffer*, 18 Civ. Pro. (N. Y.) 336, 9 N. Y. Supp. 540, 30 N. Y. St. 831; *Smith v. Keepers*, 5 N. Y. Civ. Proc. 66, 66 How. Pr. 474.

[a] But simply because it would be advantageous to a party to have his cause promptly disposed of does not authorize the court, in its discretion, to give preference to a cause. *Haskin v. Murray*, 29 App. Div. 370, 51 N. Y. Supp. 542.

**Application and Order.** — Courts will not grant a cause precedence except upon a proper application<sup>7</sup> made at the proper time.<sup>8</sup> By virtue of statute,<sup>9</sup> when the right to a preference depends upon facts which do not appear in the pleadings or other papers upon which the cause is to be tried or heard,<sup>10</sup> the party desiring a preference must procure an order therefor<sup>11</sup> by timely application usually made before notice of trial,<sup>12</sup> usually upon notice to the adverse party,<sup>13</sup> and upon a showing of special facts and circumstances entitling the cause to a preference.<sup>14</sup> A copy of the order must be served with or before the notice of trial or argument.<sup>15</sup> When no order of court is required, a claim for preference may usually be inserted in the note of issue to be filed with the clerk.<sup>16</sup> In such case the service of a notice of trial before making the application for a preference does not deprive the party of his right to a preference.<sup>17</sup>

**D. ADJOURNMENT OR RECESS.** — **1. In Civil Actions.** — Pending trial of a civil action, the court may in its discretion, take recesses, adjourn the cause or postpone the trial from time to time<sup>18</sup> as the case

7. See *Barron v. People*, 1 Barb. (N. Y.) 136, as to who may move criminal cases out of its order on the calendar, under a rule of court.

[a] A cause in which the commonwealth is interested will not be granted a precedence unless asked for by the commonwealth. An application by an individual party is not sufficient. *Turnbull v. Com.*, 1 Binn. (Pa.) 45.

8. See *infra*, this note.

[a] On the first day of the jury period, the attorney general must ask that precedence be given a cause in which the commonwealth is interested. *Com. v. Pascalis*, 1 Binn. (Pa.) 37.

9. N. Y. Code Civ. Proc. §793.

10. *Robertson v. Schellhaas*, 62 How. Pr. (N. Y.) 489.

11. See *Robertson v. Schellhaas*, 62 How. Pr. (N. Y.) 489.

12. *Robertson v. Schellhaas*, 62 How. Pr. (N. Y.) 489. See the N. Y. Code Civ. Proc. §793, which makes special provision for the counties of New York, Bronx, Kings, Queens and Erie.

[a] Right must be asserted when the issues are first noticed for trial and placed upon the calendar. *Gegan v. Union Trust Co.*, 120 App. Div. 382, 105 N. Y. Supp. 243.

[b] An amendment to the complaint which does not change the original cause of action does not revive the right to claim a preference lost by a failure to assert it when the first notice of trial is filed. *Gegan v. Union*

*Trust Co.*, 120 App. Div. 382, 105 N. Y. Supp. 243.

The right to a preference is waived by failure to make a timely application. *City National Bank v. National Park Bank*, 62 How. Pr. (N. Y.) 495.

13. N. Y. Civ. Proc. §793.

14. *Gegan v. Union Trust Co.*, 120 App. Div. 382, 105 N. Y. Supp. 243.

15. *City National Bank v. National Park Bank*, 62 How. Pr. (N. Y.) 495; *Robertson v. Schellhaas*, 62 How. Pr. (N. Y.) 489; *Manhattan Co. v. Dunn*, 13 N. Y. Civ. Proc. 166.

16. N. Y. Code Civ. Proc. §793. See also *Eastern Nat. Bank v. Brunswick Chemical Wks.*, 18 Abb. N. C. (N. Y.) 473, as to an order of court directing the clerk to put the cause upon the preferred calendar, under previous statute.

17. *Smith v. Keepers*, 5 N. Y. Civ. Proc. 66, 66 How. Pr. 474.

18. Ala.—*Hudmon v. Trammell*, 86 Ala. 472, 6 So. 4. Cal.—*Wiedekind v. Tuolumne County Water Co.*, 83 Cal. 198, 23 Pac. 311. Ga.—*Watson v. Warnock*, 31 Ga. 694. Ill.—*Illinois Cent. R. Co. v. Slater*, 139 Ill. 190, 28 N. E. 830; *Kozlowski v. Chicago*, 113 Ill. App. 513. Kan.—See *Stager v. Harrington*, 27 Kan. 414. Ky.—*Rogers v. Louisville & N. R. Co.*, 17 Ky. L. Rep. 1421, 35 S. W. 109. N. Y.—*Redfield v. Florence*, 2 E. D. Smith 339; *Silver v. Elias*, 34 Misc. 760, 68 N. Y. Supp. 851. N. C. *Phillips v. Holland*, 78 N. C. 31. Tex. *Griffin v. McKinney*, 25 Tex. Civ. App.



may require, and upon such terms as it imposes.<sup>19</sup> But it has been held that a trial should be completed at the term at which it is commenced so far as the introduction of testimony is concerned, at least.<sup>20</sup> The court is not adjourned simply because the judge leaves the court room pending the deliberation of the jury.<sup>21</sup>

**2. In Criminal Prosecutions.**—During the trial of a criminal prosecution, the court may in its discretion adjourn or suspend proceedings temporarily,<sup>22</sup> and such action of the court will not be reviewed unless an abuse of discretion to the injury of the accused ap-

432, 62 S. W. 78. *Wash.*—Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209.

In justice's court, see 18 STANDARD PROC. 54.

[a] The discretion of the court in passing on an application for a postponement of a trial is more full than its discretion as to continuances. *Louisville & S. Tr. Co. v. Montgomery*, 186 Ind. 384, 115 N. E. 673.

Pending deliberation of jury, see Cal. Code Civ. Proc. §617.

[b] **To Await Witnesses.**—(1) *Illinois Cent. R. Co. v. Slater*, 139 Ill. 190, 28 N. E. 830. (2) To enable defendant to procure witnesses to rebut testimony given on behalf of plaintiff after the case has been reopened for further proof. *Phelps v. Utley* (Vt.), 101 Atl. 1011. (3) But the court may decline to stop the trial and wait for a witness who has not been subpoenaed, but who had simply promised to come to trial. *Kozlowski v. Chicago*, 113 Ill. App. 513. (4) Or when the party has not exercised proper diligence in procuring the attendance of his witnesses. *Central Coal & Coke Co. v. Graham*, 129 Ark. 550, 196 S. W. 940.

[c] **Illness of Counsel.**—(1) *McCready v. Lindenborn*, 37 App. Div. 425, 56 N. Y. Supp. 54. (2) A denial of a request to postpone a trial because of illness of counsel is not reversible error unless the party is prevented from having a fair trial. *Wiedekind v. Tuolumne Water Co.*, 83 Cal. 198, 23 Pac. 311.

[d] When the attorney unexpectedly withdraws from the case, without fault of the party. *Leahy v. Dunlap*, 6 Colo. 552.

[e] A refusal to postpone submission of a case to enable a party to find a misplaced deposition is within the discretion of the court, when both sides have announced that they have no further testimony. *Owensboro Wagon Co.*

*v. San Antonio Tie & Lumber Co.* (Tex. Civ. App.), 199 S. W. 701.

[f] An application or demand which necessitates an adjournment is equivalent to an application for an adjournment. *Ives v. Quinn*, 7 Misc. 660, 28 N. Y. Supp. 267, 58 N. Y. St. 390. But compare *New York Lumber & Storage Co. v. Noone*, 46 Misc. 470, 92 N. Y. Supp. 349.

Admonishing jury on adjournment of court, see 17 STANDARD PROC. 467.

Adjournments by referee, see 22 STANDARD PROC. 559.

As to continuances, see the title, "Continuances."

Adjournment of preliminary examination, see 21 STANDARD PROC. 503.

19. *St. Louis & S. F. R. Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. 971; *Poland v. Minshall*, 96 N. Y. Supp. 200.

20. *Butler v. McMillen*, 13 Kan. 385. 21. *Chichester v. Winton Motor Carriage Co.*, 110 App. Div. 78, 96 N. Y. Supp. 1006, 17 N. Y. Ann. Cas. 450.

22. *U. S.*—*Younge v. United States*, 223 Fed. 941, 139 C. C. A. 421. *Ala.* *Brown v. State* (Ala. App.), 75 So. 174. *Ga.*—*Herndon v. State*, 111 Ga. 178, 36 S. E. 634; *Hightower v. State*, 9 Ga. App. 236, 70 S. E. 1022. *Va.*—*Taylor v. Com.*, 77 Va. 692.

[a] To permit an expert to examine an indentation in the skull of the accused to enable him to testify as to the defendant's sanity. *Herndon v. State*, 111 Ga. 178, 36 S. E. 634.

[b] But at common law a criminal trial once commenced must be carried through to its close, and a failure to finish it is equivalent to an acquittal. The trial of all indictments and informations should be completed at the first term at which the defendant appears, unless continued for cause. And at the next term, in the absence of statute providing otherwise, the trial must be recommenced and cannot be taken up where it was left off. *Bufler v. McMillen*, 13 Kan. 385.

pears.<sup>23</sup> But the circumstances may be such that it is prejudicial error to refuse an application for an adjournment.<sup>24</sup>

The court may, in its discretion, adjourn the trial to permit the prosecution or defendant to procure the attendance of a witness or evidence,<sup>25</sup> or to permit counsel to confer with witnesses.<sup>26</sup> So also the court may adjourn the trial because of the illness of persons connected with the trial,<sup>27</sup> or to correct an error in the copy of the com-

23. *Herndon v. State*, 111 Ga. 178, 36 S. E. 634; *Hightower v. State*, 9 Ga. App. 236, 70 S. E. 1022; *Gamblin v. State*, 12 Okla. Crim. 381, 157 Pac. 367; *Havill v. United States*, 5 Okla. Crim. 334, 115 Pac. 119.

[a] A postponement for thirty-three days over the objection of the defendant is an abuse of discretion. *State v. Tracy*, 88 Kan. 153, 127 Pac. 610.

24. **U. S.**—*Younge v. United States*, 223 Fed. 941, 139 C. C. A. 421. **Kan.** *State v. Crawford*, 9 Kan. App. 886, 61 Pac. 316. **Ky.**—*Etly v. Com.*, 130 Ky. 723, 113 S. W. 896. **Tex.**—*Jones v. State*, 81 Tex. Crim. 230, 194 S. W. 1109; *Sessions v. State* (Tex. Crim.), 98 S. W. 243; *Mahs v. State*, 54 Tex. Crim. 390, 113 S. W. 11.

See *State v. Finn*, 199 Mo. 597, 98 S. W. 9, holding no abuse of discretion shown.

25. **U. S.**—*Younge v. United States*, 223 Fed. 941, 139 C. C. A. 421. **Ala.** *Eatman v. State*, 139 Ala. 67, 36 So. 16; *Wells v. State*, 131 Ala. 48, 31 So. 572; *Stokes v. State*, 13 Ala. App. 294, 69 So. 303. **Ark.**—*Johnson v. State*, 32 Ark. 309. **Ga.**—*Walker v. State*, 116 Ga. 537, 42 S. E. 787, 67 L. R. A. 426. **Ky.**—*McCreary v. Com.*, 163 Ky. 206, 173 S. W. 351. **Neb.**—*Ossenkop v. State*, 86 Neb. 539, 126 N. W. 72. **Okla.** *Gamblin v. State*, 12 Okla. Crim. 381, 157 Pac. 367; *Havill v. United States*, 5 Okla. Crim. 334, 115 Pac. 119. **Tex.** *Jones v. State*, 81 Tex. Crim. 230, 194 S. W. 1109; *Mason v. State*, 74 Tex. Crim. 256, 168 S. W. 115, Ann. Cas. 1917D, 1094; *Bennett v. State*, 39 Tex. Crim. 639, 48 S. W. 61; *Miller v. State* (Tex. Crim.), 50 S. W. 704. **Va.**—*Bennett v. Com.*, 106 Va. 834, 55 S. E. 698.

[a] **To Rebut Certain Unexpected Testimony of the Defendant.**—*Eatman v. State*, 139 Ala. 67, 36 So. 16.

[b] When some of defendant's witnesses are quarantined, the court on his application may postpone the trial until the release of the quarantine, 21

days later. *Ossenkop v. State*, 86 Neb. 539, 126 N. W. 72.

[c] But where it is not shown where a witness was at the time of the application or that there was any reasonable expectation of having his attendance within any reasonable time, the court may deny an application for a postponement of the trial. *Stephens v. State* (Tex. Crim.), 97 S. W. 483.

[d] Where there is no showing of diligence to procure the presence of a witness, a motion to postpone the trial, made after its commencement, will be overruled. *Welch v. State*, 50 Tex. Crim. 28, 95 S. W. 1035.

[e] Where a party desires to impeach a witness by stenographic notes taken on a former trial in another county, it is not an abuse of discretion to refuse to suspend the case to enable him to procure the notes, if the court allows the introduction of witnesses who testify in accord with such notes. *Helms v. State*, 136 Ga. 799, 72 S. E. 246.

26. *State v. Gosey*, 111 La. 616, 35 So. 786. See also *Perryman v. State*, 114 Ga. 545, 40 S. E. 746.

[a] But the court does not abuse its discretion in refusing to stop the trial to enable the defendant to confer with his witnesses, where he had ample time therefor before trial. *Sapp v. State*, 2 Ala. App. 190, 56 So. 45. See also *Davis v. State*, 57 Tex. Crim. 545, 124 S. W. 104.

27. See *infra*, this note.

[a] **Illness of Accused.**—*Curtis v. Com.*, 87 Va. 589, 13 S. E. 73.

[b] **Illness of Juror.**—*State v. Garity*, 98 Iowa 101, 67 N. W. 92. Discharge of jury on this ground, see 17 STANDARD PROC. 616.

[c] **Illness of Witness.**—*Gale v. State*, 135 Ga. 351, 69 S. E. 537; *Casey v. State*, 96 Miss. 427, 50 So. 978.

[d] But when the defendant is represented by counsel, the absence or illness of one of his attorneys does not

plaint on which the prosecution is based.<sup>28</sup> The trial judge may suspend proceedings temporarily for the purpose of expediting the orderly disposition of other business of the court.<sup>29</sup> He may suspend trial to investigate a charge of bribery of a witness.<sup>30</sup> But he cannot be required to stop a trial already commenced and enter into an inquiry as to the prejudice of a juror.<sup>31</sup> Statutes sometimes provide that while the jury is absent, the court may adjourn from time to time as to other business, but it shall nevertheless open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged.<sup>32</sup>

**V. PLACE OF TRIAL.**—The trial of civil actions and criminal prosecutions should be held at the proper place for holding court,<sup>33</sup> and the proper county for trial,<sup>34</sup> in accordance with rules elsewhere discussed. Where the statute does not name the place of trial it may be held at the residence of a party or witness who is ill, or at any convenient place, within the jurisdiction.<sup>35</sup> But if the place of trial is designated by law, court must be held there;<sup>36</sup> it cannot be held at any other place, over the objection of a party to the action, for any reason not within the statute.<sup>37</sup> Where required to be held at the county court house it cannot be held at the home of a witness who is ill.<sup>38</sup> If, however, the statute merely requires the trial to be had at the county seat, court may be held in any building in such city or town,<sup>39</sup> *e. g.*, the residence of a judge,<sup>40</sup> or a party,<sup>41</sup> or a witness,<sup>42</sup>

require an adjournment. *Hightower v. State*, 9 Ga. App. 236, 70 S. E. 1022; *Middleton v. Com.*, 143 Ky. 456, 136 S. W. 871.

28. *State v. Libby*, 85 Me. 169, 26 Atl. 1015; *Com. v. Kelly*, 12 Gray (Mass.) 123.

29. *Ashley v. State*, 3 Ala. App. 84, 57 So. 1027; *Perry v. State*, 116 Ga. 850, 43 S. E. 253.

[a] **To draw from jury box names of jurors sufficient names to complete a venire partly drawn for another case.** *Ashley v. State*, 3 Ala. App. 84, 57 So. 1027.

30. *People v. Salsbury*, 134 Mich. 537, 96 N. W. 936.

**As to arrest of witnesses for perjury on trial**, see *infra*, VII, R, 5.

31. *State v. Howard*, 17 N. H. 171, 186.

32. See the statutes, and the following: **Nev.**—*State v. Jackman*, 31 Nev. 511, 104 Pac. 13. **Okla.**—*Ex parte Mingle*, 2 Okla. Crim. 708, 104 Pac. 68. **S. D.**—*State v. McDonald*, 16 S. D. 78, 91 N. W. 447.

33. See 6 STANDARD PROC. 22, et seq.

34. See the title, "Venue."

**Venue of preliminary examination**, see 21 STANDARD PROC. 505.

35. *Le Grange's Lessee v. Ward*, 11 Ohio 257.

36. See 6 STANDARD PROC. 25.

37. *Funk v. Carroll*, 96 Iowa 158, 64 N. W. 768; *People v. Pisano*, 142 App. Div. 524, 127 N. Y. Supp. 204.

[a] **An oral stipulation**, made in open court by the parties agreeing to a change of place of trial, is not sufficient under a statute requiring a written agreement. *Armstrong v. Loveland*, 99 App. Div. 28, 90 N. Y. Supp. 711, 15 N. Y. Ann. Cas. 292.

38. **Ark.**—*Mell v. State*, 133 Ark. 197, 202 S. W. 33, L. R. A. 1918D. 480. **Ia.**—*Funk v. Carroll*, 96 Iowa 158, 64 N. W. 768. **Miss.**—*Carter v. State*, 100 Miss. 342, 56 So. 454, Ann. Cas. 1914A, 369. **Tex.**—*Adams v. State*, 19 Tex. App. 1.

39. *Beville v. State*, 61 Fla. 8, 55 So. 854.

40. *Bates v. Sabin*, 64 Vt. 511, 24 Atl. 1013.

41. *Selleck v. Janesville*, 100 Wis. 157, 75 N. W. 975, 69 Am. St. Rep. 906, 41 L. R. A. 563.

42. **Ky.**—*Davis v. Com.*, 121 S. W. 429. **N. D.**—*State v. Tracy*, 34 N. D. 498, 158 N. W. 1069. **Can.**—*Rex v. Rogers*, 36 New Bruns. 1.



or a juror,<sup>43</sup> any of whom is too ill to attend court at the regular place; and even though this action may be an irregularity, it is not such as to affect the substantial rights of the adverse party.<sup>44</sup>

As a rule the trial of a cause cannot be held at chambers or in vacation.<sup>45</sup>

**VI. PROCEEDINGS PRELIMINARY TO TRIAL.** — A. IN GENERAL. — Matters relating to separate trials and severance,<sup>46</sup> consolidation of actions,<sup>47</sup> transfer of causes,<sup>48</sup> and the appointment of stenographers and reporters,<sup>49</sup> are treated elsewhere in this work.

B. ORDER OF SEPARATE TRIALS OF SEVERAL DEFENDANTS.<sup>50</sup> — Some statutes authorize defendants separately indicted for an offense growing out of the same transaction, to agree upon the order in which they shall be tried,<sup>51</sup> and to secure that right by filing an affidavit showing the facts.<sup>52</sup>

43. *Litchfield Bank v. Church*, 29 Conn. 137.

44. *State v. Tracy*, 34 N. D. 498, 158 N. W. 1069; *Selleck v. Janesville*, 100 Wis. 157, 75 N. W. 975, 69 Am. St. Rep. 906, 41 L. R. A. 563.

45. See 16 STANDARD PROC. 613.

46. See the titles, "Separate Trials;" "Severance."

47. See the title, "Consolidation of Actions."

Consolidating or trying indictments together, see the title "Separate Trials."

48. See the title "Transfer of Causes."

49. See the title, "Stenographers."

50. See generally the titles "Separate Trials;" "Severance."

51. *Sanchez v. State*, 70 Tex. Crim. 24, 156 S. W. 218; *Smith v. State*, 55 Tex. Crim. 326, 116 S. W. 572; *Puryear v. State*, 50 Tex. Crim. 454, 98 S. W. 258; *Brooks v. State*, 42 Tex. Crim. 347, 60 S. W. 53; *Forcey v. State*, 29 Tex. App. 408, 16 S. W. 261, under art. 707 of the Code of Crim. Proc.

[a] Transaction defined, see *Anderson v. State*, 56 Tex. Crim. 360, 120 S. W. 462.

[b] If the severance would operate as a continuance, it may be denied. *Wilson v. State*, 46 Tex. Crim. 523, 81 S. W. 34.

[c] By showing an agreement of the other party to turn state's evidence, the state can defeat the affiant's motion. *Oates v. State*, 48 Tex. Crim. 131, 86 S. W. 769.

[d] When both defendants ask that the other be first tried, the court must

designate the order of their respective trials. *Howard v. State*, 79 Tex. Crim. 267, 184 S. W. 505.

[e] A severance at a previous trial is not *res adjudicata* as to a severance at a subsequent trial, so that on the second trial the parties have the right to change the order of trial if they see fit. *Brooks v. State*, 42 Tex. Crim. 347, 60 S. W. 53.

As to order of trial of several code-defendants, see the title, "Separate Trials."

As to consolidation, see the title, "Consolidation of Actions."

52. *Wilson v. State*, 71 Tex. Crim. 330, 158 S. W. 1114; *Ryan v. State*, 64 Tex. Crim. 628, 142 S. W. 878; *Reed v. State*, 11 Tex. App. 509, 40 Am. Rep. 795.

[a] The affidavit must state (1) that the evidence of such party or parties is material for the defense of the affiant (*Marta v. State*, 81 Tex. Crim. 135, 193 S. W. 323; *Shaw v. State*, 39 Tex. Crim. 161, 45 S. W. 597, allegation must be positive in terms), and (2) that he verily believes there is not sufficient evidence against the party whose evidence is desired to secure his conviction. *Marta v. State*, 81 Tex. Crim. 135, 193 S. W. 323; *Reed v. State*, 11 Tex. App. 509, 40 Am. Rep. 795.

[b] When it would work a continuance of the case, the application should not be granted. *Burton v. State*, 65 Tex. Crim. 578, 146 S. W. 186; *Evans v. State*, 46 Tex. Crim. 72, 80 S. W. 374.

[c] The state may file affidavits in opposition to the motion of the accused for a severance. *Grooms v. State*, 40

C. FURNISHING ACCUSED WITH LIST OF GRAND JURORS. — At common law it is not necessary to serve the defendant before trial with a list of the names of the grand jurors who returned the indictment.<sup>53</sup>

D. FURNISHING ACCUSED WITH LIST OR NOTICE OF WITNESSES OR EVIDENCE. — 1. **List or Notice of Witnesses.** — a. *In the Absence of Statute.* — In the absence of statute requiring it a defendant accused of crime is not entitled to a list of the witness examined before the grand jury, or of the witnesses to be produced against him on the trial.<sup>54</sup> And it has been held, the court cannot in advance of the trial require the prosecution to furnish the defendant such a list,<sup>55</sup> although after the cause has been set down for trial, the court, on an application for a continuance on the ground of want of opportunity to sufficiently prepare for trial because of ignorance as to the witnesses for the prosecution, can exercise its discretion and continue the case, or require a list of the witnesses to be given.<sup>56</sup>

b. *Under Statute.* — Statutes sometimes require a delivery to persons accused of crime or of certain specified crimes,<sup>57</sup> a specified time before trial,<sup>58</sup> a list containing the names<sup>59</sup> and places of abode<sup>60</sup> of

Tex. Crim. 319, 50 S. W. 370; Reed v. State, 11 Tex. App. 509, 40 Am. Rep. 795.

53. Fouts v. State, 8 Ohio St. 98, overruling Mahan v. State, 10 Ohio 233.

54. U. S.—Thiede v. Utah, 159 U. S. 510, 514, 16 Sup. Ct. 62, 40 L. ed. 237 (under Utah practice); Ball v. United States, 147 Fed. 32, 78 C. C. A. 126, under Alaska practice. Cal.—People v. Neary, 104 Cal. 373, 37 Pac. 943. Fla. Padgett v. State, 64 Fla. 389, 59 So. 946, Ann. Cas. 1914B, 897; Baker v. State, 51 Fla. 1, 40 So. 673. La.—State v. Daspit, 129 La. 752, 56 So. 661; State v. Kane, 36 La. Ann. 153. Mo.—State v. Nugent, 71 Mo. 136. S. C.—Spartanburg v. Parris, 85 S. C. 227, 67 S. E. 246; State v. Robison, 61 S. C. 106, 39 S. E. 247. Utah.—People v. Thiede, 11 Utah 241, 39 Pac. 837. Wis.—Cornell v. State, 104 Wis. 527, 80 N. W. 745.

[a] The constitutional provision giving the defendant a right to be confronted with the witnesses against him does not entitle the defendant to a list of witnesses examined by the grand jury. Wilson v. United States, 221 U. S. 361, 375, 31 Sup. Ct. 538, 55 L. ed. 771, Ann. Cas. 1912D, 558; United States v. Aviles, 222 Fed. 474.

55. United States v. Aviles, 222 Fed. 474; State v. Blackman, 39 Ia. Ann. 847, 2 So. 588. But see United States v. Southmayd, 6 Biss. (U. S.) 321, 27 Fed. Cas. No. 16,361, holding that in all cases in which there has been no preliminary examination, the court

may, in its discretion, order a list of the witnesses sworn before the grand jury to be furnished to the accused.

56. United States v. Aviles, 222 Fed. 474.

57. See *infra*, this note.

[a] In Capital Cases.—Com. v. Edwards, 4 Gray (Mass.) 1; Colbert v. State, 4 Okla. Crim. 500, 113 Pac. 558.

[b] The federal statute applies only to the trial of treason and capital cases. Jones v. United States, 162 Fed. 417, 89 C. C. A. 303; Balliet v. United States, 129 Fed. 689, 64 C. C. A. 201; United States v. Williams, 1 Cranch C. C. 178, 28 Fed. Cas. No. 16,709.

58. Thiede v. Utah, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237; Logan v. United States, 144 U. S. 263, 304, 12 Sup. Ct. 617, 36 L. ed. 429; Franklin v. State, 9 Okla. Crim. 178, 131 Pac. 183, "at least two days before the case is called for trial."

[a] Fractions of a day are to be disregarded. Franklin v. State, 9 Okla. Crim. 178, 131 Pac. 183.

59. State v. Burke, 54 N. H. 92.

[a] The failure to give the Christian name of the witness does not disqualify him, where the defendant is not prejudiced. Walker v. State, 10 Okla. Crim. 533, 139 Pac. 711.

[b] If the list contains the name by which witness is known, it is sufficient although it does not contain his true name. State v. Burke, 54 N. H. 92.

60. Lord v. State, 18 N. H. 173.

witnesses to be used against them on the trial,<sup>61</sup> or a list of the witnesses examined before the grand jury in the particular case.<sup>62</sup> Some statutes provide for a delivery on<sup>63</sup> or before<sup>64</sup> arraignment, of a copy of the indictment including the list of witnesses endorsed thereon,<sup>65</sup> or provide for a delivery of a list upon request.<sup>66</sup> And some forbid the prosecuting attorney from introducing any witness, who was not examined before the grand jury or magistrate, and the minutes of whose testimony were not presented with the indictment, unless he give the defendant or his attorney, if not found in the county,<sup>67</sup> a

[a] In designating the place of abode, (1) no particular formality is required. Any mode which gives the information with sufficient clearness and certainty, so that the respondent can readily understand it, is sufficient. *Lord v. State*, 18 N. H. 173, 177. (2) It is sufficient to give their names and add "all of Konawa, Okla." *Franklin v. State*, 9 Okla. Crim. 178, 131 Pac. 183.

61. *U. S.*—*Wilson v. United States*, 221 U. S. 361, 375, 31 Sup. Ct. 538, 55 L. ed. 771, Ann. Cas. 1912D, 558. *Md.* *Schaumloeffel v. State*, 102 Md. 470, 62 Atl. 803. *N. H.*—*Lord v. State*, 18 N. H. 173. *Okla.*—*State v. Frisbee*, 8 Okla. Crim. 406, 127 Pac. 1091; *Colbert v. State*, 4 Okla. Crim. 500, 113 Pac. 558.

[a] The federal statute does not apply to courts of territories. It applies only to trials in the United States courts. *Thiede v. Utah*, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237; *Ball v. United States*, 147 Fed. 32, 78 C. C. A. 126.

Setting out names of witnesses in preliminary complaint, see 12 STANDARD PROC. 140.

62. *Echols v. State*, 101 Ga. 531, 29 S. E. 14; *Com. v. Walton*, 17 Pick. (Mass.) 402.

[a] The names of all the witnesses to be used on the trial need not be furnished under a statute entitling the accused to a list of witnesses on whose testimony the charge against him is founded. *Echols v. State*, 101 Ga. 531, 29 S. E. 14; *Inman v. State*, 72 Ga. 269; *Com. v. Walton*, 17 Pick. (Mass.) 403.

[b] The names of witnesses examined before the grand jury in other cases need not be furnished. *Com. v. Edwards*, 4 Gray (Mass.) 1.

63. *People v. Neary*, 104 Cal. 373, 37

Pac. 943. See also 2 STANDARD PROC. 862, note 5.

64. *Heller v. People*, 2 Colo. App. 459, 31 Pac. 773; *People v. Pennington*, 267 Ill. 45, 107 N. E. 871.

65. *Askew v. People*, 23 Colo. 446, 48 Pac. 524.

Indorsement of names of witnesses on indictment and information, see 12 STANDARD PROC. 240, 276.

Delivery of copy of indictment, see the title "Service of Process and Papers."

[a] The witnesses contemplated by the statute are those who have testified before the grand jury, and those who are known by the prosecution at the time of arraignment to be material witnesses. *Askew v. People*, 23 Colo. 446, 48 Pac. 524.

[b] Application of Statute To Information.—A statute requiring a list of witnesses to be indorsed on the indictment has no application to an information and the defendant, prosecuted by information, is not entitled to a list of witnesses. *People v. Neary*, 104 Cal. 373, 37 Pac. 943.

[c] Second Trial.—A statute requiring delivery previous to arraignment does not apply to the second trial of the defendant. *Heller v. People*, 2 Colo. App. 459, 31 Pac. 773.

66. *Giano v. People*, 30 Colo. 20, 69 Pac. 504, in cases other than felonies.

[a] A request after arraignment on the eve of trial comes too late. *Giano v. People*, 30 Colo. 20, 69 Pac. 504.

[b] Before waiving arraignment and pleading, the request must be made. *Kelly v. People*, 132 Ill. 363, 371, 24 N. E. 56.

67. *State v. Kiefer*, 172 Iowa 306, 151 N. W. 440; *State v. Hasty*, 121 Iowa 507, 96 N. W. 1115. Compare *State v. Russell*, 98 Iowa 652, 68 N. W. 433.



notice in writing,<sup>68</sup> stating the name, place of residence,<sup>69</sup> and occupation of such witness,<sup>70</sup> and the substance of what he expects to prove by him.<sup>71</sup>

The courts have no power to deprive the defendant of this right to a list of witnesses,<sup>72</sup> but he may waive it,<sup>73</sup> either by an affirmative act<sup>74</sup> or by failure to make proper objection.<sup>75</sup>

The competency of witnesses whose names are not on the indictment or list is elsewhere discussed.<sup>76</sup>

**Objection.** — When no list of witnesses such as the statute requires has been furnished the defendant, he must make a timely<sup>77</sup> demand

68. *State v. Butler*, 157 Iowa 163, 138 N. W. 383; *State v. Rainsbarger*, 74 Iowa 196, 37 N. W. 153.

[a] **Where Delivered.**—A notice of witnesses to be introduced may be delivered to the defendant outside of the county where the indictment is pending. *State v. Kiefer*, 172 Iowa 306, 151 N. W. 440.

[b] **Return and Proof of Service.** (1) When formal service of notice is made, the return should be such as is required in the case of service of original notices, or it should be shown by other evidence that the notice was in fact given to the defendant. *State v. Allen*, 100 Iowa 7, 69 N. W. 274. (2) A return of the sheriff need not be verified. *State v. Pugsley*, 75 Iowa 742, 750, 38 N. W. 498. (3) A return of service of the "within notice" by reading and delivery of a copy is not objectionable as showing that the copy was read to the defendant. *State v. Pugsley*, 75 Iowa 742, 38 N. W. 498. See also *State v. O'Brien*, 158 Iowa 659, 138 N. W. 895.

**Competency of witnesses not in notice**, see 3 STANDARD PROC. 243.

69. *State v. Butler*, 157 Iowa 163, 138 N. W. 383; *State v. Hermann*, 135 Iowa 167, 112 N. W. 632.

[a] **Defects and mistakes in the list or notice as to the names, places of residence or occupations of the witnesses are not fatal if not prejudicial to the accused.** *State v. Butler*, 157 Iowa 163, 138 N. W. 383; *State v. Mathews*, 133 Iowa 398, 109 N. W. 616; *State v. Rainsbarger*, 74 Iowa 196, 37 N. W. 153.

70. *State v. McPherson*, 114 Iowa 492, 87 N. W. 421; *State v. Dale*, 109 Iowa 97, 80 N. W. 208.

71. *State v. Trusty*, 122 Iowa 82, 97 N. W. 989; *State v. Boomer*, 103 Iowa

106, 72 N. W. 424; *State v. Hall*, 97 Iowa 400, 66 N. W. 725.

[a] **A statement of the legal effect of what the witness is expected to testify to is insufficient.** *State v. Kreder*, 86 Iowa 25, 52 N. W. 638.

[b] **Illustration.**—(1) A notice that the state will prove by the witness that the defendant is guilty as charged does not meet the requirements of the statute. *State v. Kreder*, 86 Iowa 25, 52 N. W. 658. (2) It is insufficient to state that the prosecution expects to prove that the nuisance has been kept and maintained as charged. *State v. Kreder*, 86 Iowa 25, 52 N. W. 658. (3) But a notice of expectation to prove that the cars from which the kegs of brandy "were stolen" were in the possession of the receiver of the railway is not objectionable because of the quoted words. *State v. Hall*, 97 Iowa 400, 66 N. W. 725.

72. *Franklin v. State*, 9 Okla. Crim. 178, 131 Pac. 183.

73. *Robbins v. State*, 12 Okla. Crim. 294, 155 Pac. 491; *Franklin v. State*, 9 Okla. Crim. 178, 131 Pac. 183; *State v. Frisbee*, 8 Okla. Crim. 406, 127 Pac. 1091; *Holmes v. State*, 70 Tex. Crim. 214, 156 S. W. 1172.

74. *Franklin v. State*, 9 Okla. Crim. 178, 131 Pac. 183.

[a] **A refusal of defendant to consent to a continuance is a waiver of his right to a list two full days before trial.** *Franklin v. State*, 9 Okla. Crim. 178, 131 Pac. 183.

75. See *infra*, this section.

76. See 3 ENCY. OF EV. 241.

77. **Before Arraignment.**—See *supra*, this section.

[a] **When the case is called, he must object.** *Lord v. State*, 18 N. H. 173.

for a list or object to proceeding with the trial until the requirements of the statute are complied with,<sup>78</sup> and preserve the evidence of such demand or objection in a bill of exceptions.<sup>79</sup> If he does not take objection at a proper time, but proceeds to trial without objection, he is regarded as having waived the objection,<sup>80</sup> unless the court, in its discretion, should afterwards receive the objection for the purpose of postponing the trial, in order that a proper list may be furnished.<sup>81</sup> When a witness is called whose name is not on the list furnished, the defendant may, in some states, except to such witness for the purpose of excluding his testimony.<sup>82</sup> And when the statute requires an indorsement upon the indictment or information of the names of the prosecuting witness or the witnesses for the state, he may move to set aside the indictment or information.<sup>83</sup>

**2. Prosecutors and Informers.**—It is well settled that a defendant upon the trial of an indictment against him is not entitled, as of right, to know who gave the information or made the complaints which started the prosecution,<sup>84</sup> unless statute so provides.<sup>85</sup>

**3. Evidence.**—Except where the statute so provides,<sup>86</sup> a person accused of crime is not, as a general rule, entitled to a copy of the testimony given before the grand jury or on preliminary examination or to a disclosure of the evidence relied on to prove the indictment or information.<sup>87</sup> But the court may in its discretion allow the de-

78. *People v. Pennington*, 267 Ill. 45, 107 N. E. 871; *Lord v. State*, 18 N. H. 173.

79. *People v. Pennington*, 267 Ill. 45, 107 N. E. 871; *Kelly v. People*, 132 Ill. 363, 24 N. E. 56.

80. Ill.—*People v. Pennington*, 267 Ill. 45, 107 N. E. 871. Ia.—*State v. Hurd*, 101 Iowa 391, 70 N. W. 613; *State v. Bernstein*, 99 Iowa 5, 68 N. W. 442. N. H.—*Lord v. State*, 18 N. H. 173. Okla.—*State v. Frisbee*, 8 Okla. Crim. 406, 127 Pac. 1091.

81. *Lord v. State*, 18 N. H. 173.

82. *Lord v. State*, 18 N. H. 173. See 3 ENCY. OF EV. 241.

83. See 12 STANDARD PROC. 625.

84. *State v. Fortin*, 106 Me. 382, 76 Atl. 896; *Barkman v. State*, 41 Tex. Crim. 105, 52 S. W. 73; *Bratt v. State* (Tex. Crim.), 41 S. W. 624; *McGee v. State*, 37 Tex. Crim. 668, 40 S. W. 967.

85. See the statutes.

As to indorsement on the indictment of the name of the prosecutor or informer, see 12 STANDARD PROC. 233.

86. See the statutes and *People v. Ung Sing*, 171 Cal. 83, 151 Pac. 1145; *State v. McClain*, 130 Iowa 73, 106 N. W. 376; *State v. Cross*, 95 Iowa 629, 64 N. W. 614; *State v. Mullenhoff*, 74 Iowa 271, 37 N. W. 329.

[a] In California, the defendant is

not entitled to a copy of the testimony taken before the grand jury except when the district attorney demanded the appointment of a reporter and the testimony was taken down. *People v. Ung Sing*, 171 Cal. 83, 151 Pac. 1145.

[b] A statute requiring notice of witnesses to be used at trial does not apply to papers or documents. *State v. Bennett*, 137 Iowa 427, 110 N. W. 150; *State v. Craig*, 78 Iowa 637, 43 N. W. 462.

Filing preliminary examination, see 21 STANDARD PROC. 521.

Filing minutes of evidence of witnesses on which the indictment is founded, see 10 STANDARD PROC. 657.

Inspection of minutes of grand jury, see 10 STANDARD PROC. 657, and 6 ENCY. OF EV. 260.

87. Ind.—*Merrick v. State*, 63 Ind. 327. Mass.—*Com. v. Jordan*, 207 Mass. 259, 93 N. E. 809. Minn.—*State ex rel. Robertson v. Steele*, 117 Minn. 384, 135 N. W. 1128, Ann. Cas. 1913D, 343. N. M.—*Terr. v. McFarlane*, 7 N. M. 421, 37 Pac. 1111. Ohio.—*State v. Rhoads*, 81 Ohio St. 397, 91 N. E. 186, 27 L. R. A. (N. S.) 558, 18 Ann. Cas. 415. Tex.—*Morrison v. State*, 40 Tex. Crim. 473, 488, 51 S. W. 358. See also *Creswel v. State*, 14 Tex. App. 1.

fendant to inspect certain evidence.<sup>88</sup> And the prosecuting attorney may stipulate not to use any testimony save that of which he gives notice.<sup>89</sup>

**4. Interviewing Witnesses.**—A defendant in a criminal prosecution has no right to be conducted to different parts of the state that he may interview witnesses whose names he does not know.<sup>90</sup>

**E. SERVING LIST OF JURORS.**—The necessity of serving a defendant with a list of jurors before trial is elsewhere discussed.<sup>91</sup>

**F. SETTING CASE FOR TRIAL AND NOTICE.**—**1. In Civil Actions.**  
**a. Generally.**—Setting a case for trial is an entry or order made in the cause by the court, either of its own motion, in regulating its business in compliance with the statute or rules of court made conformably thereto, or by agreement of parties, by which a day certain is fixed, on or after which a cause may be called for final disposition or trial.<sup>92</sup> The practice in setting causes down for trial varies in the different states.<sup>93</sup> Usually either party may bring an issue to trial or to a hearing.<sup>94</sup> In some states the party desiring to set the cause

[a] **A report of the autopsy need not be furnished.** *Com. v. Jordan*, 207 Mass. 259, 93 N. E. 809. See *State v. Truba*, 88 Vt. 557, 93 Atl. 293.

[b] **A copy of his own testimony before the grand jury need not be furnished the accused.** *Porter v. State*, 173 Ind. 694, 760, 91 N. E. 340.

[c] **A copy of his confession need not be furnished the accused.** *Santry v. State*, 67 Wis. 65, 30 N. W. 226. See *Goode v. State*, 57 Tex. Crim. 220, 123 S. W. 597.

[d] **A copy of his testimony before the state fire marshal need not be furnished a defendant under indictment for arson.** *State ex rel. Robertson v. Steele*, 117 Minn. 384, 125 N. W. 1128, Ann. Cas. 1913D, 343.

[e] **The defendant has no right to the notes of evidence at his preliminary examination which are taken down by the private stenographer of the commonwealth's attorney at his own expense and for his own use.** *Com. v. Brown*, 90 Va. 671, 19 S. E. 447.

[f] **Inspection of Real Evidence.** The prosecution is not required to produce for the inspection of the defendant prior to trial all articles in its possession intended to be adduced in evidence against the defendant. *Padgett v. State*, 64 Fla. 389, 59 So. 946, Ann. Cas. 1914B, 897. See *State v. Bramhall*, 134 La. 1, 63 So. 603, denying request for sample of alleged intoxicating liquor.

**88.** *State v. Truba*, 88 Vt. 557, 93 Atl. 293.

[a] **The transcript of the testimony taken at an inquest cannot be inspected by the defendant as a matter of right.** His application is addressed to the discretion of the court. *State v. Truba*, 88 Vt. 557, 93 Atl. 293.

[b] **In a prosecution of a city treasurer, it is error for the court to deny a motion to impound the public documents and books pertaining to such office and in the possession of the state's attorney, and to permit an examination thereof before their introduction in evidence.** *People v. Gerold*, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916A, 636.

**89.** See *infra*, this note and generally the title, "Stipulations."

[a] **The remedy of the defendant, for breach by the prosecuting attorney of a stipulation not to use any testimony save that of which he gave notice, is not by objection to the witness' testimony but by motion for a continuance or postponement.** *State v. McClain*, 130 Iowa 73, 106 N. W. 376.

**90.** *People v. Talman*, 26 Cal. App. 348, 146 Pac. 1063.

**91.** See 16 STANDARD PROC. 1006.

**92.** *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466.

**93.** See the statutes and rules of court, and see *infra*, this section.

**94.** **Cal.**—Code Civ. Proc. §593. **N. Y.** *Walker v. Chilson*, 65 Hun 529, 20 N. Y. Supp. 527, 48 N. Y. St. 203; *Townsend v. Hillmann*, 9 N. Y. Supp. 629, 18 Civ. Proc. 213. **Wis.**—Buckley v.



down for trial proceeds by making application to the court to fix the time for trial.<sup>95</sup> In other states, either party may notice a cause for trial and have it placed on the calendar, and the cause will be tried in its order.<sup>96</sup> In some courts it is the custom on the first day of the term to call the docket for the entire term and assign the causes to their respective days of trial.<sup>97</sup> And it has been held that the court may set a cause for trial upon its own motion without previous notice.<sup>98</sup>

b. *Notice of Application To Fix Time for Trial.* — Notice of an application to have a cause set down for trial is not necessary,<sup>99</sup> unless required by rule of court,<sup>1</sup> or by statute.<sup>2</sup>

c. *Notice of Trial.* — (1.) **Necessity for and Waiver.** — In the absence of statute or rule of court requiring it,<sup>3</sup> notice of the time at which a cause is set for trial is not required.<sup>4</sup> The parties are bound to learn from the proceedings of the court when the case is to be heard.<sup>5</sup>

Lewis, 20 Wis. 490; Roberts v. Delaney, 2 Wis. 382.

[a] **The failure of the plaintiff to bring the cause to trial (1) is not a ground for nonsuit** (Schroeder v. Kohlenback, 6 Abb. Pr. [N. Y.] 66; Roberts v. Delaney, 2 Wis. 382), unless (2) statute so provides. See the statutes and 7 STANDARD PROC. 677.

[b] **Where there are several defendants, all must have given notice of trial to the plaintiff before any of them can move the trial as against the plaintiff.** Ward v. Dewey, 12 How. Pr. (N. Y.) 193.

95. See *infra*, VI, F, 1, c.

96. Roberts v. Delaney, 2 Wis. 382.

[a] **Either party may serve a notice of trial.** But only the party who has noticed a cause for trial can move it for that purpose. Haberstick v. Fischer, 67 How. Pr. (N. Y.) 318, 6 Civ. Proc. 82.

97. Gullett v. Swinney, 61 Mo. App. 226.

98. Cochrane v. Parker, 12 Colo. App. 169, 54 Pac. 1027.

99. McNeill & Co. v. Doe, 163 Cal. 338, 125 Pac. 345; Chappell v. Real Estate Pooling Co., 89 Md. 258, 42 Atl. 936. See Dusy v. Prudom, 95 Cal. 646, 30 Pac. 798.

[a] **A statute requiring notice of trial does not require notice of the intended application to the court to have a day fixed for the trial.** McNeill & Co. v. Doe, 163 Cal. 338, 125 Pac. 345; Hayden v. Superior Court, 22 Cal. App. 23, 133 Pac. 26.

1. See the rules of court and Hay-

den v. Superior Court, 22 Cal. App. 23, 133 Pac. 26.

[a] **It is competent for the court to require by rule that notice of the application for setting a cause for trial be given.** Cochrane v. Parker, 12 Colo. App. 169, 54 Pac. 1027.

[b] **The rule of court binds the court and the parties, and an order setting a case down for trial without the notice required by the rule of court may be vacated.** Hayden v. Superior Court, 22 Cal. App. 23, 133 Pac. 26.

2. See the statutes and Western Security Co. v. Lafleur, 17 Wash. 406, 49 Pac. 1061, the statute requires "notice of setting the cause for trial shall be served on the opposite party three days before any time fixed by the rules of the court for setting the case for trial," and does not require notice of the time the cause will be tried.

3. See *infra*, this section.

4. **Ill.**—Glos v. Gleason, 209 Ill. 517, 70 N. E. 1045. **Mich.**—Comp. Sts., 1915, §12,573 the present statute provides that no notice of trial or note of issue shall be necessary. As to cases decided under the former statute see Marvin v. Bowlby, 135 Mich. 640, 98 N. W. 399; Hathaway v. Marquette Cir. Judge, 117 Mich. 323, 75 N. W. 761; People v. St. Clair Cir. Judge, 41 Mich. 549, 49 N. W. 923. **Mo.**—Gullett v. Swinney, 61 Mo. App. 226. **Wash.**—Western Security Co. v. Lafleur, 17 Wash. 406, 49 Pac. 1061.

5. Yancey v. National Ben. Assn., 122 Cal. 676, 55 Pac. 604; Dusy v. Prudom, 95 Cal. 646, 30 Pac. 798. But see

**Under Statute.** — In some states, statutes require the party desiring to bring a cause to trial or hearing to give a notice of trial,<sup>6</sup> which notice cannot be dispensed with by the court,<sup>7</sup> except as a condition of granting a favor.<sup>8</sup> If both parties are represented when the case is called for trial, the notice becomes immaterial,<sup>9</sup> except as entitling the party to a continuance on the ground of insufficient notice or knowledge to enable him to prepare for trial.<sup>10</sup>

**Waiver.** — Even when notice of trial is required by statute, the party may waive his right to notice.<sup>11</sup>

**(II.) Form and Sufficiency of.** — In the absence of statute or rule of court prescribing the form,<sup>12</sup> any form of notice is sufficient which apprises the adverse party that the cause will be brought on for trial at the time and place specified.<sup>13</sup>

*infra*, as to present law in California.

[a] When a case is published in the trial call of the court by its correct number but wrong title, there is sufficient notice to the parties' attorneys. *Holmes v. Straus*, 204 Ill. App. 305.

6. See the statutes and the following: *Cal.*—*Sheldon v. Landwehr*, 159 Cal. 778, 116 Pac. 44; *Estate of Dean*, 149 Cal. 487, 87 Pac. 13. But see *Eltzroth v. Ryan*, 91 Cal. 584, 27 Pac. 932; *Wunderlin v. Cadogan*, 75 Cal. 617, 17 Pac. 713, under previous statute. *Minn.*—*Mead v. Billings*, 43 Minn. 239, 45 N. W. 228. *N. Y.*—*Weaver v. Miller* (App. Div.), 175 N. Y. Supp. 609. See *Germania L. Ins. Co. v. Powell*, 29 Misc. 424, 61 N. Y. Supp. 942. *N. D.*—*Oswald v. Moran*, 9 N. D. 170, 82 N. W. 741. *Wash.*—*Kelley v. Bausman*, 98 Wash. 686, 168 Pac. 181. *Wis.*—*Roberts v. Delaney*, 2 Wis. 382.

In justice's court, see 18 STANDARD PROC. 53.

**Notice of new trial**, see *infra*, VI, F, 1, e.

7. *Honeywell v. Shaffer*, 18 Civ. Proc. 336, 9 N. Y. Supp. 540, 30 N. Y. St. 831.

8. *Honeywell v. Shaffer*, 18 Civ. Proc. 336, 9 N. Y. Supp. 540, 30 N. Y. St. 831.

9. *Sheldon v. Landwehr*, 159 Cal. 778, 116 Pac. 44; *Handy v. Handy*, 31 Cal. App. 590, 161 Pac. 21. Compare 2 STANDARD PROC. 536.

[a] Such a statute has reference only to proceedings taken against a party in his absence. It necessitates proof of such notice as would require the party to appear and prosecute or defend, when one party, in the absence of the other, calls a case for trial

and seeks, upon an *ex parte* showing, to secure a dismissal, verdict or judgment. *Sheldon v. Landwehr*, 159 Cal. 778, 116 Pac. 44; *Estate of Dean*, 149 Cal. 487, 87 Pac. 13.

As to waiver generally, see *infra*, this section.

10. *Sheldon v. Landwehr*, 159 Cal. 778, 116 Pac. 44. See the title, "Continuances."

11. *Peninsular Stove Co. v. Osmun*, 73 Mich. 570, 41 N. W. 693; *Mead v. Billings*, 43 Minn. 239, 45 N. W. 228.

[a] **Guardian ad litem** may waive notice. *Granger v. Sheriff*, 133 Cal. 416, 65 Pac. 873.

**Waiver by Appearance.**—See *supra*, this section and 2 STANDARD PROC. 536.

12. See the statutes and rules of court.

[a] **Statute requires notice to be signed** by the party or attorney giving it. *Hathaway v. Marquette Cir. Judge*, 117 Mich. 323, 75 N. W. 761.

13. *Townsend v. Hillmann*, 9 N. Y. Supp. 629, 18 Civ. Proc. 213.

**Form of notice of trial**, see 9 STANDARD PROC. 1223, and *Franklin v. Mansfield*, 8 Mich. 99.

[a] **The notice of trial must be given for that term for which the note of issue is filed.** *Leonard v. Faber*, 31 App. Div. 137, 52 N. Y. Supp. 772, 28 Civ. Proc. 18; *National Carbonating Co. v. Standard Aerating Co.*, 47 N. Y. Supp. 1016. As to note of issue, see *infra*, VI, F, 1, d.

[b] **If two actions between the same parties** are pending, the notice must specify which action is to be tried. *Lisher v. Parmelee*, 1 Wend. (N. Y.) 22.

(III.) **When Given.** — Notice of trial cannot be given before issue joined.<sup>14</sup> But it may be given after issue joined and within the time allowed for amendment of the pleadings,<sup>15</sup> although a notice then given is liable to be defeated and rendered unavailing by the service of the amended pleading.<sup>16</sup> The notice must be given the prescribed time before trial.<sup>17</sup> And the court has no authority to shorten the statutory notice,<sup>18</sup> except when the party is seeking or receiving a favor.<sup>19</sup>

(IV.) **Service of.** — Notice of trial may be served personally,<sup>20</sup> or by mail,<sup>21</sup> in accordance with general rules elsewhere discussed. If there are several defendants, all must be given notice of trial before the plaintiff can move on the trial.<sup>22</sup>

(V.) **Effect of Failure To Give Notice.** — When upon direct appeal from a judgment of dismissal, it affirmatively appears that there was no proof of the giving of or waiver of notice of trial, the error is deemed prejudicial and the judgment will be reversed.<sup>23</sup> But a failure to give notice may be waived.<sup>24</sup>

(VI.) **Effect of Irregularities in Notice and Remedies.** — When the notice of trial is deemed irregular for any reason, it should be returned promptly to the attorney causing it to be served,<sup>25</sup> or the irregularity

[c] **In determining the sufficiency** of the notice, the court will not only look to the face of the notice but to other circumstances to determine whether the opposite party was misled by its defects. *Bander v. Covill*, 4 Cow. (N. Y.) 60.

14. *Wallace v. Syracuse B. & N. Y. R. Co.*, 27 App. Div. 457, 50 N. Y. Supp. 329.

**Time of trial**, see *supra*, IV, A.

15. *Townsend v. Hillmann*, 9 N. Y. Supp. 629, 18 Civ. Proc. (N. Y.) 213.

16. *Cramer v. Mack*, 12 Fed. 803, 20 Blatchf. 479; *Townsend v. Hillmann*, 9 N. Y. Supp. 629, 18 Civ. Proc. 213. See *infra*, I, C, 5.

[a] **A party giving notice before the expiration of the time to amend** does so at his peril. *Grindal v. De Lano*, 21 Civ. Proc. (N. Y.) 224, 15 N. Y. Supp. 823, 40 N. Y. St. 233; *Washburn v. Herrick*, 4 How. Pr. (N. Y.) 15, 2 Code R. 2.

17. *Kline v. Blair*, 1 Mich. N. P. 184; *Roberts v. Schaf*, 76 App. Div. 433, 78 N. Y. Supp. 778.

[a] **Notice of trial served by mail**, under the New York statute, must be served not less than sixteen days before the day of trial. *Germania L. Ins. Co. v. Powell*, 29 Misc. 424, 61 N. Y. Supp. 942.

18. *Grindal v. De Lano*, 21 Civ. Proc. 224, 15 N. Y. Supp. 823, 40 N. Y. St. 233.

19. *Grindal v. De Lano*, 21 Civ. Proc. 224, 15 N. Y. Supp. 823, 40 N. Y. St. 233.

20. See the title, "**Service of Process and Papers.**"

[a] **Leaving at Office of Attorney.** *Smethurst v. Harwood*, 30 N. J. L. 230.

21. *People v. St. Clair Circuit Judge*, 41 Mich. 549, 49 N. W. 923; *Kline v. Blair*, 1 Mich. N. P. 184; See *Elliot v. McHale*, 1 Mich. N. P. 312; *Schwartz v. Livingston*, 64 Hun 635, 18 N. Y. Supp. 879, 46 N. Y. St. 477; *Seifert v. Caverly*, 63 Hun 604, 18 N. Y. Supp. 327, 44 N. Y. St. 472.

**As to manner of serving notice by mail**, see the title, "**Service of Process and Papers.**"

22. *Ward v. Dewey*, 12 How. Pr. (N. Y.) 193.

23. *Estate of Dean*, 149 Cal. 487, 87 Pac. 13.

24. See *supra*, VI, F, 1, c, (VI).

25. *Ward v. Smith*, 45 Misc. 169, 91 N. Y. Supp. 905; *Silliman v. Clark*, 2 How. Pr. (N. Y.) 160; *Koehler v. Kelly*, 7 N. Y. Civ. Proc. 81.

**As to return of papers served generally**, see the title, "**Service of Process and Papers.**"



will be waived.<sup>26</sup> But a void notice need not be returned.<sup>27</sup> The party serving the notice cannot have its sufficiency determined by a motion to compel its acceptance.<sup>28</sup> Irregularities or mistakes in the notice of trial which occasion no surprise are immaterial and will be disregarded.<sup>29</sup>

d. *Note of Issue*.—Some statutes require the party serving the notice of trial to file with the clerk a note of issue<sup>30</sup> within the time prescribed,<sup>31</sup> stating the nature of the issue, whether of law or of fact,<sup>32</sup> and the time when the last pleading was served.<sup>33</sup> The statute requiring the filing of a note of issue is directory, not mandatory,<sup>34</sup> as the note is for the convenience and information of the clerk,<sup>35</sup> rather than a jurisdictional prerequisite to trial or summary disposition of the action.<sup>36</sup> The court may in a proper case allow a note of issue to be filed or amended *nunc pro tunc*.<sup>37</sup>

26. *Germania L. Ins. Co. v. Powell*, 29 Misc. 424, 61 N. Y. Supp. 942 (where postage was insufficient); *Mangone v. Metropolitan St. R. Co.*, 21 Misc. 565, 48 N. Y. Supp. 644; *Meislahn v. Hanken*, 45 N. Y. St. 676, 18 N. Y. Supp. 361.

27. *Walker v. Chilson*, 65 Hun 529, 20 N. Y. Supp. 527, 48 N. Y. St. 203.

[a] **When the notice is not served in time**, it is a nullity and need not be returned. *Walker v. Chilson*, 65 Hun 529, 20 N. Y. Supp. 527, 48 N. Y. St. 203.

28. *Lauferty v. Mutual Reserve Fund L. Assn.*, 25 Misc. 624, 56 N. Y. Supp. 121.

[a] **If satisfied with its sufficiency**, he can proceed with his action and take judgment by default, in which case the question as to its sufficiency will be raised on motion to set aside the default. *Lauferty v. Mutual Reserve Fund L. Assn.*, 25 Misc. 624, 56 N. Y. Supp. 121.

29. *Smith v. Northern Pac. R. Co.*, 3 N. D. 17, 53 N. W. 173 (immaterial error as to date of term); *Conkey v. Northern Bank*, 6 Wis. 447, where wrong name of county seat was given.

30. Mich.—*Elliot v. McHale*, 1 Mich. N. P. 312. But see present statute of Michigan. Minn.—See *Mead v. Billings*, 43 Minn. 239, 45 N. W. 228. N. Y. N. Y. Code Civ. Proc., §977; *Weaver v. Miller* (App. Div.), 175 N. Y. Supp. 609; *Ziegler v. Trenkman*, 31 App. Div. 305, 52 N. Y. Supp. 613. N. D.—*Oswald v. Moran*, 9 N. D. 170, 82 N. W. 741. S. D.—See *J. I. Case Threshing Mach. Co. v. Eichinger*, 15 S. D. 530, 91 N. W. 82.

31. N. Y. Code Civ. Proc., §977; *Miner v. Galvanotype Engrav. Co.*, 30 Misc. 200, 61 N. Y. Supp. 1102.

[a] **Must be filed for the term for which the action is noticed for trial**. *Bruxey v. Burke*, 21 Misc. 564, 48 N. Y. Supp. 644; *Siefke v. Siefke*, 21 Misc. 407, 47 N. Y. Supp. 953.

32. *Regulations of Circuit Calendars*, 13 How. Pr. (N. Y.) 345; *Oswald v. Moran*, 9 N. D. 170, 82 N. W. 741.

33. *Jones v. Seaman*, 30 Misc. 65, 62 N. Y. Supp. 883.

[a] **Service on the adverse party is not directed by the statute**. *Pathman v. Williams*, 33 N. D. 365, 157 N. W. 293.

34. *Pathman v. Williams*, 33 N. D. 365, 157 N. W. 293.

35. *Pathman v. Williams*, 33 N. D. 365, 157 N. W. 293.

36. *Pathman v. Williams*, 33 N. D. 365, 157 N. W. 293.

37. See *infra*, this note.

[a] **As a condition of granting a favor for which the opposite party applies**, the court may incorporate a provision in its order allowing the filing of a note of issue *nunc pro tunc*. *National Carbonating Co. v. Standard Aerating Co.*, 47 N. Y. Supp. 1016; *Wright v. Zimmerman*, 21 Misc. 407, 47 N. Y. Supp. 954.

[b] **But when the notice of trial is of no effect** because given for a term for which no note of issue is filed, the court cannot correct the irregularity by allowing a note of issue to be filed *nunc pro tunc*. *National Carbonating Co. v. Standard Aerating Co.*, 47 N. Y. Supp. 1016.

e. *New Notices of Trial and Notes of Issue.*—The note of issue should be filed as often as the issue is changed,<sup>38</sup> unless statute provides otherwise.<sup>39</sup> And this requirement cannot be evaded by the stipulation of the attorneys.<sup>40</sup>

*After Amendment to Pleadings.*—Except when statute provides otherwise,<sup>41</sup> an amendment to the pleadings changing the issues, made after serving a notice of trial and filing note of issue, necessitates new notices,<sup>42</sup> unless the court allowing the amendment otherwise directs,<sup>43</sup> or unless new notices are waived,<sup>44</sup> or unless the amendment was not interposed in good faith.<sup>45</sup> But when a proper notice of trial is filed, the court may permit the note of issue to be amended *nunc pro tunc*.<sup>46</sup>

*After the filing of supplemental pleadings* a new note of issue is not required.<sup>47</sup>

[c] **When the plaintiff fails to file a notice for trial** until nineteen months after filing of a note of issue, he will not be allowed to amend the note of issue *nunc pro tunc*. *Bruxey v. Burke*, 21 Misc. 564, 48 N. Y. Supp. 644.

*Where amended pleadings are filed*, see *infra*, I, C, 5.

38. *Graham v. Stirling Ins. Co.*, 19 Civ. Proc. 452, 13 N. Y. Supp. 562.

[a] **Change From Issue of Law to Issue of Fact.**—(1) When, after filing a note of issue specifying the issue as one of law, the issue of law is disposed of, a new note of issue and notice of trial must be filed and served to bring the cause to trial upon the issue of fact subsequently joined. *Romaine v. Bowdoin*, 70 Hun 366, 24 N. Y. Supp. 67, 54 N. Y. St. 115; *Leonard v. Faber*, 31 App. Div. 137, 52 N. Y. Supp. 772; *Oswald v. Moran*, 9 N. D. 170, 82 N. W. 741. (2) If, in such case, the clerk places the cause upon the trial calendar without a new note of issue, the cause should be stricken from the calendar on motion. *Oswald v. Moran*, 9 N. D. 170, 82 N. W. 741.

39. See the statutes.

40. *Leonard v. Faber*, 31 App. Div. 137, 52 N. Y. Supp. 772, 28 Civ. Proc. 18; *Keilty v. Traynor*, 25 Misc. 351, 55 N. Y. Supp. 744, 28 Civ. Proc. 342.

41. *Minn.*—*Griggs v. Edelbrock*, 59 Minn. 485, 61 N. W. 555; *Stevens v. Curry*, 10 Minn. 316. *N. D.*—*Kerr v. Grand Forks*, 15 N. D. 294, 107 N. W. 197. *S. D.*—*J. I. Case Threshing Mach. Co. v. Eichinger*, 15 S. D. 530, 91 N. W. 82.

42. *Coler v. Lamb*, 19 App. Div. 236, 46 N. Y. Supp. 117; *Jones v. Seaman*, 30 Misc. 65, 62 N. Y. Supp. 883; *Yates*

*v. McAdam*, 18 Misc. 295, 42 N. Y. Supp. 109; *Grindal v. De Lano*, 21 Civ. Proc. 224, 15 N. Y. Supp. 823, 40 N. Y. St. 233.

[a] **There Must Be a New Notice of Trial and a New Note of Issue.** *Gair v. Birmingham & Co.*, 20 Civ. Proc. 233, 15 N. Y. Supp. 147.

[b] **Where the amendment is only as to the amount of the damages**, a new notice of trial and note of issue must be given and filed. *Wright v. Zimmerman*, 21 Misc. 407, 47 N. Y. Supp. 954.

43. N. Y. Code Civ. Proc., §723.

44. *Knowles v. Lichtenstein*, 33 App. Div. 605, 54 N. Y. Supp. 49, 6 N. Y. Ann. Cas. 305.

[a] **By laches in failing to move to strike the cause from the calendar** until the cause has appeared a second time on the calendar. *Levey v. Tribune Assn.*, 22 Misc. 245, 49 N. Y. Supp. 608. See *Stanfield v. Stanfield*, 21 Misc. 409, 47 N. Y. Supp. 1010.

45. *Minrath v. Teachers' Land & Imp. Co.*, 66 Hun 632, 21 N. Y. Supp. 204, 50 N. Y. St. 39.

46. *Bruxey v. Burke*, 21 Misc. 564, 48 N. Y. Supp. 644; *Wright v. Zimmerman*, 21 Misc. 407, 47 N. Y. Supp. 954; *Gair v. Birmingham & Co.*, 20 N. Y. Civ. Proc. 233, 15 N. Y. Supp. 147. See also *Honeywell v. Shaffer*, 13 Civ. Proc. 336, 9 N. Y. Supp. 540, 30 N. Y. St. 831, where a reply was filed by leave and the note of issue was amended *nunc pro tunc*.

47. See *infra*, this note.

[a] **Reason.**—Since a supplemental pleading does not, as does an amendment, become a substitute for the original pleadings, and the issues joined

**New Trial.** — Since upon the granting of a new trial, whether by the trial<sup>48</sup> or by an appellate court,<sup>49</sup> the new trial proceeds as if no trial had taken place and new issues may be made, within certain limitations, a new notice of trial and note of issue may be required.<sup>50</sup>

**2. In Criminal Prosecutions.** — The practice in setting criminal prosecutions for trial differs in the several states.<sup>51</sup> In the absence of statute requiring it, written notice of trial to the defendant is not required.<sup>52</sup>

**G. CALLING CASE FOR TRIAL.** — Calling a case for trial is an announcement or declaration by the court that the cause has been reached in its order and that the judicial examination of the issues of law or fact upon which the cause depends is about to begin.<sup>53</sup> As a general rule, cases should be called and tried in the order in which they are docketed.<sup>54</sup> But the court cannot decline to prefer a cause entitled to preference by statute or the general rules of practice.<sup>55</sup> On the calling of the case, the parties announce their readiness for trial.<sup>56</sup> The court may, it seems, permit a party to withdraw his an-

under the original pleadings ordinarily remain as issues to be tried. *Lovatt v. Watson*, 35 Hun (N. Y.) 553; *Myers v. Metropolitan Elevated R. Co.*, 19 Civ. Proc. 448, 12 N. Y. Supp. 2, 16 Daly 410, 34 N. Y. St. 293; *Fisher v. Gunn*, 12 Misc. 207, 34 N. Y. Supp. 27, 67 N. Y. St. 828.

48. See 20 STANDARD PROC. 648.

49. See 19 STANDARD PROC. 341.

50. See 20 STANDARD PROC. 648; 19 STANDARD PROC. 340; and *supra*, this section.

[a] But where the statute provides that a case once placed on the trial calendar remains there until disposed of, it is not deemed disposed of if a new trial results from an appeal, and it need not be re-noticed for trial and no new note of issue is necessary. *Watson v. Phyfe*, 18 Abb. N. C. 469, 11 Civ. Proc. 442, 4 N. Y. St. 750, 5 N. Y. St. 328.

51. See the statutes and rules of court.

[a] Before an indictment is found against the accused, the court may, at his request, appoint counsel for his defense and may at the same time set a day for trial. *Charlon v. State*, 106 Ga. 400, 32 S. E. 347.

[b] In the absence of any special rule of court fixing cases for trial when reached on the docket, the defendant cannot be ruled to trial without a previous setting of his case or other proper notice giving him time to subpoena his witnesses. *State v. Town-*

*send*, 44 La. Ann. 569, 10 So. 926.

[c] Publication in a newspaper of notice of the fixing of cases is not required. *State v. Fuller*, 111 La. 85, 35 So. 395.

[d] Presence of defendant, see *People v. Rader*, 136 Cal. 253, 68 Pac. 707, and generally *infra*, VII, G, 2.

52. *Murphy v. State*, 131 Wis. 420, 111 N. W. 511.

[a] An affidavit for continuance on the ground the attorney for the accused had not been notified of the time for trial is insufficient if it fails to show that the prisoner was not aware of the date set for trial a sufficient length of time to make preparation therefor. *May v. State*, 38 Neb. 211, 56 N. W. 804.

53. *Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466.

[a] But a mere calling of the case at the opening of the court on the first day of the term, for the purpose of ascertaining in a general way what cases are for trial at the term, is not a calling of the case for trial. *State v. Clark*, 67 Wis. 229, 30 N. W. 122.

54. See 6 STANDARD PROC. 53.

55. *Honeywell v. Shaffer*, 18 Civ. Proc. 336, 9 N. Y. Supp. 540, 30 N. Y. St. 831.

As to preferences, see *supra*, IV, C.

56. See *infra*, this note.

[a] In criminal prosecutions, (1) it is for the state as for any other plaintiff to answer first whether ready or not (*State v. Emerson*, 90 Mo. 236, 2



nouncement of readiness to enable him to except to the pleadings of the adverse party.<sup>57</sup>

**H. PASSING CAUSE.**—When on the calling of a cause, it appears that the counsel of one of the parties is engaged in the trial of another cause,<sup>58</sup> or that something has occurred since the case was put on the calendar which renders it unjust to compel either party to go to trial,<sup>59</sup> the court may pass it temporarily and set it for trial at the foot of the call for the next day or the day to which it is passed. This rule is sometimes incorporated in rules of court.<sup>60</sup> The attention of the court should be called to the engagement in a proper way when the day calendar is called at the opening of the court.<sup>61</sup> And a party by moving to have a cause passed till another day impliedly consents to a trial on the day to which it is passed.<sup>62</sup>

**VII. CONDUCT OF AND PROCEEDINGS ON TRIAL.**—**A. GENERALLY.**—The supervision and conduct of trials, both civil and criminal, are largely within the sound discretion of the court or judge,<sup>63</sup>

*S. W. 274*), although (2) it is not error for the court to require the defendant to say first whether he is ready for trial. *Pines v. State*, 21 Ga. 227; *King v. State*, 21 Ga. 220. (3) However, when the state has asked for a continuance, that should be first disposed of. *State v. Emerson*, 90 Mo. 236, 2 S. W. 274.

[b] But a solicitor general is not required to announce "ready," when a case is called in its regular order. It is otherwise if the case is called out of its order. *Duffey v. Harris*, 19 Ga. App. 646, 91 S. E. 1006; *Collins v. Smith*, 7 Ga. App. 653, 67 S. E. 847.

[c] The prohibition of amendment after an announcement of readiness for trial has reference to issues of fact and not of law. So that when the defendant, after an announcement of ready for trial, presents a demurrer which is heard and overruled, and then requests leave to amend his answer, an order denying leave on the sole ground that he has announced his readiness for trial is erroneous. *De Witt v. Jones*, 17 Tex. 620.

57. *Cooper v. Singleton*, 19 Tex. 260, 269, 70 Am. Dec. 333.

58. *Willard v. Saunders*, 83 Ill. App. 375.

Continuance on this ground, see 5 STANDARD PROC. 444.

59. *Brady v. Kinetoscope Exhibiting Co.*, 19 App. Div. 226, 46 N. Y. Supp. 168.

[a] Illness of the party is ground for passing the case until the next day.

*Brady v. Kinetoscope Exhibiting Co.*, 19 App. Div. 226, 46 N. Y. Supp. 168.

60. See the rules of court and *Isgrigg v. Coleman*, 107 Ill. App. 625; *Robinson v. De Fere*, 106 App. Div. 406, 94 N. Y. Supp. 847; *Costello v. Third Ave. R. R. Co.*, 16 App. Div. 213, 44 N. Y. Supp. 620.

[a] A rule relating to a "day calendar" is not confined to the general calendar but includes also the preferred calendar. *Mayer v. McWalters*, 17 App. Div. 291, 45 N. Y. Supp. 243.

[b] The United States district court is a court of record within a rule of court providing for the passing of a cause when counsel is engaged in the trial of a cause in a court of record. *Spero v. Supreme Council*, 95 App. Div. 499, 84 N. Y. Supp. 939.

61. *Mayer v. McWalters*, 17 App. Div. 291, 45 N. Y. Supp. 243; *Costello v. Third Ave. R. Co.*, 16 App. Div. 213, 44 N. Y. Supp. 620.

62. *Union Surety & Guar. Co. v. Tenney*, 102 Ill. App. 95.

63. **U. S.**—*Grunberg v. United States*, 145 Fed. 81, 76 C. C. A. 51. **Fla.**—*Tully v. State*, 69 Fla. 662, 68 So. 934. **Ill.**—*Brewer v. National Union Bldg. Assn.*, 166 Ill. 221, 46 N. E. 752; *City Ry. Co. v. McDonough*, 125 Ill. App. 223, 233. **Kan.**—*State v. Moore*, 80 Kan. 232, 102 Pac. 475; *State v. Laird*, 79 Kan. 681, 100 Pac. 637. **Ky.**—*Wilson v. Wilson*, 174 Ky. 771, 193 S. W. 7; *Com. v. Adkins*, 171 Ky. 299, 188 S. W. 401. **La.**—*State v. Major*, 132 La. 201, 61 So. 202; *State v. Robinson*, 29 La. Ann. 364. **Mass.**

except as to matters regulated by statute,<sup>64</sup> and as to such matters, the trial court cannot be too careful in planting itself firmly upon the statute and complying strictly with its terms,<sup>65</sup> but technical errors are not ground for reversal and new trial.<sup>66</sup>

Many matters relating to trials are discussed elsewhere in this work or in its companion work, the *Encyclopaedia of Evidence*.<sup>67</sup> Among such matters are included the following: the right to open and close,<sup>68</sup> the reception of evidence generally,<sup>69</sup> variance and failure of proof,<sup>70</sup> witnesses,<sup>71</sup> experiments in and out of court,<sup>72</sup> view by the jury,<sup>73</sup> objections and exceptions,<sup>74</sup> enlargement of issues by failure to object to evidence,<sup>75</sup> province of the judge and jury,<sup>76</sup> demurrer to the evidence,<sup>77</sup> dismissal discontinuance and nonsuit,<sup>78</sup> directed verdict,<sup>79</sup> special in-

Com. v. Coyne, 228 Mass. 269, 117 N. E. 337. Mich.—Murray v. Lepper, 99 Mich. 135, 57 N. W. 1097. Mo.—McCarthy v. Missouri R. Co., 15 Mo. App. 385. N. Y.—Bedell v. Powell, 13 Barb. 183; Allen v. Bodine, 6 Barb. 383. N. C.—State v. Cobb, 164 N. C. 418, 79 S. E. 419. N. D.—State v. Tracy, 34 N. D. 498, 158 N. W. 1069. S. C. Goldsmith v. Solomons, 2 Strobb. 296. Tex.—Weige v. State, 81 Tex. Crim. 476, 196 S. W. 524.

[a] The conduct of trial as to permitting delay must be left to the sound discretion of the trial court. *Brewer v. National Union Bldg. Assn.*, 166 Ill. 221, 46 N. E. 752.

[b] The taking of plea of guilty of a codefendant in open court in the presence of the panel is in the discretion of the court. *Grunberg v. United States*, 145 Fed. 81, 76 C. C. A. 51.

Discretion as to argument, see 2 STANDARD PROC. 734, et seq.

Not ground for new trial, see 20 STANDARD PROC. 453.

64. See the statutes.

65. *People v. Coyne*, 116 Cal. 295, 48 Pac. 218.

[a] The order of trial directed by the statute may be departed from for good reasons and in the discretion of the court. *White v. State*, 78 Tex. Crim. 216, 181 S. W. 192.

66. *People v. Coyne*, 116 Cal. 295, 48 Pac. 218. See the titles "Appeals;" "Review."

Error in application of law is not denial of due process, see 7 STANDARD PROC. 924.

[a] The trend of modern decisions on points of practice in general is that

causes should be permitted to be heard on their merits, where in so ruling, positive violence is not done some rule or rules of procedure and practice. *Vinson v. Los Angeles P. R. Co.*, 147 Cal. 479, 82 Pac. 53; *Pacific Window Glass Co. v. Smith*, 8 Cal. App. 762, 768, 97 Pac. 898.

67. See particular titles and indexes to these works.

Judge as a witness, see 3 STANDARD PROC. 215.

Service of copy of indictment and information on accused, see the title "Service of Process and Papers."

Inspection of minutes of grand jury, see 10 STANDARD PROC. 657.

Indorsement of witnesses on indictment, see 12 STANDARD PROC. 240 and 275.

68. See the title "Opening and Closing."

69. See *infra*, VII, Q.

70. See the title "Variance and Failure of Proof."

71. See the title "Witnesses," and the ENCY. OF EV.

72. See 5 ENCY. OF EV. 471; and 17 STANDARD PROC. 530.

73. See the title "View."

74. See the title "Objections and Exceptions," and the ENCY. OF EV.

75. See 20 STANDARD PROC. 317, 706.

76. See the title "Province of Judge and Jury."

77. See the title "Demurrer to Evidence."

78. See the title "Dismissal, Discontinuance and Nonsuit."

79. See the title "Verdict."

terrogatories to jury,<sup>80</sup> issues to the jury in equity,<sup>81</sup> instructions,<sup>82</sup> arguments of counsel,<sup>83</sup> deliberation and custody of jury,<sup>84</sup> verdict,<sup>85</sup> and findings of fact, and conclusions of law.<sup>86</sup>

B. **RIGHT TO A FAIR TRIAL.** — Parties litigant are entitled to a fair and impartial trial, as far as that may be secured to them by law.<sup>87</sup> Both the federal and state constitutions guarantee the right to a fair and impartial trial to a person accused of crime.<sup>88</sup> This right is invaded, where the minds of the jury are affected by any influence, except the law and the evidence,<sup>89</sup> such as hisses, cheers, demonstrations, improper appeals, and argument not warranted by the evidence.<sup>90</sup>

**Enforcement of Right.** — It is not only the duty of the trial court,<sup>91</sup> but of the prosecuting attorney also,<sup>92</sup> to see that an accused is given a

80. See the title "**Special Interrogatories to Juries.**"

81. See the title "**Issues in Pleading and Practice.**"

82. See the title "**Instructions.**"

83. See the title "**Argument.**"

**Denial of right to argue, as ground for new trial, see 20 STANDARD PROC. 470.**

**Denying right to open and close as ground for new trial, see 20 STANDARD PROC. 454, note 36 and 470.** As to opening and closing generally, see the title "**Opening and Closing.**"

84. See the title "**Juries and Jurors.**"

85. See the title "**Verdict.**"

86. See the title "**Findings and Conclusions.**"

87. See generally the titles "**Due Process of Law;**" "**New Trial;**" and also titles dealing with particular aspects of trial practice, such, for instance, as "**Arguments;**" "**Instructions;**" "**Juries and Jurors.**"

88. See U. S. Const. Art. VI, the state constitutions, and also the following cases: **Cal.**—*People v. Sansome*, 84 Cal. 449, 24 Pac. 143. **Ga.**—*Patton v. State*, 117 Ga. 230, 43 S. E. 533. **N. Y.**—*People v. Becker*, 210 N. Y. 274, 104 N. E. 396. **Okla.**—*Green v. State*, 6 Okla. Crim. 585, 120 Pac. 667. **S. C.**—*State v. Weldon*, 91 S. C. 29, 74 S. E. 43, Ann. Cas. 1913E, 801, 39 L. R. A. (N. S.) 667. **Tex.**—*Burt v. State*, 38 Tex. Crim. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; *Vines v. State*, 31 Tex. Crim. 31, 19 S. W. 545. **Wash.**—*State v. Pryor*, 67 Wash. 216, 121 Pac. 56.

[a] A fair trial consists not alone in an observance of the naked forms of law, but in a recognition and a

just application of its principles. *State v. Pryor*, 67 Wash. 216, 121 Pac. 56.

[b] **Unfairness, whether intentional or not, taints everything it touches, and will vitiate a verdict, unless it clearly appears from the record that there is no rational conclusion at which the jury could have arrived favorable to the defendant.** *Hicks v. United States*, 2 Okla. Crim. 626, 103 Pac. 873, quoted in *Porter v. State*, 8 Okla. Crim. 64, 67, 126 Pac. 699.

89. *Patton v. State*, 117 Ga. 230, 43 S. E. 533. See also *Chambers v. United States*, 237 Fed. 513, 150 C. C. A. 395.

As to conduct and misconduct of jurors, see the title "**Juries and Jurors.**"

**Use of juror's personal knowledge, see 17 STANDARD PROC. 537.**

90. *Patton v. State*, 117 Ga. 230, 43 S. E. 533.

As to conduct and misconduct of the judge, parties, counsel and bystanders, see *infra*, VII, R, T, U, and V, and the title "**Juries and Jurors.**"

91. **Cal.**—*People v. Shaw*, 111 Cal. 171, 43 Pac. 593. **Mich.**—*People v. Gotshall*, 123 Mich. 474, 82 N. W. 274. **Okla.**—*Carter v. State*, 12 Okla. Crim. 164, 152 Pac. 1132; *Green v. State*, 6 Okla. Crim. 585, 120 Pac. 667; *Stuedle v. State*, 6 Okla. Crim. 494, 119 Pac. 1022.

[a] "**The court presiding over a trial has power to compel such decorum in his court room as will inspire respect for the proceedings, and the exercise of such power, rather than mere advice and suggestion, is a duty.**" *People v. Arnold*, 248 Ill. 169, 177, 93 N. E. 786.

92. See *infra*, VII, U.



fair and impartial trial. And when things impairing this right happen, the judge should act on his own motion to prevent them or undo what has been improperly done.<sup>93</sup> If the court does not act of its own motion, the injured party may take such action as he deems appropriate.<sup>94</sup>

C. PUBLICITY OF PROCEEDINGS. — 1. **In Civil Actions.** — As a general rule the sittings of every court of justice should be public, both at common law,<sup>95</sup> and under statutes.<sup>96</sup> At common law, three exceptions are commonly made, though the first two have been said to be no exceptions at all.<sup>97</sup> The first exception exists in the case of wardships,<sup>98</sup> the second in the case of lunatics,<sup>99</sup> and third, where a public trial would defeat the object of the action.<sup>1</sup> Perhaps an exception exists in those cases where the practice of the old ecclesiastical courts is continued.<sup>2</sup> In proceedings for the annulment or dissolution of marriages,

93. *Odell v. State*, 120 Ga. 152, 47 S. E. 577; *Patton v. State*, 117 Ga. 230, 43 S. E. 533.

Discharge of jurors and jury, see the title "Juries and Jurors."

94. *Patton v. State*, 117 Ga. 230, 43 S. E. 533.

An objection at the time of occurrence is essential in order that misconduct may be made available for a new trial. See 20 STANDARD PROC. 465, and 17 STANDARD PROC. 529.

Objection to improper argument, see 2 STANDARD PROC. 829.

Reprimand of counsel, see 2 STANDARD PROC. 843, note 77.

Instructions against sympathy and prejudice, see 13 STANDARD PROC. 951.

Instruction to jury to disregard improper argument, see 2 STANDARD PROC. 841.

Motion for new trial, see 20 STANDARD PROC. 459, 466.

95. *Scott v. Scott*, (1913) App. Cas. (Eng.) 417, Ann. Cas. 1913E, 614.

96. Cal. Code Civ. Proc., §124. See **Ill.**—*Crabtree v. Hagenbaugh*, 23 Ill. 349, 76 Am. Dec. 694. **Ia.**—*Harkins v. Harkins*, 99 N. W. 154; *Hobart v. Hobart*, 45 Iowa 501. **Mont.**—*State v. Keeler*, 52 Mont. 205, 156 Pac. 1080, 1083, Ann. Cas. 1917E, 619, L. R. A. 1916E, 472.

97. *Scott v. Scott*, (1913) App. Cas. (Eng.) 417, Ann. Cas. 1913E, 614, per Earl of Halsbury, p. 442.

[a] With respect to the first two apparent exceptions, neither forms a part of the public administration of justice at all, per Earl of Halsbury, p. 442. The court is really sitting primarily to guard the interests of the ward or lunatic. Its jurisdiction is parental and administrative, and the

disposal of controverted questions is an incident only in the jurisdiction, per Viscount Haldane, p. 437. *Scott v. Scott*, (1913) App. Cas. (Eng.) 417, Ann. Cas. 1913E, 614.

98. *Nagle-Gilman v. Christopher*, 4 Ch. Div. (Eng.) 173, 46 L. J. Ch. 60; *Ogle v. Brandling*, 2 Russ. & M. 688, 39 Eng. Reprint 557, directing a hearing in private notwithstanding one party withheld his consent.

99. *Nagle-Gilman v. Christopher*, 4 Ch. Div. (Eng.) 173, 46 L. J. Ch. 60;

1. *Mellor v. Thompson*, 55 L. J. Ch. (Eng.) 942, 31 Ch. Div. 55, 54 L. T. N. S. 219 (an action to restrain the defendant from disclosing matters communicated to him as a solicitor); *Andrew v. Raeburn*, L. R. 9 Ch. (Eng.) 522, 31 L. T. N. S. 73, 22 Wkly. Rep. 564, query.

[a] With respect to this exception, that of litigation as to a secret process, this case stands on a different footing from the first two exceptions. The paramount object of litigation is to do justice, and as publicity would destroy the subject-matter, the general rule as to publicity, "after all only the means to an end," must accordingly yield. *Scott v. Scott*, (1913) A. C. (Eng.) 417, 437, Ann. Cas. 1913E, 614, per Viscount Haldane.

2. *D. v. D.* (1903) L. R. P. D. (Eng.) 144; *Nagle-Gilman v. Christopher*, 4 Ch. Div. (Eng.) 173, 46 L. J. Ch. 60, obiter. But compare *Scott v. Scott*, (1913) App. Cas. (Eng.) 417, 470, 473, Ann. Cas. 1913E, 614, 631, where Lord Shaw states that the ecclesiastical courts from the moment they sat to open the depositions of the witnesses and throughout the whole course of the trial thereafter were open courts of

a private trial cannot be ordered,<sup>3</sup> unless authorized by statute,<sup>4</sup> though even under a statute requiring such actions to be heard in open court, it has been held that while the court cannot exclude the general public,<sup>5</sup> it may exclude persons of such immature years, as in the judgment of the court, should not be permitted to listen to the testimony.<sup>6</sup>

There is a conflict of authority as to the power of the parties to stipulate to a hearing at chambers.<sup>7</sup>

Some statutes authorize trials of issues of fact in private in actions for divorce, criminal conversation, seduction, or breach of promise of marriage.<sup>8</sup> But such statutes do not authorize the court to forbid the making of a public report of the testimony in a case.<sup>9</sup>

**2. In Criminal Prosecutions.**—A person accused of crime has a constitutional right to a public trial.<sup>10</sup> There is some diversity among

the realm. Furthermore, the practice of the old ecclesiastical courts in this respect is not continued.

3. *Scott v. Scott*, (1913) App. Cas. (Eng.) 417, Ann. Cas. 1913E, 614; *Hall v. Castleden*, 1 Sw. & Tr. (Eng.) 605, 6 Jur. N. S. 348, 29 L. J. Mat. 81, 1 L. T. N. S. 489. But see *A. v. A.*, 44 L. J. Mat. (Eng.) 15, L. R. 3 P 230, 31 L. T. N. S. 801, 23 Wkly. Rep. 386, and compare 7 STANDARD PROC. 786, with respect to divorce actions.

4. See *infra*, this section.

5. *Harkins v. Harkins* (Iowa), 99 N. W. 154.

6. *Harkins v. Harkins* (Iowa), 99 N. W. 154; *Hobart v. Hobart*, 45 Iowa 501. See also *Barnett v. Barnett*, 29 L. J. Mat. (Eng.) 28.

7. See 16 STANDARD PROC. 611, 613, and *Nagle-Gilman v. Christopher*, 4 Ch. Div. (Eng.) 173, 46 L. J. Ch. 60, holding the high court of justice has no power to hear cases in private "even with the consent of the parties," except in certain cases. But see *In the Matter of Lord Portsmouth*, G. Coop. 106, 35 Eng. Reprint 495, holding private hearings in cases of family disputes may be had in equity on the consent of both parties.

[a] **As Dependent on Nature of Proceedings.**—In proceedings, which, like those in the matrimonial court, affect status, the public has a general interest which the parties cannot exclude. Consequently they cannot consent to a private hearing. It would be otherwise where all that is at stake is the individual rights of the parties. *Scott v. Scott*, (1913) App. Cas. (Eng.) 417, 436, Ann. Cas. 1913E, 614, per Viscount Haldane. See also *Hobart v. Hobart*, 45 Iowa 501, under statute.

8. See the statutes and *People v. Hartman*, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108; *In re Shortridge*, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78, 21 L. R. A. 755. But see *Hobart v. Hobart*, 45 Iowa 501, under a statute requiring divorce actions to be had in "open court."

[a] **Statute Does Not Apply to Criminal Prosecutions.**—*People v. Hartman*, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108.

9. *In re Shortridge*, 99 Cal. 526, 34 Pac. 227, 37 Am. St. Rep. 78, 21 L. R. A. 755. See also *Scott v. Scott*, (1913) App. Cas. (Eng.) 417, Ann. Cas. 1913E, 614, 633, as to power of court to enjoin perpetual silence in the absence of statute.

10. **U. S.**—*Davis v. United States*, 247 Fed. 394, 159 C. C. A. 448, L. R. A. 1918C, 1164; *Reagan v. United States*, 202 Fed. 488, 120 C. C. A. 627, 44 L. R. A. (N. S.) 583. **Ala.**—*Jackson v. Mobley*, 157 Ala. 408, 47 So. 590. **Cal.**—*People v. Hartman*, 103 Cal. 241, 37 Pac. 153, 42 Am. St. Rep. 108; *People v. Swafford*, 65 Cal. 223, 3 Pac. 809, an extreme case. **Colo.**—*Benedict v. People*, 23 Colo. 126, 46 Pac. 637. **Idaho.**—*State v. Johnson*, 26 Idaho 609, 144 Pac. 784. **Kan.**—*State v. Dreany*, 65 Kan. 292, 69 Pac. 182. **Me.**—*Williamson v. Lacy*, 86 Me. 80, 29 Atl. 943, 25 L. R. A. 506. **Mich.**—*People v. Murray*, 89 Mich. 276, 50 N. W. 995, 28 Am. St. Rep. 294, 14 L. R. A. 809; *In re Way*, 41 Mich. 299, 1 N. W. 1041. **N. Y.**—*People ex rel. Childs v. Extraordinary Term*, 184 App. Div. 829, 171 N. Y. Supp. 922; *People v. Hall*, 51 App. Div. 57, 64 N. Y. Supp. 433, 15 N. Y. Crim. 29. **N. D.**—*State v. Nyhus*, 19 N. D. 326, 124 N. W. 71, 27 L. R. A. (N. S.)

the decisions as to when the defendant is deprived of a public trial and as to when he is deemed to be prejudiced by an exclusion of spectators.<sup>11</sup>

A public trial, as the expression necessarily implies, is one at which the public is free to attend;<sup>12</sup> one that is not secret.<sup>13</sup> Publicity does not absolutely forbid all temporary shutting of doors, or render incompetent a witness who cannot be heard by the largest audience.<sup>14</sup> On the other hand, the fact that the officers of the court are allowed to be present does not make a trial public.<sup>15</sup>

487. **Ohio.**—*State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, 116 Am. St. Rep. 734, 9 L. R. A. (N. S.) 277. **Ore.** *State v. Osborne*, 54 Ore. 289, 103 Pac. 62. **Tex.**—*Grimmett v. State*, 22 Tex. App. 36, 2 S. W. 631, 58 Am. Rep. 630.

[a] The provision in the federal constitution operates on the national government only. *Freeman v. United States*, 227 Fed. 732, 743, 142 C. C. A. 256; *State v. Osborne*, 54 Ore. 289, 103 Pac. 62.

[b] In Mississippi, (1) the constitution authorizes the court in its discretion to exclude from the courtroom, in prosecutions for certain crimes, all persons except such as are necessary in the conduct of the trial. Const. Art. 3, §26. (2) It does not apply to murder trials. *Carter v. State*, 99 Miss. 435, 54 So. 734.

Publicity of preliminary examination, see 21 STANDARD PROC. 507.

Military courts are not within application of provision. See 6 STANDARD PROC. 116.

As to pronouncement of sentence, see the title "Sentence and Judgment."

[a] A rule of court requiring objections to argument of counsel to be whispered is beyond the authority of the court because it violates the right of an accused to a public trial, and because it prevents the preservation of a bill of exceptions by bystanders. *Weige v. State*, 81 Tex. Crim. 476, 196 S. W. 524.

11. See *infra*, this note.

[a] **Presumption of Prejudice.**—(1) In some decisions, prejudice will be presumed from an exclusion of spectators. **U. S.**—*Davis v. United States*, 247 Fed. 394, 159 C. C. A. 448, L. R. A. 1918C, 1164. **Mont.**—*State v. Keeler*, 52 Mont. 205, 156 Pac. 1080, Ann. Cas. 1917E, 619, L. R. A. 1916E, 472. **Ore.**—*State v. Osborne*, 54 Ore. 289, 103 Pac. 62. (2) The intimation in some

cases that the burden is on the defendant to show injury by reason of the deprivation cannot be endorsed. *People v. Hartman*, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108; *People v. Murray*, 89 Mich. 276, 50 N. W. 995, 28 Am. St. Rep. 294, 14 L. R. A. 809.

(3) But other decisions hold an order excluding spectators is not deemed to be reversible error in the absence of a showing that the defendant was prejudiced thereby, or was deprived of the presence, aid, or counsel of any person whose presence might have been of advantage to him. *Reagan v. United States*, 202 Fed. 488, 120 C. C. A. 627, 44 L. R. A. (N. S.) 583.

12. *Davis v. United States*, 247 Fed. 394, 159 C. C. A. 448, L. R. A. 1918C, 1164.

13. **Cal.**—*People v. Swafford*, 65 Cal. 223, 3 Pac. 809. **Colo.**—*Benedict v. People*, 23 Colo. 126, 46 Pac. 637. **Fla.** *Robertson v. State*, 64 Fla. 437, 60 So. 118.

14. *State v. Brooks*, 92 Mo. 542, 573, 5 S. W. 257, 330, quoting *Cooley* Const. Lim. 380.

[a] **Rule Stated.**—"The doors of the court room are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects, . . . with due regard to the size of the courtroom, the conveniences of the court, the right to exclude objectionable characters, and youth of tender years, and to do other things which may facilitate the proper conduct of the trial." *People v. Hartman*, 103 Cal. 242, 245, 37 Pac. 153, 42 Am. St. Rep. 108.

15. *People v. Hartman*, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108.

[a] **Presence of Others.**—But it has been held that the trial is public, in a sense, when the officers of the court, the witnesses and counsel are present and when members of the bar are not excluded. *Reagan v. United States*, 202 Fed. 488, 120 C. C. A. 627,



Generally the effect of the constitutional provision has arisen in four classes of cases: (1) the exclusion of persons where there is insufficient room in the court room; (2) the exclusion of spectators temporarily to secure proper administration of justice, when the trial is interrupted by an obtrusive mob which tends to embarrass witnesses or detract from the decorum of the court; (3) the exclusion of spectators in the interests of public morals and public decency; and (4) the exclusion of witnesses.<sup>16</sup>

With respect to the first class, the authorities agree that the court may regulate the admission of the public to the court room in any appropriate manner to prevent overcrowding and disorder.<sup>17</sup> The word "public" is not used in an enlarged sense,<sup>18</sup> and does not require unreasonable and impossible things, as that all persons have an absolute right to be present regardless of the conveniences of the court and due and orderly conduct of the trial.<sup>19</sup>

With respect to the second class, a court may exclude objectionable characters,<sup>20</sup> and those persons who fail to behave decorously, or who interfere in any manner with the conduct of a case;<sup>21</sup> and it may temporarily exclude all the spectators from the court room if they become disorderly or boisterous so as to interfere with the court and confuse

44 L. R. A. (N. S.) 583. See *infra*, this section.

16. See *infra*, this section.

17. **Cal.**—*People v. Hartman*, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108; *People v. Letoile*, 31 Cal. App. 166, 159 Pac. 1057. **Ky.**—*Wendling v. Com.*, 143 Ky. 587, 137 S. W. 205. **Mo.** *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330. **Mont.**—*State v. Keeler*, 52 Mont. 205, 156 Pac. 1080, Ann. Cas. 1917E, 619, L. R. A. 1916E, 472. **Neb.** *Rhoades v. State*, 102 Neb. 750, 169 N. W. 433; *Roberts v. State*, 100 Neb. 199, 158 N. W. 930, Ann. Cas. 1917E, 1040. **Tex.**—*Kugadt v. State*, 38 Tex. Crim. 681, 44 S. W. 989.

[a] The aisles and passageways may be kept clear. *Davis v. United States*, 247 Fed. 394, 159 C. C. A. 448, L. R. A. 1918C, 1164.

18. *State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, 116 Am. St. Rep. 734, 9 L. R. A. (N. S.) 277.

19. **Cal.**—*People v. Hartman*, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108; *People v. Stanley*, 33 Cal. App. 624, 166 Pac. 596. **Ky.**—*Wendling v. Com.*, 143 Ky. 587, 137 S. W. 205. **Mont.** *State v. Keeler*, 52 Mont. 205, 156 Pac. 1080, Ann. Cas. 1917E, 619, L. R. A. 1916E, 472. **Ohio.**—*State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, 116 Am. St. Rep. 734, 9 L. R. A. (N. S.) 277.

[a] An order closing the doors after the courtroom is filled, cannot be complained of. *State v. Keeler*, 52 Mont. 205, 156 Pac. 1080, Ann. Cas. 1917E, 619, L. R. A. 1916E, 472.

[b] But the constitution does import a duty to make reasonable provision in respect to accommodation of spectators. *State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, 116 Am. St. Rep. 734, 9 L. R. A. (N. S.) 277.

20. **U. S.**—*Davis v. United States*, 247 Fed. 394, 159 C. C. A. 448, L. R. A. 1918C, 1164. **Cal.**—*People v. Hartman*, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108. **Ohio.**—*State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, 116 Am. St. Rep. 734, 9 L. R. A. (N. S.) 277.

[a] Intoxicated persons may be excluded or removed. *Davis v. United States*, 247 Fed. 394, 159 C. C. A. 448, L. R. A. 1918C, 1164.

[b] Individuals whose conduct outside the courtroom makes their presence within a menace, may be excluded. *Davis v. United States*, 247 Fed. 394, 159 C. C. A. 448, L. R. A. 1918C, 1164.

21. *Tilton v. State*, 5 Ga. App. 59, 62 S. E. 651; *State v. Keeler*, 52 Mont. 205, 156 Pac. 1080, Ann. Cas. 1917E, 619, L. R. A. 1916E, 472.

the witnesses, where it is impossible to discover the particular individuals creating the disturbance.<sup>22</sup>

With respect to the third class, when the nature of evidence to be adduced relates to indecent, vulgar, scandalous, or immoral matters, the court may exclude youths of tender years<sup>23</sup> and may, it has been held, properly request women to leave the court room<sup>24</sup> and, within reasonable bounds, may exclude persons attending the trial from motives of morbid or prurient curiosity.<sup>25</sup> Some authorities hold that the court, under such circumstances, may at the beginning of the trial exclude all spectators, or all persons except the judge, jurors, litigants, counsel, officers of the court, witnesses, and representatives of newspapers,<sup>26</sup> and, it has been held, friends of the defendant<sup>27</sup> who desire to

22. **Ala.**—*Lide v. State*, 133 Ala. 43, 31 So. 953. **Cal.**—*People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849. **Minn.** *State v. Callahan*, 100 Minn. 63, 110 N. W. 342. **Neb.**—*Rhoades v. State*, 102 Neb. 750, 169 N. W. 433. **Ohio.** *State v. Hensley*, 75 Ohio St. 255, 265, 79 N. E. 462, 116 Am. St. Rep. 734, 9 L. R. A. (N. S.) 277. **Tex.**—*Grimmett v. State*, 22 Tex. App. 36, 2 S. W. 631, 58 Am. St. Rep. 630.

Preserving order in the courtroom, see *infra*, VII, V.

[a] The court may exclude all the spectators during the examination of a witness where the witness is embarrassed by the situation and by the presence or disturbance and laughter of the audience. *Grimmett v. State*, 22 Tex. App. 36, 2 S. W. 631, 58 Am. St. Rep. 630. See also *State v. Callahan*, 100 Minn. 63, 110 N. W. 342.

[b] A sweeping unlimited order of exclusion is erroneous. *State v. Callahan*, 100 Minn. 63, 110 N. W. 342.

[c] The order of exclusion will be presumed to have been temporary to relieve the condition with reference to a particular witness. And while the record may not show a rescission of the order, it may be inferred it was not enforced when not necessary. *State v. Callahan*, 100 Minn. 63, 110 N. W. 342.

23. **Cal.**—*People v. Hartman*, 103 Cal. 242. **Ga.**—*Tilton v. State*, 5 Ga. App. 59, 62 S. E. 651. **Neb.**—*Rhoades v. State*, 102 Neb. 750, 169 N. W. 433. **N. D.**—*State v. Nyhus*, 19 N. D. 326, 124 N. W. 71, 27 L. R. A. (N. S.) 487. **Ohio.**—See *State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, 116 Am. St. Rep. 734, 9 L. R. A. (N. S.) 277.

24. *State v. McCool*, 34 Kan. 617, 9 Pac. 745. See also *Tilton v. State*, 5 Ga. App. 59, 62 S. E. 651.

25. See *State v. Callahan*, 100 Minn. 63, 68, 110 N. W. 342. See also *Ked-dington v. State*, 19 Ariz. 457, 172 Pac. 273; *State v. Hensley*, 75 Ohio St. 255, 265, 79 N. E. 462, 116 Am. St. Rep. 734, 9 L. R. A. (N. S.) 277.

26. **U. S.**—*Callahan v. United States*, 240 Fed. 683, 153 C. C. A. 481; *Reagan v. United States*, 202 Fed. 488, 120 C. C. A. 627, 44 L. R. A. (N. S.) 583. **Colo.**—*Benedict v. People*, 23 Colo. 126, 46 Pac. 637. **Fla.**—*Robertson v. State*, 64 Fla. 437, 60 So. 118. **Idaho.**—*State v. Johnson*, 26 Idaho 609, 144 Pac. 784. **N. Y.**—*People v. Hall*, 51 App. Div. 57, 64 N. Y. Supp. 433, 15 N. Y. Crim. 29. **N. D.**—*State v. Nyhus*, 19 N. D. 326, 124 N. W. 71, 27 L. R. A. (N. S.) 487.

27. *State v. Johnson*, 26 Idaho 609, 144 Pac. 784.

[a] Criticising this Idaho case, the court in *State v. Keeler*, 52 Mont. 205, 156 Pac. 1080, Ann. Cas. 1917E, 619, L. R. A. 1916E, 472, says: "If the trial court employs the term 'spectators' in its common, ordinary acceptance, then any friend of the defendant present merely as a looker-on, an observer, or a witness to the proceedings was excluded in violation of the rule which the court announces. Who shall determine whether a spectator is drawn to the courtroom by idle curiosity or by interest? What test shall be applied and what shall constitute interest sufficient to justify his presence? Why should an exception be made in favor of a friend of the defendant while the taxpayer, who is interested to know how the public

remain, and members of the bar;<sup>28</sup> but other authorities hold that such a sweeping exclusion is opposed to the constitution.<sup>29</sup>

With respect to the fourth class, the exclusion of witness from the court room does not deprive a defendant of his right to a public trial.<sup>30</sup>

When the trial does not relate to indecent or vulgar matters, an order excluding the public generally without regard to their conduct or character is erroneous.<sup>31</sup>

**Waiver.** — A person accused of crime may waive his right to a public trial.<sup>32</sup> He may do so by requesting an order excluding spectators.<sup>33</sup> It has been held that this right cannot be waived by silence<sup>34</sup> any more than the right to a trial by jury where the charge is felony and

servants—the judge, the county attorney, the sheriff, etc.—perform their work, is excluded? The bare statement of the proposition is its own refutation.

28. *State v. Johnson*, 26 Idaho 609, 144 Pac. 784. But see *State v. Keeler*, 52 Mont. 205, 156 Pac. 1080, Ann. Cas. 1917E, 619, L. R. A. 1916E, 472.

29. *Cal.*—*People v. Hartman*, 103 Cal. 242. But see *People v. Stanley*, 33 Cal. App. 624. *Ga.*—*Tilton v. State*, 5 Ga. App. 59, 62 S. E. 651. *Mich.* *People v. Yeager*, 113 Mich. 228, 71 N. W. 491. See *People v. Murray*, 89 Mich. 276, 50 N. W. 995, 28 Am. St. Rep. 294, 14 L. R. A. 809. *Mont.* *State v. Keeler*, 52 Mont. 205, 156 Pac. 1080, Ann. Cas. 1917E, 619, L. R. A. 1916E, 472. *Ohio.*—*State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, 116 Am. St. Rep. 734, 9 L. R. A. (N. S.) 277. *Ore.*—*State v. Osborne*, 54 Ore. 289, 103 Pac. 62, rape case.

[a] **The court has no power** "to exclude from the courtroom any one sui juris who comes into the presence of the court when there is accommodation for him, and who conducts himself in a becoming manner." *State v. Keeler*, 52 Mont. 205, 156 Pac. 1080, 1083, Ann. Cas. 1917E, 619, L. R. A. 1916E, 472.

[b] **A statement of the court that there will be nothing testified to which any right minded person would desire to hear but that it has no power to order the spectators from the courtroom, is not in violation of the constitution although all the spectators withdraw from the courtroom thereafter.** *People v. Gregory*, 8 Cal. App. 738, 97 Pac. 912.

[c] **To direct an officer to stand at the courtroom door and see that the room is not overcrowded, but that all**

respectable citizens be admitted and have an opportunity to get in when they apply, is to deprive the defendant of a public trial. *People v. Murray*, 89 Mich. 276, 50 N. W. 995, 28 Am. St. Rep. 294, 14 L. R. A. 809.

[d] **Where Courtroom Has Several Entrances.**—If persons are prohibited from entering at the public entrance, it is no answer to say that there are other places of ingress to the courtroom, and that one person entered the courtroom through the clerk's office. *People v. Murray*, 89 Mich. 276, 50 N. W. 995, 28 Am. St. Rep. 294, 14 L. R. A. 809.

[e] **An order excluding all listeners from the courtroom during the examination of a prosecuting witness in a rape case is an exclusion of the general public in violation of the constitution.** *Rhoades v. State*, 102 Neb. 750, 169 N. W. 433.

30. *State v. Worthen*, 124 Iowa 408, 100 N. W. 330; *State v. Quirk*, 101 Minn. 334, 112 N. W. 409.

**As to exclusion of witnesses**, see 14 ENCY. OF EV. 587.

31. *Davis v. United States*, 247 Fed. 394, 159 C. C. A. 448, L. R. A. 1918C, 1164 (trial for robbery); *People v. Murray*, 89 Mich. 276, 50 N. W. 995, 28 Am. St. Rep. 294, 14 L. R. A. 809, trial for murder.

32. *State v. Keeler*, 52 Mont. 205, 156 Pac. 1080, Ann. Cas. 1917E, 619, L. R. A. 1916E, 472.

33. *People v. Swafford*, 65 Cal. 223, 3 Pac. 809; *Dutton v. State*, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916C, 89.

34. *People v. Stanley*, 33 Cal. App. 624, 166 Pac. 596; *State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, 116 Am. St. Rep. 734, 9 L. R. A. (N. S.) 277. See *State v. Johnson*, 26 Idaho 609, 144 Pac. 784, query. But see *People v. Swafford*, 65 Cal. 223, 3 Pac.



the plea not guilty, but the authorities on this point are not uniform.<sup>35</sup>

**D. PRESENCE OF JUDGE. — 1. In Civil Actions.** — It is the duty of the judge of a trial court to preside in a judicial capacity during all the time of the trial of a civil case.<sup>36</sup> The absence of the judge for any considerable time without the consent of the parties is material error,<sup>37</sup> but it has been held that a temporary absence of the judge is not reversible error if the parties are not prejudiced thereby,<sup>38</sup> and if they make no objection.<sup>39</sup>

**2. In Criminal Prosecutions.** — It is the duty of a trial judge to be present during all the stages of a criminal trial.<sup>40</sup> The judge must not absent himself from the court room or from the presence and proceedings on the trial so as to lose control of them at any time<sup>41</sup> dur-

809, explained in *People v. Hartman*, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108.

As to waiver of trial by jury, see 16 STANDARD PROC. 941.

35. See *State v. Keeler*, 52 Mont. 205, 156 Pac. 1080, Ann. Cas. 1917E, 619, L. R. A. 1916E, 472, and cases cited *supra*, this section. See also *Ked-dington v. State*, 19 Ariz. 457, 172 Pac. 273.

36. Ill.—*Wells v. O'Hare*, 209 Ill. 627, 636, 70 N. E. 1056; *Chicago City Ry. Co. v. Creech*, 207 Ill. 400, 69 N. E. 919; *Meredeth v. People*, 84 Ill. 479. Ore.—*Olson v. Saxton*, 86 Ore. 670, 169 Pac. 119. Wis.—*Smith v. Sherwood*, 95 Wis. 558, 70 N. W. 682.

Visits by judge to jury room, see 17 STANDARD PROC. 483.

Presence of justice of the peace, see 18 STANDARD PROC. 54, note 78.

[a] If he finds it necessary to absent himself from the court room while a trial is in progress, he should suspend all judicial proceedings until his return. *Wells v. O'Hare*, 209 Ill. 627, 637, 70 N. E. 1056.

[b] If the judge retires to his chambers leaving the door of the court room open so that he can see and hear what is going on in the court room, there is no reversible error. *Chicago City Ry. Co. v. Creech*, 207 Ill. 400, 69 N. E. 919.

37. *Smith v. Sherwood*, 95 Wis. 558, 70 N. W. 682. See 2 STANDARD PROC. 744.

[a] **Consent Presumed.**—In the absence of any showing to the contrary, it will be presumed, it has been held, the judge was absent with the consent of the parties. *Gorham v. Sioux City Stock Yards Co.*, 118 Iowa 749,

92 N. W. 698. See also *Nichols & Shepherd Co. v. Metzger*, 43 Mo. App. 607.

38. Ga.—*Horne v. Rogers*, 110 Ga. 362, 35 S. E. 715, 49 L. R. A. 176. Ill.—*Wells v. O'Hare*, 209 Ill. 627, 637, 70 N. E. 1056; *Chicago City Ry. Co. v. Anderson*, 93 Ill. App. 419. Mo. *Brownlee v. Hewitt*, 1 Mo. App. 360.

39. *Horne v. Rogers*, 110 Ga. 362, 370, 35 S. E. 715, 49 L. R. A. 176 (holding the rulings of the earlier cases will not be extended in the slightest, and that if proper objection is made, the former cases will not control); *Olson v. Saxton*, 86 Ore. 670, 169 Pac. 119.

40. U. S.—*Freeman v. United States*, 227 Fed. 732, 759, 142 C. C. A. 256. Cal.—*People v. Grider*, 13 Cal. App. 703, 110 Pac. 586. Colo.—*O'Brien v. People*, 17 Colo. 561, 31 Pac. 230. Ill. *Durden v. People*, 192 Ill. 493, 61 N. E. 317, 55 L. R. A. 240; *Thompson v. People*, 144 Ill. 378, 32 N. E. 968; *Meredeth v. People*, 84 Ill. 479. N. M. *Territory v. West*, 14 N. M. 546, 99 Pac. 343. Okla.—*Wright v. State*, 7 Okla. Crim. 280, 123 Pac. 434; *Cochran v. State*, 4 Okla. Crim. 390, 393, 111 Pac. 978, 114 Pac. 747. S. D.—*State v. Jackson*, 21 S. D. 494, 113 N. W. 880, 16 Ann. Cas. 87. Tex.—*Hughes v. State*, 67 Tex. Crim. 333, 149 S. W. 173; *White v. State*, 61 Tex. Crim. 498, 135 S. W. 562; *French v. State*, 55 Tex. Crim. 538, 117 S. W. 848; *Bateson v. State*, 46 Tex. Crim. 34, 80 S. W. 88.

See 2 STANDARD PROC. 744.

41. Ark.—*Skaggs v. State*, 88 Ark. 62, 70, 113 S. W. 346, 16 Ann. Cas. 622. Colo.—*O'Brien v. People*, 17 Colo. 561, 31 Pac. 230. Ga.—*Hayes v. State*, 58 Ga. 35. Ill.—*Meredeth v. People*, 84 Ill. 479. Ia.—*State v.*

ing the trial, without suspending proceedings during his absence.<sup>42</sup> He is not precluded from changing his seat to any portion of the room he may prefer,<sup>43</sup> or from temporarily engaging in conversation, or reading and writing,<sup>44</sup> but he must remain within hearing of counsel,<sup>45</sup> and be so situated that he can hear and observe the proceedings.<sup>46</sup> It is not error for him to retire to an adjoining room, if he remain within hearing.<sup>47</sup> So also the temporary absence from the bench of one of several judges does not invalidate the judgment,<sup>48</sup> but the absence of one of the judges during a material part of the trial is error.<sup>49</sup>

**Consent or Waiver.** — It has been held that an accused cannot consent to the absence of the trial judge during trial,<sup>50</sup> but there is authority to the contrary.<sup>51</sup>

**Effect of Absence.** — If the trial judge, in a felony case, retires from the bench so as to lose control of the case while substantial proceedings such as the taking of evidence or the argument of counsel, are being

Carnagy, 106 Iowa 483, 76 N. W. 805. **Kan.**—State v. Beuerman, 59 Kan. 586, 53 Pac. 874. **Miss.**—Turbeville v. State, 56 Miss. 793, 799. **Okla.**—Peters Branch of I. Shoe Co. v. Blake, 176 Pac. 892; Wright v. State, 7 Okla. Crim. 280, 123 Pac. 434.

[a] **He should remain within hearing**, that he may not even temporarily lose control of the proceedings and the conduct of the trial. State v. Carnagy, 106 Iowa 483, 487, 76 N. W. 805.

[b] **It is just as serious an error for the court to retire to a remote place in the courtroom**, out of hearing and control of the proceedings in progress as it is to absent himself from the courtroom entirely. Wright v. State, 7 Okla. Crim. 280, 123 Pac. 434.

**Presence during argument**, see 2 STANDARD PROC. 744.

**Presence at view by jury**, see the title "**View.**"

42. **Ga.**—O'Shields v. State, 81 Ga. 301, 6 S. E. 426. **Ill.**—Meredeth v. People, 84 Ill. 479. **Ky.**—May v. Com., 153 Ky. 141, 154 S. W. 1074. **N. M.** Territory v. West, 14 N. M. 546, 99 Pac. 343. **Okla.**—Cochran v. State, 4 Okla. Crim. 379, 111 Pac. 974. **Tex.** Hughes v. State, 67 Tex. Crim. 333, 149 S. W. 173; Scott v. State, 47 Tex. Crim. 568, 85 S. W. 1060, 122 Am. St. Rep. 717.

43. Turbeville v. State, 56 Miss. 793.

[a] **But in the trial of a capital case**, especially during the examination of a witness for the state, the judge should not retire beyond the bar, for even a brief absence, without ordering

a suspension of business. Hayes v. State, 58 Ga. 35.

44. Turbeville v. State, 56 Miss. 793; Cravens v. State, 55 Tex. Crim. 519, 117 S. W. 156, 16 Ann. Cas. 907.

45. Turbeville v. State, 56 Miss. 793; Anderson v. State, 50 Tex. Crim. 134, 95 S. W. 1037.

46. Wright v. State, 7 Okla. Crim. 280, 123 Pac. 434.

47. **Ark.**—Skaggs v. State, 88 Ark. 62, 113 S. W. 346, 16 Ann. Cas. 622. **Conn.**—State v. Smith, 49 Conn. 376. **Ga.**—Brantley v. State, 10 Ga. App. 24, 72 S. E. 520. **Ill.**—Schintz v. People, 178 Ill. 320, 52 N. E. 903; Thompson v. People, 144 Ill. 378, 32 N. E. 968. **Miss.**—Turbeville v. State, 56 Miss. 793. **Tex.**—Cravens v. State, 55 Tex. Crim. 519, 117 S. W. 156, 16 Ann. Cas. 907.

See Chicago City R. Co. v. Creech, 207 Ill. 400, 69 N. E. 919.

48. See 6 STANDARD PROC. 76, notes 53 to 56.

49. Hinman v. People, 13 Hun (N. Y.) 266. See 6 STANDARD PROC. 76, note 55.

50. See *infra*, this note.

[a] **Neither the accused nor his counsel can consent to the absence of the judge and to the appointment of a member of the bar to preside.** Meredith v. People, 84 Ill. 479.

51. McVay v. State, 104 Ark. 629, 150 S. W. 125; State v. Lautenschlager, 22 Minn. 514.

**During Argument.**—See 2 STANDARD PROC. 745.

**Necessity for objection**, see *infra*, note 53.

carried on in the presence of the jury, a judgment of conviction will be reversed.<sup>52</sup> It has been held that the defendant must interpose an objection or move for a mistrial,<sup>53</sup> and some authorities hold that a temporary absence of the judge is not ground for reversal unless some harm results to the defendant because of it.<sup>54</sup> In misdemeanor cases, the absence of the judge, if objection is seasonably made, is fatal error,<sup>55</sup> except when it appears to the reviewing court that the accused was not prejudiced.<sup>56</sup>

**3. Change of Judge Pending Trial.**<sup>57</sup>—A judge has no power to delegate his authority to act.<sup>58</sup>

In criminal prosecutions, especially for felonies, the trial once commenced must proceed to the end before the same judge,<sup>59</sup> unless the

**52. Ark.**—*Stokes v. State*, 71 Ark. 112, 71 S. W. 248. **Colo.**—See *O'Brien v. People*, 17 Colo. 561, 31 Pac. 230, when the judge was absent for one-half an hour during the argument. **Ill.** *Wells v. O'Hare*, 209 Ill. 627, 70 N. E. 1056; *Thompson v. State*, 144 Ill. 378, 32 N. E. 968 (where judge was absent during closing argument of the state); *Meredeth v. People*, 84 Ill. 479, where the judge was absent for a part of two days, and a member of the bar presided. **Okla.**—*Wright v. State*, 7 Okla. Crim. 280, 123 Pac. 434, where the judge walked to the rear of the court room.

**53. O'Brien v. People**, 17 Colo. 561, 31 Pac. 230; *Pritchett v. State*, 92 Ga. 65, 18 S. E. 536; *O'Shields v. State*, 81 Ga. 301, 6 S. E. 426.

**54. Pritchett v. State**, 92 Ga. 65, 18 S. E. 536; *O'Shields v. State*, 81 Ga. 301, 6 S. E. 426; *White v. State*, 61 Tex. Crim. 498, 135 S. W. 562 (*limiting* *Bateson v. State*, 46 Tex. Crim. 34, 80 S. W. 88); *Scott v. State*, 47 Tex. Crim. 568, 85 S. W. 1060, 122 Am. St. Rep. 717. See *Williams v. State* (Tex. Crim.), 99 S. W. 1000.

[a] A mere momentary stepping aside of the judge will not authorize or require a reversal. *Scott v. State*, 47 Tex. Crim. 568, 85 S. W. 1060, 122 Am. St. Rep. 717.

**55. Wells v. O'Hare**, 209 Ill. 627, 70 N. E. 1056, dictum.

**56. Ward v. State**, 14 Ga. App. 424, 81 S. E. 130; *Wells v. O'Hare*, 209 Ill. 627, 70 N. E. 1056, dictum.

**57. Exchange or transfer of judges**, see 16 STANDARD PROC. 634.

**58. Ill.**—*Durden v. People*, 192 Ill. 493, 61 N. E. 317, 55 L. R. A. 240; *Davis v. Wilson*, 65 Ill. 525. **Ind.** *Britton v. Fox*, 39 Ind. 369. **Nev.**

*Schwartz v. Stock*, 26 Nev. 128, 145, 65 Pac. 351. **Wis.**—*Van Slyke v. Trempealeau C. F. M. F. Ins. Co.*, 39 Wis. 390, 20 Am. Rep. 50.

See 6 STANDARD PROC. 76, note 56.

**59. U. S.**—*Freeman v. United States*, 227 Fed. 732, 753, 142 C. C. A. 256. **Cal.**—*People v. Eckert*, 16 Cal. 110. See *People v. Henderson*, 28 Cal. 465. **Ill.**—*Durden v. People*, 192 Ill. 493, 61 N. E. 317, 55 L. R. A. 240. **N. Y.**—*People v. McPherson*, 74 Hun 336, 26 N. Y. Supp. 236, 11 N. Y. Crim. 6, 55 N. Y. St. 688. See *Blend v. People*, 41 N. Y. 604.

[a] If one of the justices comes late into the case, either he should not join in hearing it, or the witnesses who were examined before his entrance should be resworn. *Reg. v. Jeffreys*, 22 L. T. N. S. (Eng.) 786.

[b] The right of judges to hold court for each other and perform each other's duties where they find it necessary or convenient, does not involve the right or power of one judge to finish for another the performance of a duty already entered upon by the latter, when that duty involves the exercise of judgment and the application of legal knowledge and judicial deliberation to facts known to the latter and not known to the former. *Durden v. People*, 192 Ill. 493, 498, 61 N. E. 317, 55 L. R. A. 240.

[c] It is not sufficient that the court or tribunal is the same after the substitution of another judge of equal power. The trial must proceed before the same judge before whom it was commenced. *Durden v. People*, 192 Ill. 493, 506, 61 N. E. 317, 55 L. R. A. 240. *Contra*, *Hedrick v. Bell*, 84 Ill. App. 523, a civil action.



statute allows a substitution of another judge.<sup>60</sup> And it has been held that neither the government nor the accused nor both can consent to the substitution of one judge for another in a felony case.<sup>61</sup> If the judge becomes incapacitated by illness or death after the jury is impaneled and sworn, the proper course to pursue is to declare a mistrial and begin *de novo*.<sup>62</sup> It is error either to substitute another judge during trial,<sup>63</sup> or to appoint a member of the bar to preside over the trial during the judge's absence,<sup>64</sup> or to fill the place of one of the judges who leaves the court pending trial.<sup>65</sup>

**Civil Cases.** — Similar rules seem to govern the substitution of the judge during the trial of civil actions.<sup>66</sup> But it has been held permissible to substitute another judge after the hearing of the evidence and instructions and before argument,<sup>67</sup> and to substitute another judge with the consent of the parties,<sup>68</sup> and also that there is no ground for reversal unless some special harm or prejudice results from the change.<sup>69</sup>

**Imposition of sentence by another judge,** see the title, "**Sentence and Judgment.**"

**An application for new trial may be made to another judge,** see 20 STANDARD PROC. 582.

**What judge must settle bill of exceptions,** see 4 STANDARD PROC. 332.

60. See the statutes and *People v. Lichtenstein*, 22 Cal. App. 592, 135 Pac. 692.

61. *Freeman v. United States*, 227 Fed. 732, 759, 142 C. C. A. 256; *Turbeville v. State*, 56 Miss. 793. But see *People v. Henderson*, 28 Cal. 465.

[a] **Otherwise in Misdemeanor Cases.**—*Turbeville v. State*, 56 Miss. 793.

[b] **In California**, it has been held that there may be no inconvenience in another judge taking up the case after the close of the testimony. If the parties consent to such a course, they cannot subsequently repudiate the proceedings. *People v. Henderson*, 28 Cal. 465, a prosecution for murder.

62. *West v. State*, 42 Fla. 244, 28 So. 430.

63. *Durden v. People*, 192 Ill. 493, 61 N. E. 317, 55 L. R. A. 240.

64. *Meredeth v. People*, 84 Ill. 479; *Davis v. Wilson*, 65 Ill. 525, 530; *Turbeville v. State*, 56 Miss. 793.

65. *People v. Eckert*, 16 Cal. 110, whether ground for reversal, query. See 6 STANDARD PROC. 76.

66. See *infra*, this note.

[a] **A statute authorizing any judge to act for another judge who is not present at a hearing by reason of sickness or otherwise**, "except in the trial of causes when the trial has al-

ready commenced," prohibits one judge from taking the place of another who becomes ill during the trial. He may perhaps perform some of the duties of the absentee, such as adjourning the trial, or discharging the jury in case of disagreement, or because of such absence, or in receiving a verdict, but he cannot preside over the trial while any material matters are under consideration. He cannot even read instructions prepared by the trial judge. *Rossman v. Moffett*, 75 Minn. 289, 77 N. W. 960.

**Calling in other judges in case of disqualification,** see 16 STANDARD PROC. 634, 690.

67. *Bullock v. Neal*, 42 Ark. 278.

[a] **When the trial judge becomes ill after the giving of the instructions and unable to continue in the discharge of his duties**, the trial may proceed under a special judge before the same jury and without rehearing the testimony. *Bullock v. Neal*, 42 Ark. 278.

**As to special judges generally,** see 16 STANDARD PROC. 696.

68. *Turbeville v. State*, 56 Miss. 793, *obiter*.

69. *Hedrick v. Bell*, 84 Ill. App. 523.

[a] **"Under our judicial system it is not uncommon for as many judges as may be in the circuit to have presided, and caused the orders of the court to be entered of record in a particular case while pending in court.** There is no greater reason, in our opinion, for requiring the same judge to sit throughout the trial of a given case, than there would be that the same judge who had caused the order of the

A person not a judge may by consent of the parties, appearing of record, act as such,<sup>70</sup> but the trial judge cannot, without such consent, designate a member of the bar as judge during the remainder of the trial.<sup>71</sup> These rules do not, however, prohibit the trial judge from inviting another judge to sit with him during argument.<sup>72</sup>

**E. PRESENCE OF COURT OFFICERS.** — The proper court officers should be present at the trial.<sup>73</sup>

**F. PRESENCE OF JURY.** — The necessity for the presence of the jury is elsewhere discussed.<sup>74</sup>

**G. PRESENCE OF PARTIES.** — **1. In Civil Actions.** — A party to an action has a right to be present upon the trial of the action.<sup>75</sup> The non-appearance of the plaintiff at the trial is ground for a dismissal or nonsuit,<sup>76</sup> but it has been held that the court is not required to dismiss the action over the objection of the defendant, but may try the case on the merits.<sup>77</sup> When the defendant fails to appear at the trial the

court to be entered, disposing of a demurrer to a declaration should also rule upon the pleas to the same declaration. . . . It is always the same court, the orders and judgment are of and by the court, the personality of the judge being wholly merged therein, and unless some special harm or prejudice has resulted by reason of such change of judges . . . there can be no just ground for complaint." *Hedrick v. Bell*, 84 Ill. App. 523.

70. *Davis v. Wilson*, 65 Ill. 525; *Tabor v. Armstrong*, 30 Ky. L. Rep. 938, 99 S. W. 957.

71. *Davis v. Wilson*, 65 Ill. 525.

72. *Schwartz v. Stock*, 26 Nev. 128, 145, 65 Pac. 351.

73. See *infra*, this note.

[a] **As to clerk**, see *Hollar v. State* (Tex. Crim.), 73 S. W. 961, and 6 STANDARD PROC. 21.

[b] **As to sheriff**, see *Jackson v. Com.*, 100 Ky. 239, 38 S. W. 422, 1091, 66 Am. St. Rep. 336.

74. See 17 STANDARD PROC. 454.

**Presence of jury during argument**, see 2 STANDARD PROC. 745; 17 STANDARD PROC. 454.

75. **Ind.**—*Ziegler v. Funkhouser*, 42 Ind. App. 428, 85 N. E. 984. **Ia.**—*Garvik v. Burlington, C. R. & N. Ry. Co.*, 124 Iowa 691, 100 N. W. 498. **Kan.** See *Masters v. McHolland*, 12 Kan. 17. **Ky.**—*Louisville & N. R. Co. v. Kelly's Admx.*, 100 Ky. 421, 38 S. W. 852, 40 S. W. 452.

**Presence of parties and counsel when court communicates with the jury after**

its retirement to deliberate on verdict, see 17 STANDARD PROC. 481.

[a] **Private examination by jury in absence of party** not permissible. *Garvik v. Burlington, C. R. & N. Ry. Co.*, 124 Iowa 691, 100 N. W. 498. See 21 STANDARD PROC. 363, note 90.

[b] **But at the signing and filing of findings**, neither party is entitled to have notice or to be present. *San Luis Obispo Co. v. Simas*, 1 Cal. App. 175, 81 Pac. 972. As to notice, see 8 STANDARD PROC. 1019.

**Nonappearance at trial, as a default**, see 6 STANDARD PROC. 805.

**Recital of presence of party in certificate to deposition**, see 7 STANDARD PROC. 347.

76. See 7 STANDARD PROC. 676; 14 STANDARD PROC. 855.

**At common law**, no verdict could be given unless the plaintiff or his attorney was present. See 7 STANDARD PROC. 676.

77. *Comstock Castle Stove Co. v. Galland*, 6 Kan. App. 831, 49 Pac. 690.

[a] See *Marshall v. Livingston*, 77 Ga. 21, holding that the court, in the absence of the plaintiff or his counsel and after dismissal of a suit to recover personally may permit the sheriff to prove that the plaintiff executed the recognizances which would operate as a judgment of restitution if he dismissed his action. Having received the property on the faith of the recognizance, he could not make an issue on such statements. *Contra*, *Diment v. Bloom*, 67 Minn. 111, 69 N. W. 700; *Keator v. Glaspie*, 44 Minn. 448, 47

court should direct the trial to proceed,<sup>78</sup> and cannot render a judgment by default,<sup>79</sup> except, perhaps, where the defendant has the affirmative of all the issues.<sup>80</sup> The mere absence of a party is not ground for a continuance, unless his presence is shown to be necessary.<sup>81</sup> Nor is it in itself ground for new trial,<sup>82</sup> or for equitable relief against the judgment.<sup>83</sup>

**2. In Criminal Prosecutions.**<sup>84</sup> — a. *For Felonies.* — It is a well settled general rule that in all felony cases the accused must be present in person at all stages of the trial.<sup>85</sup> Thus he must be present at

N. W. 52; *Vail v. Wright*, 3 N. J. L. 681.

[b] **Reason of Rule.** — If the court were required to dismiss the case because of the plaintiff's absence, the plaintiff may commence his case and have it dismissed from time to time until the defendant fails to appear, or his evidence is lost, and then take judgment. *Comstock Castle Stove Co. v. Galland*, 6 Kan. App. 831, 49 Pac. 690.

**Where counterclaim is interposed**, see 14 STANDARD PROC. 855, note 54 [a] and the title "**Set-Off, Counterclaim and Recoupment.**"

**78. Colo.** — *Davis v. Peek*, 12 Colo. App. 259, 55 Pac. 192. **Kan.** — *Union Pac. Ry. Co. v. Horney*, 5 Kan. 340. **Mich.** — *Culley v. Walkeen*, 80 Mich. 443, 45 N. W. 368. **N. Y.** — *Gaskell v. Cowan*, 14 Misc. 254, 35 N. Y. Supp. 711, 70 N. Y. St. 446.

**Bastardy proceeding**, see 4 STANDARD PROC. 73.

**79.** See 14 STANDARD PROC. 855, 856.

**80.** *Schooler v. Asherst*, 1 Litt. (Ky.) 216, 13 Am. Dec. 232.

**81.** See 5 STANDARD PROC. 448.

**82.** See 20 STANDARD PROC. 491

**83.** See 15 STANDARD PROC. 315.

**84. Presence at preliminary examination**, see 21 STANDARD PROC. 507.

**On arraignment**, see 2 STANDARD PROC. 869.

**At plea**, see 2 STANDARD PROC. 883, notes 14-17; 2 STANDARD PROC. 892, 908; and *Miller v. State*, 29 Neb. 437, 45 N. W. 451.

**Presence of accused when granting continuance**, see 5 STANDARD PROC. 441.

**Presence at sentence**, see the title "**Sentence and Judgment.**"

**Presence at court martial**, see 6 STANDARD PROC. 117.

**Presence of accused as essential to due process of law**, see 7 STANDARD PROC. 922,

**85. U. S.** — *Lewis v. United States*, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. ed. 1011. **Ala.** — *Cook v. State*, 60 Ala. 39, 31 Am. Rep. 31; *Slocovitch v. State*, 46 Ala. 227. **Ark.** — *Davidson v. State*, 108 Ark. 191, 158 S. W. 1103, Ann. Cas. 1915B, 436. **Fla.** — *Fails v. State*, 60 Fla. 8, 53 So. 612, Ann. Cas. 1912B, 1146; *Palmquist v. State*, 30 Fla. 73, 11 So. 521. **Ga.** — *Nolan v. State*, 55 Ga. 521, 21 Am. Rep. 281. **Ill.** — *People v. Turney*, 273 Ill. 546, 557, 113 N. E. 105. **Ind.** — *Roberts v. State*, 111 Ind. 340, 12 N. E. 500. **Kan.** — *State v. Moran*, 46 Kan. 318, 26 Pac. 754; *State v. Smith*, 44 Kan. 75, 24 Pac. 84, 21 Am. St. Rep. 266, 8 L. R. A. 774. **La.** — *State v. Thomas*, 128 La. 813, 55 So. 415. **Miss.** — *Booker v. State*, 81 Miss. 391, 33 So. 221, 95 Am. St. Rep. 474; *Rolls v. State*, 52 Miss. 391; *Long v. State*, 52 Miss. 23. **Mo.** — *State v. Crockett*, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4; *State v. Braunschweig*, 36 Mo. 397. **N. Y.** — *People v. Genet*, 59 N. Y. 80, 17 Am. Rep. 315; *Maurer v. People*, 43 N. Y. 1. **N. C.** — *State v. Dry*, 152 N. C. 813, 67 S. E. 1000; *State v. Jenkins*, 84 N. C. 812, 37 Am. Rep. 643. **Ohio.** — *Jones v. State*, 26 Ohio St. 208. **Okla.** — *Humphrey v. State*, 3 Okla. Crim. 504, 106 Pac. 978, 139 Am. St. Rep. 972. **Ore.** — *State v. Spores*, 4 Ore. 198; *Dougherty v. Com.*, 69 Pa. 286. **Tenn.** — *Vowell v. State*, 132 Tenn. 349, 178 S. W. 768; *Clark v. State*, 4 Humph. 254. **Tex.** — *Emery v. State*, 57 Tex. Crim. 423, 123 S. W. 133, 136 Am. St. Rep. 988; *Derden v. State*, 56 Tex. Crim. 396, 120 S. W. 485, 133 Am. St. Rep. 986. **Utah.** — *State v. Mannion*, 19 Utah 505, 57 Pac. 542, 75 Am. St. Rep. 753, 45 L. R. A. 638. **Va.** — *Coleman v. Com.*, 90 Va. 635, 19 S. E. 161; *Hooker v. Com.*, 13 Gratt. (54 Va.) 763. **W. Va.** — *State v. Sutter*, 71 W. Va. 371, 76 S. E. 811, 43 L. R. A. (N. S.) 399; *State v. Stevenson*, 64 W. Va. 392, 62 S. E. 688.



the empaneling of the jury,<sup>86</sup> when witnesses are examined to determine their competency<sup>87</sup> and are sworn,<sup>88</sup> at the introduction of evidence<sup>89</sup> during the argument of counsel,<sup>90</sup> the charging the jury,<sup>91</sup> when the jury after its retirement returns and receives additional instructions,<sup>92</sup> or reexamines evidence or witnesses,<sup>93</sup> and when the ver-

**Wis.**—*French v. State*, 85 Wis. 400, 55 N. W. 566, 39 Am. St. Rep. 855, 21 L. R. A. 402.

[a] **The rule applies only to trial courts**, not courts of appeal in which the case is not tried on the facts. *Phleming v. State*, Minor (Ala.) 42; *State v. Jacobs*, 107 N. C. 772, 11 S. E. 962, 22 Am. St. Rep. 912.

[b] **After plea of guilty** any examination of witnesses for the purpose of determining the character of the sentence, must be in the presence of defendant. *State v. Stevenson*, 64 W. Va. 392, 62 S. E. 688, 19 L. R. A. (N. S.) 713.

[c] **Until Final Judgment.**—*Allen v. Com.*, 86 Ky. 642, 6 S. W. 645. See the title "Sentence and Judgment."

[d] **Position in Court.**—He must be where he can see, hear, be seen and be heard. *Derden v. State*, 56 Tex. Crim. 396, 120 S. W. 485, 133 Am. St. Rep. 986. See generally *infra*, VII, J. But the fact that the defendant steps into an ante room connected with the courtroom, to telephone, and is there for five minutes while his counsel continues a cross-examination, is not a violation of the rule. *People v. Bragle*, 88 N. Y. 585, 63 How. Pr. 143, 42 Am. Rep. 269.

**Misconduct making removal necessary**, see *infra*, VII, G, 2, c.

86. **U. S.**—*Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. ed. 262. **Miss.** *Warfield v. State*, 96 Miss. 170, 50 So. 561. **Mo.**—*State v. Smith*, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4. **S. D.** *State v. Pearse*, 19 S. D. 75, 102 N. W. 222.

[a] **While Juror Was Being Examined or Challenged.**—*State v. Thomas*, 128 La. 813, 55 So. 415.

[b] **Placing the names of the jury panel in the box** preparatory to drawing a jury to try the case, after defendant's counsel has announced ready but in defendant's absence, is not a violation of the rule, since it may be done at any time and the presumption is that the names are kept there subject to be drawn. *Bearden v. State*, 44 Ark. 331.

87. *People v. McNair*, 21 Wend. (N. Y.) 608.

88. *Bearden v. State*, 44 Ark. 331.

89. **Ala.**—*Boyd v. State*, 153 Ala. 41, 45 So. 591. **Ind.**—*Shular v. State*, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211. **Kan.**—*State v. Moran*, 46 Kan. 318, 26 Pac. 754. **Miss.**—*Booker v. State*, 81 Miss. 391, 33 So. 221, 95 Am. St. Rep. 474. **Tenn.**—*Richards v. State*, 91 Tenn. 723, 20 S. W. 533, 30 Am. St. Rep. 907. **Utah.**—*State v. Mannion*, 19 Utah 505, 57 Pac. 542, 75 Am. St. Rep. 753, 45 L. R. A. 638. **W. Va.**—*State v. Stevenson*, 64 W. Va. 392, 62 S. E. 688, 19 L. R. A. (N. S.) 713.

[a] **The reading of depositions** is a part of the trial within the rule. *People v. Kohler*, 5 Cal. 72.

[b] **Evidence admitted in defendant's absence** may be stricken out, and given anew in his presence, thus curing the error. **Ala.**—*Boyd v. State*, 153 Ala. 41, 45 So. 591. **Mont.**—*State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026. **Tex.**—*Cason v. State*, 52 Tex. Crim. 220, 106 S. W. 337. *Contra*, *Booker v. State*, 81 Miss. 391, 33 So. 221, 95 Am. St. Rep. 474.

90. *Tiller v. State*, 96 Ga. 430, 23 S. E. 825. See 2 STANDARD PROC. 743.

91. **Ark.**—*Stroope v. State*, 72 Ark. 379, 80 S. W. 749. **Ga.**—*Bonner v. State*, 67 Ga. 510. **Ill.**—*Crowell v. People*, 190 Ill. 508, 60 N. E. 872. **Ky.** *Bailey v. Com.*, 24 Ky. L. Rep. 1419, 71 S. W. 632. **N. C.**—*State v. Blackwelder*, 61 N. C. 38. **Tex.**—*Gardner v. State*, 55 Tex. Crim. 394, 117 S. W. 140; *Hill v. State*, 54 Tex. Crim. 646, 114 S. W. 117. **Wash.**—*State v. Shutzler*, 82 Wash. 365, 144 Pac. 284. **Wis.** *Havenor v. State*, 125 Wis. 444, 104 N. W. 116.

92. *Cowart v. State*, 65 Tex. Crim. 482, 145 S. W. 341. See 13 STANDARD PROC. 982.

93. *Maurer v. People*, 43 N. Y. 1; *Cowart v. State*, 65 Tex. Crim. 482, 145 S. W. 341. See 17 STANDARD PROC. 582.

[a] **Rereading of Depositions.**—*People v. Kohler*, 5 Cal. 72.

diet is returned<sup>94</sup> and the jury discharged.<sup>95</sup> But the accused need not be present at preliminary proceedings, motions, and so forth, which are not essentially a part of the trial and have no bearing upon proof of his guilt or innocence,<sup>96</sup> as, for instance, a motion to compel an election between counts,<sup>97</sup> or the appointment of an assistant prosecutor,<sup>98</sup> or a motion for change of venue,<sup>99</sup> continuance,<sup>1</sup> hearing of a demurrer,<sup>2</sup> motion to quash,<sup>3</sup> motion for new trial,<sup>4</sup> or in motion arrest

94. U. S.—Frank v. Mangum, 237 U. S. 309, 35 Sup. Ct. 582, 59 L. ed. 969. Ala.—Wells v. State, 147 Ala. 140, 41 So. 630; State v. Hughes, 2 Ala. 102, 36 Am. Dec. 411. Cal.—People v. Beauchamp, 49 Cal. 41. Colo.—Smith v. People, 8 Colo. 457, 8 Pac. 920. Fla.—Summeralls v. State, 37 Fla. 162, 20 So. 242, 53 Am. St. Rep. 247. Ga.—Nolan v. State, 55 Ga. 521, 21 Am. Rep. 281; Lyons v. State, 7 Ga. App. 50, 66 S. E. 149. Ky.—Temple v. Com., 14 Bush 769, 29 Am. Rep. 442. Miss.—Sherrod v. State, 93 Miss. 774, 47 So. 554, 20 L. R. A. (N. S.) 509. Mo.—State v. Braunschweig, 36 Mo. 397. N. C.—State v. Jenkins, 84 N. C. 812, 37 Am. Rep. 643. Ore.—State v. McDaniel, 70 Ore. 232, 140 Pac. 993. Tenn.—Perce v. State, 118 Tenn. 765, 103 S. W. 780. Tex.—Derdin v. State, 56 Tex. Crim. 396, 120 S. W. 485, 133 Am. St. Rep. 986. Wis.—French v. State, 85 Wis. 400, 55 N. W. 566, 39 Am. St. Rep. 855, 21 L. R. A. 402. Wyo.—Trumbull v. Territory, 3 Wyo. 280, 21 Pac. 1081, 6 L. R. A. 384.

See the title "Verdict."

[a] Felonies not capital offenses do not demand the defendant's presence when the verdict is rendered, though he has the right to be present. State v. Kelly, 97 N. C. 404, 2 S. E. 185, 2 Am. St. Rep. 299.

Waiver by voluntary absence, see *infra*, VII, G, 2, c.

95. Teat v. State, 53 Miss. 439, 24 Am. Rep. 708; State v. Holloway, 57 Ore. 162, 110 Pac. 397, 791. See 17 STANDARD PROC. 625.

[a] In case of discharge for disagreement, in the absence of accused, the error is non-prejudicial. State v. White, 19 Kan. 445, 27 Am. Rep. 137. See also State v. Vaughan, 29 Iowa 286; Yarbrough v. Com., 89 Ky. 151, 12 S. W. 143, 25 Am. St. Rep. 524.

96. Ala.—Milton v. State, 134 Ala. 42, 32 So. 653. Cal.—People v. Witt, 170 Cal. 104, 148 Pac. 928. Fla.—Ammons v. State, 65 Fla. 166, 61 So. 496.

Ind.—Jones v. State, 152 Ind. 318, 53 N. E. 222. Miss.—Swor v. State, 81 Miss. 453, 33 So. 223. N. Y.—People v. Vail, 57 How. Pr. 81, 6 Abb. N. C. 206. S. C.—State v. Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877. Utah.—State v. Woolsey, 19 Utah 486, 57 Pac. 426. Wis.—Vogel v. State, 138 Wis. 315, 119 N. W. 190.

[a] When the jury is called into court to be informed of an adjournment it is not necessary that defendant be present. State v. Suire, 142 La. 101, 76 So. 254.

97. State v. Kendall, 56 Kan. 238, 42 Pac. 711.

98. Hall v. State, 132 Ind. 317, 31 N. E. 536.

99. Ark.—Bond v. State, 63 Ark. 504, 39 S. W. 554, 58 Am. St. Rep. 129. Mo.—State v. Long, 209 Mo. 366, 108 S. W. 35. Okla.—Henry v. State, 10 Okla. Crim. 369, 136 Pac. 982, 52 L. R. A. (N. S.) 113.

See 4 STANDARD PROC. 992.

1. State v. Long, 209 Mo. 366, 108 S. W. 35; Henry v. State, 10 Okla. Crim. 369, 136 Pac. 982, 52 L. R. A. (N. S.) 113. See 5 STANDARD PROC. 441, note 4. But see Wheeler v. State, 14 Ind. 573; Shelton v. Com., 89 Va. 450, 16 S. E. 355.

2. Miller v. State, 29 Neb. 437, 45 N. W. 451.

3. Ind.—Epps v. State, 102 Ind. 539, 1 N. E. 491. Mont.—State v. Little Whirlwind, 22 Mont. 425, 56 Pac. 820. N. Y.—People v. Vail, 57 How. Pr. 81, 6 Abb. N. C. 206.

See 12 STANDARD PROC. 637.

[a] The hearing on such motion is not part of the trial and accused is not entitled to be present. State v. Atkinson, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877.

[b] When considered as part of the trial such a motion should not be made in the defendant's absence. State v. Clifton, 57 Kan. 448, 46 Pac. 715.

4. See 20 STANDARD PROC. 612 and the following: Ala.—Dorsey v. State,

of judgment.<sup>5</sup>

b. *For Misdemeanors*.—In misdemeanor cases the accused has the right to be personally present and the trial cannot proceed without him unless he waives this right.<sup>6</sup> In some states the matter is variously regulated by statutes,<sup>7</sup> some of which provide that the defendant need not be personally present,<sup>8</sup> and others require his presence where punishment by imprisonment may be inflicted.<sup>9</sup>

c. *Waiver of Presence*.—According to some authorities, it is not in the power of a person accused of a felony either by himself or by counsel to waive the right to be personally present during the trial,<sup>10</sup>

107 Ala. 157, 18 So. 199. **Ill.**—God-freidson v. People, 88 Ill. 284. **La.** State v. White, 52 La. Ann. 206, 26 So. 849. **Mo.**—State v. Brown, 63 Mo. 439. **N. J.**—Donnelly v. State, 26 N.

J. L. 601. **Va.**—But see Hooker v. Com., 13 Gratt. (54 Va.) 763. **W. Va.** State v. Grove, 74 W. Va. 702, 82 S. E. 1019. **Eng.**—Rex v. Fielder, 2 D. & R. 46, 16 E. C. L. 72; Rex v. Caudwell, 17 Q. B. 503, 117 Eng. Reprint 1374.

5. **La.**—State v. West, 45 La. Ann. 928, 13 So. 173. **S. C.**—State v. Jefcoat, 20 S. C. 383. **Wash.**—State v. Grier, 11 Wash. 244, 39 Pac. 874.

*Contra*, Rolls v. State, 52 Miss. 391.

6. **Ala.**—Slocovitch v. State, 46 Ala. 227. **Ark.**—Owen v. State, 38 Ark. 512; Warren v. State, 19 Ark. 214, 68 Am. Dec. 214. **Ga.**—Lyons v. State, 7 Ga. App. 50, 66 S. E. 149. **Miss.**—Corbin v. State, 99 Miss. 486, 55 So. 43. **Ohio.**—Fight v. State, 7 Ohio (pt. 1), 180, 28 Am. Dec. 626. **Pa.**—Lynch v. Com., 88 Pa. 189, 32 Am. Rep. 445. **Tex.**—Love v. State, 71 Tex. Crim. 259, 158 S. W. 532.

As to waiver, see *infra*, VII, G, 2, c.

A default judgment against a corporation prosecuted for a misdemeanor, may be entered on its failure to appear. See 5 STANDARD PROC. 681, note 49.

7. See the statutes.

8. **Cal.**—People v. Ebner, 23 Cal. 158. **Kan.**—State v. Forner, 75 Kan. 423, 89 Pac. 674, 12 Ann. Cas. 703. **Ky.**—Payne v. Com., 16 Ky. L. Rep. 839, 30 S. W. 416, default judgment for non-appearance at trial.

Compare Warren v. State, 19 Ark. 214, 68 Am. Dec. 214. See 14 STANDARD PROC. 626, note 70.

[a] The statute applies only where the defendant voluntarily waives his right to be present. Owen v. State, 38 Ark. 512.

9. Anderson v. State, 6 Okla. Crim. 606, 116 Pac. 1134; Stuart v. State, 6

Okla. Crim. 27, 115 Pac. 1026; Brooks v. State, 77 Tex. Crim. 517, 179 S. W. 447; Derden v. State, 56 Tex. Crim. 396, 120 S. W. 485, 133 Am. St. Rep. 986.

10. **U. S.**—See Lewis v. United States, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. ed. 1011; Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. ed. 262. These cases are distinguished in Diaz v. United States, 223 U. S. 442, 458, 32 Sup. Ct. 250, 56 L. ed. 500, Ann. Cas. 1913C, 1138. **Ala.**—Waller v. State, 40 Ala. 325. **Ark.**—Sneed v. State, 5 Ark. 431, 41 Am. Dec. 102. **N. Y.**—Maurer v. People, 43 N. Y. 1. **Ohio.**—Rose v. State, 20 Ohio 31. **Tenn.** Andrews v. State, 2 Sneed 550. **Va.** Jackson v. Com., 19 Gratt. (60 Va.) 656.

[a] *Reason of Rule*.—The argument that the defendant may waive his presence necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view of the relations which the accused holds to the public as of the end of human punishment. The public has an interest in his life and liberty. Neither can be taken except in the mode prescribed by law; that which the law makes essential in proceedings involving life and liberty cannot be dispensed with or affected by the consent of the accused. Hopt v. Utah, 110 U. S. 574, 578, 4 Sup. Ct. 202, 28 L. ed. 262.

[b] *Failure to object or except* does not affect the matter. State v. Thomas, 128 La. 813, 55 So. 415, citing and quoting Hopt v. Utah, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. ed. 262.

[c] *Neither presence of counsel nor his failure to object* is a waiver. Maurer v. People, 43 N. Y. 1.



unless a waiver is authorized by statute.<sup>11</sup> According to other authorities, the defendant can waive any right guaranteed him by the law or the constitution, and can therefore waive his right to be present at any stage of the trial in noncapital cases.<sup>12</sup> And it has been held he may, even in capital cases, waive his right to be present at a step in the progress of the case,<sup>13</sup> though the general rule is otherwise.<sup>14</sup>

In all cases where the defendant's presence is not essential he may waive the right to be present,<sup>15</sup> as in misdemeanor cases in which he is represented by counsel,<sup>16</sup> or the hearing and determination of a motion

[d] **Waiver by Voluntary Absence.** Voluntary failure to appear for receiving the verdict is no excuse for receiving it in his absence (*State v. Braunschweig*, 36 Mo. 397; *Cowart v. State*, 65 Tex. Crim. 482, 145 S. W. 341; *Clark v. State*, 4 Humph. [Tenn.] 254. *Contra*, *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743), unless statute provides otherwise. See *infra*, this section. Absconding as method of waiver where waiver is permitted, see *infra* the catchline, "How Waiver is Made."

11. See *infra*, this section.

12. **U. S.**—*Diaz v. United States*, 223 U. S. 442, 32 Sup. Ct. 250, 56 L. ed. 500, Ann. Cas. 1913C, 1138, under *Phillipine practice*. **Ark.**—*Whitley v. State*, 114 Ark. 243, 169 S. W. 952; *Davidson v. State*, 108 Ark. 191, 158 S. W. 1103, Ann. Cas. 1915B, 436. **Ind.**—*McCorkle v. State*, 14 Ind. 39. **N. C.** *State v. Cherry*, 154 N. C. 624, 70 S. E. 294. **Okla.**—*Hays v. Territory*, 7 Okla. 15, 54 Pac. 300. **Pa.**—*Lynch v. Com.*, 88 Pa. 189, 32 Am. Rep. 445. But see *Prine v. Com.*, 18 Pa. 103; *Dunn v. Com.*, 6 Pa. 384.

**Waiver by absconding**, see *infra* this section the catchline "How Waiver is Made."

[a] **Right to be present at motion to vacate judgment** may be waived. *People v. Turney*, 273 Ill. 546, 558, 113 N. E. 105; *Sahlinger v. People*, 102 Ill. 241.

13. *Davidson v. State*, 108 Ark. 191, 158 S. W. 1103, Ann. Cas. 1915B, 436; *Darden v. State*, 73 Ark. 315, 84 S. W. 507.

[a] **A reversal** (1) will not be granted on account of the defendant's absence upon his own consent in a capital case, unless it appears he was prejudiced in some way by such absence. *Davidson v. State*, 108 Ark. 191, 203, 158 S. W. 1103, Ann. Cas. 1915B, 436. (2) The error in examining a talesman during the voluntary absence

of the defendant in a capital case, is without prejudice, if the talesman is peremptorily challenged by the state. *Powers v. State*, 23 Tex. App. 42, 62, 5 S. W. 153.

14. *Sherrod v. State*, 93 Miss. 774, 47 So. 554, 20 L. R. A. (N. S.) 509; *State v. Kelly*, 97 N. C. 404, 2 S. E. 185, 2 Am. St. Rep. 299; *State v. Jenkins*, 84 N. C. 812, 37 Am. Rep. 643. See cases cited *supra*, this section.

15. See the following notes and cases.

16. **U. S.**—*United States v. Leckie*, 1 Spr. 227, 26 Fed. Cas. No. 15,583. **Ark.**—*Henderson v. Murfreesboro*, 119 Ark. 603, 178 S. W. 912; *Cox v. Jonesboro*, 112 Ark. 96, 164 S. W. 767; *Owen v. State*, 38 Ark. 512. **Cal.**—*People v. Ebner*, 23 Cal. 158. **Ga.**—*Hill v. State*, 118 Ga. 21, 44 S. E. 820; *Fraser v. State*, 21 Ga. App. 154, 94 S. E. 79. **Ill.**—*Holliday v. People*, 9 Ill. 111; *Carter v. People*, 122 Ill. App. 77. **Ia.** *State v. Hale*, 91 Iowa 367, 59 N. W. 281. **Ky.**—*Veal v. Com.*, 162 Ky. 250, 172 S. W. 501; *Walston v. Com.*, 32 Ky. L. Rep. 535, 106 S. W. 224. **Miss.** *Williams v. State*, 103 Miss. 147, 60 So. 73. **N. Y.**—*Blythe v. Tompkins*, 2 Abb. Pr. 468. **Ore.**—*State v. Waymire*, 52 Ore. 281, 97 Pac. 46. **S. C.**—*State v. Rabens*, 79 S. C. 542, 60 S. E. 442, 1110. **Va.**—*Shiflett v. Com.*, 90 Va. 386, 18 S. E. 838; *Pifer v. Com.*, 14 Gratt. (55 Va.) 710. **W. Va.**—*State v. Campbell*, 42 W. Va. 246, 24 S. E. 875. But see *Slocovitch v. State*, 46 Ala. 227.

**As to his right to be present**, see *supra*, VII, G, 2, b.

[a] **Distinction Between Fine and Imprisonment Cases.**—In *State v. Campbell*, 42 W. Va. 246, 24 S. E. 875, the court after reviewing authorities as to whether, in cases where imprisonment may be inflicted as punishment, the accused must be present, concludes that in all misdemeanor cases the ac-

for a change of venue<sup>17</sup> or continuance,<sup>18</sup> or when the jury is taken to view the place of the crime.<sup>19</sup>

A waiver of the right to be present at certain periods of his trial is sometimes permitted the accused by statute,<sup>20</sup> as when he voluntarily absents himself at the rendition of the verdict.<sup>21</sup>

**By Whom Waived.** — Even when a waiver is permitted, it is a general rule that in felony cases, the presence of an accused can only be waived personally.<sup>22</sup> His counsel has no right to waive this right for him,<sup>23</sup> unless both the accused and his counsel are in court, and the waiver of counsel is made in the defendant's presence,<sup>24</sup> or unless, it has been held, counsel is duly authorized,<sup>25</sup> or the waiver is acquiesced in.<sup>26</sup> In misdemeanor cases, it has been held that the right to be present can be waived by the defendant through his counsel with the consent of the court,<sup>27</sup> but there is authority to the contrary.<sup>28</sup>

cused may appear by attorney and the trial may proceed without his personal presence, but that judgment of imprisonment cannot be imposed without bringing the defendant into court. Compare *Ex parte Tracy*, 25 Vt. 93. See generally the title "**Sentence and Judgment.**"

[b] **It is discretionary with the court** (1) to accept such a waiver and permit the trial to proceed in the defendant's absence. **Ark.**—*Bridges v. State*, 38 Ark. 510. **Me.**—*State v. Garland*, 67 Me. 423. **N. C.**—*State v. Dry*, 152 N. C. 813, 67 S. E. 1000. (2) And if the case be on appeal from a judgment of conviction in a justice court, the court may compel his appearance and if he fails to appear may dismiss his appeal. *Owen v. State*, 38 Ark. 512. (3) When the judgment may be for imprisonment, the court should not in the exercise of its discretion, permit a trial in the absence of the accused. *Owen v. State*, 38 Ark. 512.

17. *Lester v. State*, 91 Wis. 249, 64 N. W. 850.

18. *Henry v. State*, 10 Okla. Crim. 369, 136 Pac. 982, 52 L. R. A. (N. S.) 113; *State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888.

19. **Cal.**—*People v. Searle*, 33 Cal. App. 228, 164 Pac. 819; *People v. White*, 20 Cal. App. 156, 128 Pac. 417. **Ind.**—*Shular v. State*, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211. **Mich.** *People v. Auerbach*, 176 Mich. 23, 141 N. W. 869, Ann. Cas. 1915B, 557. **N. H.** *State v. Buzzell*, 59 N. H. 65. **N. Y.** *People v. Thorn*, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368.

See generally the title "**View.**"

20. See generally the statutes.

21. *Davidson v. State*, 108 Ark. 191, 158 S. W. 1103, Ann. Cas. 1915B, 436; *State v. Hope*, 100 Mo. 347, 13 S. W. 490, 8 L. R. A. 608; *State v. Smith*, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4.

22. *Lyons v. State*, 7 Ga. App. 50, 66 S. E. 149; *State v. Dry*, 152 N. C. 813, 67 S. E. 1000.

23. **Ga.**—*Lyons v. State*, 7 Ga. App. 50, 66 S. E. 149. **Pa.**—*Prine v. Com.*, 18 Pa. 103. **Tex.**—*Shipp v. State*, 11 Tex. App. 46.

24. *Neal v. State*, 32 Neb. 120, 49 N. W. 174.

25. *Davidson v. State*, 108 Ark. 191, 158 S. W. 1103, Ann. Cas. 1915B, 436; *overruling Osborn v. State*, 24 Ark. 629.

[a] **Presumption of Authority.** When counsel acts for the defendant and in his name consents to the return of a verdict in his absence, it will be presumed counsel had authority from the defendant to enter into the stipulation waiving his presence. *Davidson v. State*, 108 Ark. 191, 203, 158 S. W. 1103, Ann. Cas. 1915B, 436.

26. *Frank v. State*, 142 Ga. 741, 762, 83 S. E. 645, L. R. A. 1915D, 817.

27. *State v. Dry*, 152 N. C. 813, 67 S. E. 1000.

[a] **A waiver by an attorney of his right to be present is not to be construed as a waiver of the right of the defendant to be present**, particularly where the attorney is not aware that the defendant is not present. *Lyons v. State*, 7 Ga. App. 50, 55, 66 S. E. 149.

28. See *Lyons v. State*, 7 Ga. App. 50, 66 S. E. 149; *Rex v. Streeck*, 2 Car. & P. 413, 12 E. C. L. 646.

**How Waiver Is Made.** — Defendant may expressly waive any objection to proceedings taken during his temporary absence.<sup>29</sup> And when he voluntarily and temporarily absents himself from the court room, after the commencement of the trial,<sup>30</sup> or when he absconds after the commencement of the trial,<sup>31</sup> he is deemed to have waived his right to be present. Where the defendant insists upon disturbing the trial so as to make necessary his temporary removal to an adjoining room during a portion of the proceedings, he cannot complain.<sup>32</sup> It is ir-

29. *O'Toole v. State*, 40 Tex. Crim. 578, 51 S. W. 244.

30. **U. S.**—*Diaz v. United States*, 223 U. S. 442, 32 Sup. Ct. 250, 56 L. ed. 500, Ann. Cas. 1913C, 1138. **Ark.**—*Davidson v. State*, 108 Ark. 191, 158 S. W. 1103, Ann. Cas. 1915B, 436; *Darden v. State*, 73 Ark. 315, 84 S. W. 507. **Ga.**—*Robson v. State*, 83 Ga. 166, 9 S. E. 610; *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743; *Wilkerson v. State*, 14 Ga. App. 475, 81 S. E. 395. **Ill.**—*Sahlinger v. People*, 102 Ill. 241. **Ind.**—*State v. Wamire*, 16 Ind. 357; *McCorkle v. State*, 14 Ind. 39. **Kan.**—*State v. Bland*, 91 Kan. 160, 136 Pac. 947; *State v. Thurston*, 77 Kan. 522, 94 Pac. 1011; *State v. Way*, 76 Kan. 928, 93 Pac. 159, 14 L. R. A. (N. S.) 603. **Ky.**—*Howard v. Com.*, 118 Ky. 1, 80 S. W. 211, 81 S. W. 704. **Mich.**—*Frey v. Calhoun* Circ. Judge, 107 Mich. 130, 64 N. W. 1047. **Minn.**—*State v. Gorman*, 113 Minn. 401, 129 N. W. 589, 32 L. R. A. (N. S.) 306. **Miss.**—*Sherrod v. State*, 93 Miss. 774, 47 So. 554, 20 L. R. A. (N. S.) 509; *Gales v. State*, 64 Miss. 105, 8 So. 167. **Mo.**—*State v. Gonce*, 87 Mo. 627. **N. J.**—*State v. Peacock*, 50 N. J. L. 34, 11 Atl. 270. **N. C.**—*State v. Cherry*, 154 N. C. 624, 70 S. E. 294; *State v. Dry*, 152 N. C. 813, 67 S. E. 1000; *State v. Kelly*, 97 N. C. 404, 2 S. E. 185, 2 Am. St. Rep. 299. **Ohio.**—*Wilson v. State*, 2 Ohio St. 319. **Pa.**—*Lynch v. Com.*, 88 Pa. 189, 32 Am. Rep. 445; *Com. v. Simon*, 44 Pa. Super. 538. **Tex.**—*Fry v. State*, 78 Tex. Crim. 435, 182 S. W. 331; *Whitehead v. State*, 66 Tex. Crim. 482, 147 S. W. 583. **Wis.**—*Stoddard v. State*, 132 Wis. 520, 112 N. W. 453; *Hill v. State*, 17 Wis. 675, 86 Am. Dec. 736.

[a] **Defendant on Bail.**—*Darden v. State*, 73 Ark. 315, 84 S. W. 507; *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743.

[b] **Where defendant voluntarily absents himself** (1) when witnesses or

any one of them are examined. *McCorkle v. State*, 14 Ind. 39. (2) When the jury returns for additional instructions. *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842. (3) When the verdict is returned. *Hill v. State*, 118 Ga. 21, 44 S. E. 820; *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743; *State v. Smith*, 90 Mo. 37, 1 S. W. 753, 59 Am. Rep. 4.

[c] **If the accused is ill**, he is not deemed to have voluntarily absented himself from the trial. *Corbin v. State*, 99 Miss. 486, 55 So. 43.

**Where waiver is not permitted**, voluntarily absenting himself does not authorize proceedings in his absence. See *supra*, note 10 [d].

31. **U. S.**—*United States v. Loughrey*, 13 Blatchf. 267, 26 Fed. Cas. No. 15,631. **Ark.**—*Davidson v. State*, 108 Ark. 191, 158 S. W. 1103, Ann. Cas. 1915B, 436. **D. C.**—*Falk v. United States*, 15 App. Cas. 446, 454, 181 U. S. 618, 21 Sup. Ct. 923, 45 L. ed. 1030, where the accused absconded before the conclusion of the testimony, and the testimony was concluded and a verdict of guilty returned in the absence of the defendant. **Ind.**—*Southerland v. State*, 176 Ind. 493, 96 N. E. 583; *State v. Wamire*, 16 Ind. 357. **Kan.**—*State v. Way*, 76 Kan. 928, 93 Pac. 159, 14 L. R. A. (N. S.) 603. **Ky.**—*Howard v. Com.*, 118 Ky. 1, 80 S. W. 211, 81 S. W. 704. **Minn.**—*State v. Gorman*, 113 Minn. 401, 129 N. W. 589, 32 L. R. A. (N. S.) 306. **Miss.**—*Price v. State*, 36 Miss. 531, 72 Am. Dec. 195. **N. C.**—*State v. Cherry*, 154 N. C. 624, 70 S. E. 294; *State v. Kelly*, 97 N. C. 404, 2 S. E. 185, 2 Am. St. Rep. 299. **Ohio.**—*Fight v. State*, 7 Ohio (pt. 1) 180, 28 Am. Dec. 626.

32. *United States v. Davis*, 6 Blatchf. 464, 25 Fed. Cas. No. 14,923, where he persisted in denying in a loud voice, statements of the district attorney in his opening, notwithstanding repeated admonitions from the court. He was taken to an adjoining



regular and improper to begin a felony trial without the presence of the accused however.<sup>33</sup>

d. *Showing of, in Record.*—The presence of accused must be shown by the record,<sup>34</sup> but it has been held that a formal statement is not necessary where his presence may be inferred from the whole record,<sup>35</sup> and that where his presence is shown once his continued presence throughout the trial will be presumed in the absence of anything to the contrary.<sup>36</sup> So his presence when the verdict was received will be presumed unless the contrary appears.<sup>37</sup>

H. PRESENCE OF OTHERS UNDER INDICTMENT.—The presence of other persons under indictment who are to be tried separately is within the discretion of the court and in the exercise of such discretion may be permitted or refused according to the circumstances of the case.<sup>38</sup>

room until the opening statement was concluded, but had liberty of access to his counsel.

33. *Com. v. McCarthy*, 163 Mass. 458, 40 N. E. 766. See also *Slocovitch v. State*, 46 Ala. 227.

34. *U. S.*—*Peters v. United States*, 94 Fed. 127, 36 C. C. A. 105. *Ark.*—*Osborn v. State*, 24 Ark. 629; *Brown v. State*, 24 Ark. 620. *Cal.*—*People v. Rozelle*, 78 Cal. 84, 20 Pac. 36; *People v. Sing Lum*, 61 Cal. 538. *Fla.*—*Palmquist v. State*, 30 Fla. 73, 11 So. 521; *Gladden v. State*, 12 Fla. 562; *Holton v. State*, 2 Fla. 476, 500. *Ill.*—*People v. Blevins*, 251 Ill. 381, 96 N. E. 214, Ann. Cas. 1912C, 451; *Fielden v. People*, 128 Ill. 595, 21 N. E. 584. *Ky.*—*Rutherford v. Com.*, 78 Ky. 639. *Miss.*—*McQuillen v. State*, 8 Smed. & M. 587. *Mo.*—*State v. Ott*, 49 Mo. 326; *State v. Matthews*, 20 Mo. 55. *N. J.*—*West v. State*, 22 N. J. L. 212. *Okla.*—*Humphrey v. State*, 3 Okla. Crim. 504, 106 Pac. 978, 139 Am. St. Rep. 972. *Wash.*—*State v. Howard*, 33 Wash. 250, 74 Pac. 382. *Wis.*—*French v. State*, 85 Wis. 400, 55 N. W. 566, 39 Am. St. Rep. 855, 21 L. R. A. 402.

But see *O'Brien v. State*, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323.

[a] *Only in Capital Cases.*—*Dougherty v. Com.*, 69 Pa. 286; *Holmes v. Com.*, 25 Pa. 221.

[b] *Amendment of record to show presence of accused*, see *People v. Rozelle*, 78 Cal. 84, 20 Pac. 36.

[c] *The effect of a failure to show the defendant's presence is a reversal on an appeal by the accused.* *La.*—*State v. Thomas*, 128 La. 813, 55 So. 415. *Mo.*—*State v. Dooley*, 64 Mo. 146.

*Wis.*—*Kraimer v. State*, 117 Wis. 350, 93 N. W. 1097.

35. *Ark.*—*Sweeden v. State*, 19 Ark. 205. *Fla.*—*Palmquist v. State*, 30 Fla. 73, 11 So. 521. *N. C.*—*State v. Craton*, 28 N. C. 164. *Va.*—*Lawrence v. Com.*, 30 Gratt. (71 Va.) 845.

36. *U. S.*—*Peters v. United States*, 94 Fed. 127, 36 C. C. A. 105. *Ark.*—*Bond v. State*, 63 Ark. 504, 39 S. W. 554, 58 Am. St. Rep. 129. *Cal.*—*People v. Sing Lum*, 61 Cal. 538. *Mich.*—*Grimm v. People*, 14 Mich. 300. *Mo.*—*State v. Temple*, 194 Mo. 237, 92 S. W. 869, 5 Ann. Cas. 954; *State v. Brock*, 186 Mo. 457, 85 S. W. 595, 105 Am. St. Rep. 625; *State v. Miller*, 100 Mo. 606, 13 S. W. 832, 1051. *N. Y.*—*Stephens v. People*, 19 N. Y. 549. *Va.*—*Lawrence v. Com.*, 30 Gratt. (71 Va.) 845. *Wash.*—*State v. Costello*, 29 Wash. 366, 69 Pac. 1099. *W. Va.*—*State v. Yoes*, 67 W. Va. 546, 68 S. E. 181, 140 Am. St. Rep. 978; *State v. Newman*, 49 W. Va. 724, 39 S. E. 655. *Wyo.*—*Trumble v. Territory*, 3 Wyo. 280, 21 Pac. 1081, 6 L. R. A. 384.

37. *Ill.*—*Schirmer v. People*, 33 Ill. 276. *Pa.*—*Holmes v. Com.*, 25 Pa. 221. *Va.*—*Hooker v. Com.*, 13 Gratt. (54 Va.) 763.

38. *Ia.*—*State v. Levich*, 174 Iowa 688, 156 N. W. 824; *State v. Weems*, 96 Iowa 426, 65 N. W. 387. *Kan.*—*State v. Schneck*, 85 Kan. 334, 116 Pac. 823. *Mo.*—*State v. Ruck*, 194 Mo. 416, 92 S. W. 706. *Neb.*—*Krens v. State*, 75 Neb. 294, 106 N. W. 27; *Cunningham v. State*, 56 Neb. 691, 77 N. W. 60. *Tex.*—*Ryan v. State*, 64 Tex. Crim. 628, 142 S. W. 878; *Parnell v. State*, 50 Tex. Crim. 419, 98 S. W. 269. *Wash.*—*State v. Hyde*, 22 Wash. 551, 61 Pac. 719.

**I. RIGHT TO AND PRESENCE OF COUNSEL.—1. In Civil Actions.** A party to a civil action may appear by counsel.<sup>39</sup> But it is not the legal duty of a court in a civil case to see that litigants are supplied with counsel in every stage of the proceedings.<sup>40</sup> It is the duty of counsel engaged in the trial to remain in the court during its session or be represented there,<sup>41</sup> but their absence or withdrawal from the court room does not deprive the court of jurisdiction to proceed.<sup>42</sup> Absence of counsel does not give the party an absolute right to a continuance.<sup>43</sup> And it is not in itself a ground for new trial,<sup>44</sup> or for equitable relief against the judgment.<sup>45</sup>

**2. In Criminal Prosecutions.—a. Counsel for Prosecution.** (I.) **Generally.**—In the United States, the state's attorney is required to appear for the state in all public prosecutions<sup>46</sup> in which he is not,

39. See 2 STANDARD PROC. 555.

Diligence to employ counsel, see 5 STANDARD PROC. 444.

Denial of right as ground for new trial, see 20 STANDARD PROC. 469.

Plea in abatement by attorney, see 1 STANDARD PROC. 34.

40. Leahy v. Dunlap, 6 Colo. 552.

41. Heenan v. Howard, 81 Ill. App. 629, 636.

As to presence of counsel when instructions are given, see 13 STANDARD PROC. 979.

42. U. S.—Stewart v. Wyoming Cattle Ranch Co., 128 U. S. 383, 9 Sup. Ct. 101, 32 L. ed. 439. Ill.—Heenan v. Howard, 81 Ill. App. 629, 637. See Chicago City Ry. Co. v. Anderson, 193 Ill. 9, 61 N. E. 999. N. Y.—See Cornish v. Graff, 7 N. Y. Civ. Proc. 204. R. I.—Alexander Bros. v. Gardiner, 14 R. I. 15.

But see 13 STANDARD PROC. 978.

[a] While a trial court should refrain from instructing the jury in the absence of counsel, the court is not required to suspend proceedings if counsel see fit to absent themselves from the courtroom when their presence may be required at any moment. Aerheart v. St. Louis, etc. R. Co., 99 Fed. 907, 40 C. C. A. 171. But see 13 STANDARD PROC. 979.

[b] If counsel for a party is absent when the cause is reached on the calendar the case may be tried in his absence. But if, from continuance of cases or other cause, the case is reached sooner than expected the court should grant a reasonable time for him to appear. Kyle v. Chase, 14 Neb. 528, 16 N. W. 821. See Wasson v. Palmer, 13 Neb. 376, 14 N. W. 171. Passing cause pending engagement of counsel,

see *supra*, VI, H. Striking cause from calendar in such a case, see *supra*, II, B.

[c] The court may send for counsel as a matter of courtesy on its part, but this is not a legal obligation or duty, and hence a failure to do so is not reversible error. Ill.—Heenan v. Howard, 81 Ill. App. 629. Okla.—North v. Hooker, 172 Pac. 77; Lindsey v. Goodman, 57 Okla. 408, 157 Pac. 344. R. I. Alexander Bros. v. Gardiner, 14 R. I. 15. Wis.—Walczakowski v. Milwaukee E. R. & L. Co., 157 Wis. 191, 147 N. W. 20; Meier v. Morgan, 82 Wis. 289, 52 N. W. 174, 33 Am. St. Rep. 39. But see 13 STANDARD PROC. 979.

[d] But where courts render decisions in the absence of counsel, they should be particularly careful to direct that notice be promptly given to the attorneys of the parties. Linville v. Sheeline, 30 Nev. 106. It will be presumed that the clerk gave the required notice. Linville v. Scheeline, 30 Nev. 106, 93 Pac. 225.

43. See 5 STANDARD PROC. 444.

44. See 20 STANDARD PROC. 492. But see 13 STANDARD PROC. 981, notes 50-56.

45. See 15 STANDARD PROC. 316.

46. Fla.—Thalheim v. State, 38 Fla. 169, 183, 20 So. 938. Haw.—Territory v. Chong Chak Lai, 19 Hawaii 437, Ann. Cas. 1912B, 657. Idaho.—Adamson v. Board of Comrs., 27 Idaho 190, 147 Pac. 785. Ill.—Gilbert v. People, 121 Ill. App. 423. Mass.—Com. v. Williams, 2 Cush. 582. Mo.—In re Howell, 273 Mo. 96, 200 S. W. 65. N. D.—State v. Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

[a] If the prosecuting attorney, without stating any reason, refuses to participate in a prosecution, the court

for some reason, disqualified to act.<sup>47</sup> He cannot delegate the performance of this duty to private persons.<sup>48</sup> Although, according to some authorities, a defendant in a criminal cause cannot object if the court recognize any unofficial member of the bar conducting the prosecution.<sup>49</sup>

(II.) **Additional Counsel To Assist Regular Attorney.** — The state's attorney is permitted by law to have the assistance of private counsel in the trial of criminal cases.<sup>50</sup> He may in his discretion, subject to the supervision of the trial court, associate with himself counsel to aid him on the trial.<sup>51</sup> And the court may in its discretion, by order, appoint

can call him in and direct him to conduct the trial to a conclusion. *In re Howell*, 273 Mo. 96, 119, 200 S. W. 65.

47. *Adamson v. Board of Comrs.*, 27 Idaho 190, 147 Pac. 785; *State v. Rocker*, 130 Iowa 239, 106 N. W. 645.

48. Fla.—See *Thalheim v. State*, 38 Fla. 169, 183, 20 So. 938. Haw.—*Territory v. Chong Chak Lai*, 19 Hawaii 437, Ann. Cas. 1912B, 657. Ill.—*Gilbert v. People*, 121 Ill. App. 423.

49. *State v. Bartlett*, 105 Me. 212, 74 Atl. 18, 134 Am. St. Rep. 542, 24 L. R. A. (N. S.) 564.

[a] When the district attorney has performed such acts as are in their nature official, such as signing the indictment, etc., the management of the trial may be intrusted to private counsel. *Carlisle v. State*, 73 Miss. 387, 19 So. 207; *Byrd v. State*, 1 How. (Miss.) 247.

50. Ark.—*Fox v. State*, 102 Ark. 393, 144 S. W. 516. Cal.—*People v. Turcott*, 65 Cal. 126, 3 Pac. 461. Idaho. *State v. Steers*, 12 Idaho 174, 85 Pac. 104. Ill.—*People v. Hartenbower*, 283 Ill. 591, 119 N. E. 605; *People v. Pfanschmidt*, 262 Ill. 411, 104 N. E. 804, Ann. Cas. 1915A, 1171; *People v. Harrison*, 261 Ill. 517, 104 N. E. 259; *People v. O'Farrell*, 247 Ill. 44, 50, 93 N. E. 136. Ia.—*State v. Fitzgerald*, 49 Iowa 260, 31 Am. Rep. 148. Kan.—*State v. Wells*, 54 Kan. 161, 37 Pac. 1005; *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257. Ky.—*Price v. Caperton*, 1 Duv. 207. La.—*State v. Mangrum*, 35 La. Ann. 619. Mich. *People v. Perriman*, 72 Mich. 184, 40 N. W. 425; *Ulrich v. People*, 39 Mich. 245. Okla.—*Dunn v. State* (Okla. Crim.), 176 Pac. 86; *Cox v. State* (Okla. Crim.), 175 Pac. 264; *Reed v. State*, 2 Okla. Crim. 589, 614, 103 Pac. 1042. Pa.—See *Com. v. Eisenhower*, 181

Pa. 470, 37 Atl. 521, 59 Am. St. Rep. 670. Tex.—See *Emerson v. State*, 54 Tex. Crim. 628, 114 S. W. 834. Va. *McCue v. Com.*, 103 Va. 870, 49 S. E. 623. Wash.—*State v. Miller*, 80 Wash. 75, 141 Pac. 293. Wis.—*Rounds v. State*, 57 Wis. 45, 14 N. W. 865.

*Compare Fussell v. State*, 102 Neb. 117, 166 N. W. 197, L. R. A. 1918F, 421.

[a] "The laws of this state only prohibit persons other than the county attorney, or his deputies, from performing such acts . . . as are strictly official, such as appearing before and advising the grand jury, verifying informations, approving complaints, etc. The assistance of private counsel in the trial of criminal cases is not prohibited." *Reed v. State*, 2 Okla. Crim. 589, 614, 103 Pac. 1042.

[b] The law partner of the district attorney may assist. *Kramer v. State*, 117 Wis. 350, 93 N. W. 1097.

[c] A private attorney ostensibly appointed by the county board may be allowed to assist the county attorney, even though the county board has no authority to make such appointment. Their lack of authority does not concern the defendant. *State v. O'Brien*, 35 Mont. 482, 497, 90 Pac. 514, 10 Ann. Cas. 1006.

51. Fla.—*Thalheim v. State*, 38 Fla. 169, 183, 20 So. 938. Mass.—*Com. v. Williams*, 2 Cush. 582. Okla.—*Reed v. State*, 2 Okla. Crim. 589, 614, 103 Pac. 1042.

See *Bradshaw v. State*, 17 Neb. 147, 22 N. W. 361, under statute.

[a] The association of other counsel must be at the request of the district attorney. *Com. v. Williams*, 2 Cush. (Mass.) 582.

As to discretion of trial court, see *infra*, this section.



competent counsel to assist him, when the exigencies of the case demand it.<sup>52</sup> Although there are authorities to the contrary,<sup>53</sup> the weight of authority is to the effect that, without an order of appointment,<sup>54</sup> the court may permit counsel employed and paid by private parties<sup>55</sup> to assist the prosecuting attorney, where there is no oppression to the defendant or injustice to him,<sup>56</sup> and where the prosecuting attorney and the trial judge deem this course proper.<sup>57</sup> So also in making an appointment of counsel to assist the prosecution, the court may permit counsel paid by private parties to assist.<sup>58</sup> The right of the prosecuting attorney to assistance is sometimes recognized by statute.<sup>59</sup>

52. **Ill.**—*People v. O'Farrell*, 247 Ill. 44, 93 N. E. 136; *People v. Hartenbower*, 208 Ill. App. 465. **Me.**—*State v. Bennett*, 117 Me. 113, 102 Atl. 974; *State v. Bartlett*, 55 Me. 200. **Minn.**—*State v. Borgstrom*, 69 Minn. 508, 72 N. W. 799, 975. **Mont.**—*State v. O'Brien*, 35 Mont. 482, 90 Pac. 514, 10 Ann. Cas. 1006; *State v. Whitworth*, 26 Mont. 107, 66 Pac. 748. **Neb.**—*Goe-mann v. State*, 100 Neb. 772, 161 N. W. 421. **Vt.**—*State v. Ward*, 61 Vt. 153, 17 Atl. 483. **Wis.**—*Colbert v. State*, 125 Wis. 423, 104 N. W. 61.

[a] **The trial court has inherent power to appoint attorneys to assist the prosecutor in the trial of criminal cases.** *Williams v. State* (Ind.), 123 N. E. 209, 215.

53. **Mass.**—*Com. v. Gibbs*, 4 Gray 146; *Com. v. Williams*, 2 Cush. 582; *Com. v. Knapp*, 10 Pick. 477, 20 Am. Dec. 534. **Mich.**—*Sneed v. People*, 38 Mich. 248; *Meister v. People*, 31 Mich. 99. **Neb.**—*McKay v. State*, 90 Neb. 63, 70, 132 N. W. 741, Ann. Cas. 1913B, 1034, 39 L. R. A. (N. S.) 714, under statute. But see *Polin v. State*, 14 Neb. 540, 16 N. W. 898, in the absence of statute. **Wis.**—*Rock v. Ekern*, 162 Wis. 291, 156 N. W. 197, L. R. A. 1916D, 459; *Biemel v. State*, 71 Wis. 444, 37 N. W. 244, under statute.

[a] **Not even at the request of the district attorney, should the court permit counsel paid by private parties to assist the state's attorney.** *Biemel v. State*, 71 Wis. 444, 37 N. W. 244.

[b] **In Michigan, counsel employed and paid by private parties will not be allowed to prosecute in a criminal case against the objection of the defendant, especially where the private party has a pecuniary interest in the conviction of the accused. But preliminary examinations on charges of felony may be conducted by counsel employed and**

**paid by private parties.** *Meister v. People*, 31 Mich. 99.

54. *State v. O'Brien*, 35 Mont. 482, 497, 90 Pac. 514, 10 Ann. Cas. 1006.

55. **Fla.**—*Robinson v. State*, 69 Fla. 521, 68 So. 649, Ann. Cas. 1917C, 506, L. R. A. 1915E, 1215, under statute. **Haw.**—*Territory v. Chong Chak Lai*, 19 Hawaii 437, Ann. Cas. 1912B, 657. **Ind.**—*Keyes v. State*, 122 Ind. 527, 23 N. E. 1097. **Ia.**—*State v. Montgomery*, 65 Iowa 483, 22 N. W. 639; *State v. Fitzgerald*, 49 Iowa 260, 31 Am. Rep. 148. **Kan.**—*State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257. **Mo.**—*State v. Muman*, 181 S. W. 1143; *State v. Moreaux*, 254 Mo. 398, 409, 162 S. W. 158. **Mont.**—*State v. Biggs*, 45 Mont. 400, 123 Pac. 410; *State v. O'Brien*, 35 Mont. 482, 90 Pac. 514, 10 Ann. Cas. 1006; *State v. Tighe*, 27 Mont. 327, 71 Pac. 3. **N. D.**—*State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686. **Tex.**—*Burkhard v. State*, 18 Tex. App. 599. **Utah.**—*People v. Tidwell*, 4 Utah 506, 12 Pac. 61.

56. *Hayner v. People*, 213 Ill. 142, 72 N. E. 792.

57. **Fla.**—*Thalheim v. State*, 38 Fla. 169, 20 So. 938. **Ia.**—*State v. Fitzgerald*, 49 Iowa 260, 31 Am. Rep. 148. **Minn.**—*State v. Rue*, 72 Minn. 296, 75 N. W. 235. **Mont.**—*State v. O'Brien*, 35 Mont. 482, 90 Pac. 514. **N. D.**—*State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

58. *Hayner v. People*, 213 Ill. 142, 72 N. E. 792. See *People v. Strosnider*, 264 Ill. 434, 106 N. E. 229.

59. See the statutes and *Neb. Johns v. State*, 88 Neb. 145, 129 N. W. 247. **S. D.**—*State v. Johnson*, 24 S. D. 590, 124 N. W. 847. **Wis.**—*Biemel v. State*, 71 Wis. 444, 37 N. W. 244.

[a] **Under a statute providing that when, in the opinion of the court, the ends of justice would be promoted**

**Discretion of the Court.** — The selection and appointment of counsel to assist the prosecuting attorney lies in the discretion of the presiding judge.<sup>60</sup> It is the duty of the court to prevent oppression of the accused and to permit such assistance, only, as justice and fairness may require.<sup>61</sup>

**Time of Appointment.** — It is not required that the appointment of an assistant prosecutor be made before the cause is set for trial.<sup>62</sup>

**Swearing of Assistant Counsel.** — An assistant private counsel for the prosecution need not be sworn as assistant prosecuting attorney to enable him to act.<sup>63</sup>

thereby, the court may appoint some suitable person, an attorney at law, to perform for the time being the duties required by law to be performed by the state's attorney, the court may appoint an attorney to assist the state's attorney. *State v. Johnson*, 24 S. D. 590, 124 N. W. 847.

[b] **Affirmative Action by Court and District Attorney Necessary.** — Under a statute providing that the county attorney may, under the direction of the court, procure such assistance in the trial of a person charged with a felony as he may deem necessary, some affirmative action on the part of the county attorney and the court is essential. Mere acquiescence in or assent to the appearance of a private counsel is insufficient. An order that a designated person "is permitted" to assist is not a compliance with the statute, when no affirmative action on the part of the county attorney is taken. *McKay v. State*, 90 Neb. 63, 70, 132 N. W. 741, 39 L. R. A. (N. S.) 714; *Bradshaw v. State*, 17 Neb. 147, 22 N. W. 361. See also *Goldsberry v. State*, 92 Neb. 211, 137 N. W. 1116.

60. *Cal.*—*People v. Turcott*, 65 Cal. 126, 3 Pac. 461; *People v. Blackwell*, 27 Cal. 65. *Ill.*—*People v. Gerold*, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916A, 636; *People v. Gray*, 251 Ill. 431, 96 N. E. 268; *People v. Blevins*, 251 Ill. 381, 96 N. E. 214, Ann. Cas. 1912C, 451; *Hayner v. People*, 213 Ill. 142, 72 N. E. 792. *Me.*—*State v. Bennett*, 117 Me. 113, 102 Atl. 974; *State v. Bartlett*, 55 Me. 200. *S. D.*—*State v. Johnson*, 24 S. D. 590, 124 N. W. 847. *Wash.* *State v. Hoshor*, 26 Wash. 643, 67 Pac. 386.

[a] Both when the defendant employs his own counsel and when counsel is assigned to him, the rule applies. *People v. Blevins*, 251 Ill. 381, 96 N. E. 214, Ann. Cas. 1912C, 451.

[b] Who should be appointed is a matter resting in the discretion of the presiding judge. *State v. Bennett*, 117 Me. 113, 102 Atl. 974; *State v. Bartlett*, 55 Me. 200.

[c] The number of assistants is within the discretion of the trial court. *Thalheim v. State*, 38 Fla. 169, 189, 20 So. 938.

[d] An attorney cannot appear as of right as assistant to the prosecuting attorney whether his services are gratuitous or paid for by private parties. *Hayner v. People*, 213 Ill. 142, 72 N. E. 792.

[e] No attorney known to be a partisan as against the accused should be appointed. *Flege v. State*, 93 Neb. 610, 142 N. W. 276, 47 L. R. A. (N. S.) 1106.

61. *People v. Gray*, 251 Ill. 431, 437, 96 N. E. 268.

[a] The court should see (1) that the criminal law is not being used to gratify malice or personal ends (*Hayner v. People*, 213 Ill. 142, 72 N. E. 792), and (2) that counsel for the defendant are not overwhelmed, on account of their inexperience, by the number and ability of counsel representing the state. *People v. Blevins*, 251 Ill. 381, 96 N. E. 214, Ann. Cas. 1912C, 451.

62. *Johns v. State*, 88 Neb. 145, 129 N. W. 247.

[a] The appointment, after the passing by the state of twelve jurors for cause, of an assistant prosecutor is not error, where the accused had an opportunity to examine all the jurors touching their connection and affiliation with the assistant counsel. *Johns v. State*, 88 Neb. 145, 129 N. W. 247. See *Galloway v. State*, 88 Neb. 447, 129 N. W. 987.

63. *Ga.*—*Lindsay v. State*, 138 Ga. 818, 76 S. E. 369. *La.*—*State v. Buhler*, 132 La. 1065, 62 So. 145; *State v.*

**Control of Prosecution.**—The state's attorney as a public officer must have the direction and assume the responsibility of the prosecution, although he has the assistance of private counsel.<sup>64</sup> But it is not error for the assistant counsel to read the indictment to the jury,<sup>65</sup> or to conduct the examination of the witnesses for the state.<sup>66</sup>

**An objection** to the appearance of private counsel to assist the county attorney must be made at a proper time and in a proper manner.<sup>67</sup>

**(III.) Appointment of Special Counsel Instead of Regular Attorney.** A trial court has inherent power, aside from the statute, to appoint a temporary representative of the state, if for any reason the regular prosecuting attorney is absent or unable to act.<sup>68</sup> And statutes sometimes provide for such appointment.<sup>69</sup> Whether such a statute is exclusive and prevents a county board of supervisors from supplying the place of the regular attorney is a question on which the courts disagree.<sup>70</sup> A private attorney, by such an appointment, becomes vested

Britton, 131 La. 877, 60 So. 379. **Neb.** Gandy v. State, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108. **Ohio.**—Martin v. State, 16 Ohio 364.

See *Thalheim v. State*, 38 Fla. 169, 189, 20 So. 938.

**64. Fla.**—*Thalheim v. State*, 38 Fla. 169, 183, 20 So. 938. **Ill.**—*Hayner v. People*, 213 Ill. 142, 72 N. E. 792. See *Gilbert v. People*, 121 Ill. App. 423. **Mass.**—*Com. v. Williams*, 2 Cush. 582. **Tex.**—*Burkhard v. State*, 18 Tex. App. 599.

**Presence of assistant attorneys in grand jury room**, see 10 STANDARD PROC. 651, note 28.

**65.** *State v. Chocklett*, 155 Iowa 511, 136 N. W. 534; *State v. Crafton*, 89 Iowa 109, 56 N. W. 257.

**As to reading indictment**, see *infra*, VII, M.

**66.** *State v. Finley*, 245 Mo. 465, 150 S. W. 1051.

**67.** *Burnett v. State*, 88 Neb. 638, 130 N. W. 263; *Blair v. State*, 72 Neb. 501, 101 N. W. 17.

**[a]** A general objection to the appearance of such counsel made during the trial in connection with the examination of a witness and without any showing to support it, is properly overruled. *Blair v. State*, 72 Neb. 501, 101 N. W. 17.

**[b]** There must be a showing, under some statutes, that the county attorney did not request or require such assistance, and that the court had not appointed counsel for that purpose. *Blair v. State*, 72 Neb. 501, 101 N. W. 17.

**68. Ind.**—*State v. Ellis*, 184 Ind. 307, 112 N. E. 98. **Mo.**—*State v. Dun-*

*can*, 116 Mo. 288, 22 S. W. 699. **Okla.** Board of Comrs. v. Fain, 166 Pac. 896; *Hisaw v. State*, 13 Okla. Crim. 484, 165 Pac. 636.

**[a]** Permitting another attorney to represent the state is tantamount to an appointment. *State v. Duncan*, 116 Mo. 288, 22 S. W. 699.

**69. Ala.**—*Newell v. State*, 8 Ala. App. 182, 62 So. 968. **Cal.**—*People v. Walters*, 98 Cal. 138, 32 Pac. 864. **Idaho.**—*Adamson v. Board of Comrs.*, 27 Idaho 190, 147 Pac. 785; *Conger v. Latah Co. Comrs.*, 5 Idaho 347, 48 Pac. 1064. **Ill.**—*Gilbert v. People*, 121 Ill. App. 423. **Ind.**—*State v. Ellis*, 184 Ind. 307, 112 N. E. 98. **La.**—*State v. Buhler*, 132 La. 1065, 62 So. 145; *State v. Daspit*, 129 La. 752, 56 So. 661; *State v. Smith*, 107 La. 129, 31 So. 693, 1014. **Mo.**—*State v. Marley*, 177 S. W. 350. **Neb.**—*Spaulding v. State*, 61 Neb. 289, 85 N. W. 80. **Okla.** Board of Comrs. v. Fain, 166 Pac. 896; *Hyde v. Territory*, 8 Okla. 69, 56 Pac. 851; *Hisaw v. State*, 13 Okla. Crim. 484, 165 Pac. 636. **Tex.**—*Younger v. State*, 76 Tex. Crim. 243, 173 S. W. 1039; *Burkhard v. State*, 18 Tex. App. 599.

**Not a denial of due process of law**, see 7 STANDARD PROC. 924, note 96.

**70.** See *infra*, this note.

**[a]** Statute is not exclusive, and no order of court is required to authorize appointment by county board. *People v. Walters*, 98 Cal. 138, 32 Pac. 864.

**[b]** Statute Is Exclusive.—*Adamson v. Board of Comrs.*, 27 Idaho 190, 147 Pac. 785; *Conger v. Latah Co. Comrs.*, 5 Idaho 347, 48 Pac. 1064.



with all the power of the state's attorney and burdened also with his obligations.<sup>71</sup>

(IV.) **Presence of Counsel.**—The absence of the prosecuting attorney during the argument of defendant's counsel is not error.<sup>72</sup>

b. *Counsel for Accused.*—(I.) **Generally.**—The constitutions of the United States and of the various states guarantee to persons accused of crime the right to be heard by counsel in their defense.<sup>73</sup> This right should be strictly guarded by the court,<sup>74</sup> and it cannot be denied or materially abridged by them,<sup>75</sup> although it may be waived by the defendant.<sup>76</sup>

71. *Gilbert v. People*, 121 Ill. App. 423.

72. See 2 STANDARD PROC. 743.

[a] **Absence of prosecuting attorney** during argument is not error requiring a reversal. *Wartena v. State*, 195 Ind. 445, 5 N. E. 20.

73. See sixth amendment of U. S. Constitution, the various state constitutions, and the following: **Ga.**—*Delk v. State*, 99 Ga. 667, 26 S. E. 752. **Kan.**—*State v. Dreany*, 65 Kan. 292, 69 Pac. 182. **Ky.**—*Belmore v. Caldwell*, 2 Bibb 76. **La.**—*State v. Bridges*, 109 La. 530, 33 So. 589; *State v. De Serrant*, 33 La. Ann. 979. **Md.**—*McCleary v. State*, 122 Md. 394, 89 Atl. 1100. **N. J.**—*State v. Murphy*, 87 N. J. L. 515, 529, 94 Atl. 640; *Donnelly v. State*, 26 N. J. L. 601. **N. Y.**—*People v. Wansker*, 108 Misc. 84, 177 N. Y. Supp. 295. **Okla.**—*State ex rel. Tucker v. Davis*, 9 Okla. Crim. 94, 130 Pac. 962, 44 L. R. A. (N. S.) 1083; *Baker v. State*, 9 Okla. Crim. 62, 130 Pac. 820; *Nichols v. State*, 8 Okla. Crim. 550, 129 Pac. 673. **Tex.**—*Hamilton v. State*, 68 Tex. Crim. 419, 153 S. W. 331. **Va.**—*Barnes v. Com.*, 92 Va. 794, 23 S. E. 784. **Wis.**—*Dietz v. State*, 149 Wis. 462, 136 N. W. 166, Ann. Cas. 1913C, 732; *Carpenter v. Dane*, 9 Wis. 274.

[a] **At Common Law.**—At the early common law persons accused of crime were denied the right to be heard by counsel in their defense. But by later common law a person under indictment for a capital offense was assigned counsel. See *People ex rel. Acritelli v. Grout*, 87 App. Div. 193, 84 N. Y. Supp. 97.

[b] **The provision of the federal constitution does not apply to prosecutions in state courts.** *McDonald v. Com.*, 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293; *State v. Murphy*, 87 N. J. L. 515, 530, 94 Atl. 640.

[c] **Choice of.**—A defendant has a right to the benefit of counsel of his own selection except when he is unable to employ counsel and the court assigns counsel. *People v. Wansker*, 108 Misc. 84, 177 N. Y. Supp. 295. See *infra*, VII, I, 2, b, (III).

**Right to counsel at preliminary examination,** see 21 STANDARD PROC. 507.

74. *Baker v. State*, 9 Okla. Crim. 62, 130 Pac. 820; *Spicer v. State*, 52 Tex. Crim. 177, 105 S. W. 813.

75. **Ky.**—*McDaniel v. Com.*, 181 Ky. 766, 205 S. W. 915. **Okla.**—*Baker v. State*, 9 Okla. Crim. 62, 130 Pac. 820. **Pa.**—*Com. v. Boyd*, 246 Pa. 529, 92 Atl. 795, Ann. Cas. 1916D, 201.

**A denial of the right to counsel is error and ground for new trial.** See 20 STANDARD PROC. 469.

[a] **Illustrative of the manner of violating this right,** (1) it has been held that the right is infringed by allowing bystanders within the space between counsel for the accused and the jury and witnesses (*State v. Weldon*, 91 S. C. 29, 74 S. E. 43, Ann. Cas. 1913E, 801, 39 L. R. A. [N. S.] 687), or (2) by denying defendant's counsel the right to state what he expects to show by a witness (*Spurlock v. State* [Ala. App.], 82 So. 557), or (3) by instructing the jury, without any saving words, that they are not to consider the evidence in the light of arguments of counsel (*Com. v. Polichinus*, 229 Pa. 311, 78 Atl. 382), or (4) that they are to disregard the argument of counsel (See 2 STANDARD PROC. 828). (5) But it is not infringed by an instruction not to consider remarks of counsel as evidence or for any purpose unless such argument or remark is justified by the evidence. *Spicer v. State*, 52 Tex. Crim. 177, 105 S. W. 813.

76. See *infra*, this section.

The right to be heard by counsel should be construed so as to give every one accused of crime the benefit of counsel at every step and stage of the proceeding.<sup>77</sup>

(II.) **Right of Accused To Appear Without Counsel.**—A person accused of crime is not compelled to have counsel.<sup>78</sup> He may waive his constitutional right to counsel,<sup>79</sup> and appear without counsel if he so desires,<sup>80</sup> as the constitutions guarantee him the right to be heard either by himself,<sup>81</sup> or by counsel,<sup>82</sup> or by both.<sup>83</sup> If he does not desire counsel, the court is not justified in imposing counsel upon him,<sup>84</sup> unless it appear that he is not mentally competent or is not sui juris at the time of the trial.<sup>85</sup> And if, when brought to the bar, he announces himself ready for trial without asking that counsel be assigned him, it will be presumed on appeal that he chose to be heard in his own defense,<sup>86</sup> and a reversal and new trial will not be granted on this ground

77. *State v. Moore*, 61 Kan. 732, 60 Pac. 748; *People ex rel. Burgess v. Risley*, 13 Abb. N. C. 186, 66 How. Pr. (N. Y.) 67, giving broad scope to the word "trial" used in the constitution.

**Includes Right To Be Heard by Counsel in Argument.**—See 2 STANDARD PROC. 728.

[a] **Advice as to Confession.**—The constitutional right to counsel for his "defense" does not entitle him to counsel to determine whether he shall confess. *State v. Murphy*, 87 N. J. L. 515, 530, 94 Atl. 640.

78. *Barnes v. Com.*, 92 Va. 794, 23 S. E. 784.

79. **Fla.**—*Weatherford v. State*, 79 So. 680. **Ga.**—*Gatlin v. State*, 17 Ga. App. 406, 87 S. E. 151. **La.**—*State v. Fulco*, 138 La. 995, 71 So. 134. **Mo.** *State v. Terry*, 201 Mo. 697, 100 S. W. 432. **Nev.**—*State v. MacKinnon*, 41 Nev. 182, 168 Pac. 330. **N. J.**—*State v. Murphy*, 87 N. J. L. 515, 94 Atl. 640; *State v. Raney*, 63 N. J. L. 363, 43 Atl. 677. **Okla.**—*Baker v. State*, 9 Okla. Crim. 62, 130 Pac. 820. **Va.** *Barnes v. Com.*, 92 Va. 794, 23 S. E. 784.

80. *Baker v. State*, 9 Okla. Crim. 62, 130 Pac. 820.

81. **La.**—*State v. Kelly*, 25 La. Ann. 381. **Miss.**—*Schwartz v. State*, 103 Miss. 711, 60 So. 732. **Tex.**—*Compton v. State*, 67 Tex. Crim. 15, 148 S. W. 580. **Va.**—*Barnes v. Com.*, 92 Va. 794, 23 S. E. 784. **W. Va.**—*State v. Yoes*, 67 W. Va. 546, 68 S. E. 181, 140 Am. St. Rep. 978. **Wis.**—*Dietz v. State*, 149 Wis. 462, 136 N. W. 166, Ann. Cas. 1913C, 732, and note.

82. **As to right to counsel**, see *supra*, this section.

83. See Miss. Const., §26.

[a] **Effect of Election.**—Under a constitution giving the accused "the right to be fully heard in his defense, by himself or by his counsel, or by both, as he may elect," if the record shows that he has elected to be heard by counsel he cannot complain on appeal that he was not permitted to be present and be heard personally on a motion to quash. *State v. Atkinson*, 40 S. C. 363, 18 S. E. 1021, 42 Am. St. Rep. 877.

84. **Ia.**—*Korf v. Jasper County*, 132 Iowa 682, 108 N. W. 1031. **Ky.**—*Williams v. Com.*, 33 Ky. L. Rep. 330, 110 S. W. 339. **La.**—*State v. Kelly*, 25 La. Ann. 381. **Miss.**—*Schwartz v. State*, 103 Miss. 711, 60 So. 732. **Mo.**—*State v. Terry*, 201 Mo. 697, 100 S. W. 432. **W. Va.**—*State v. Yoes*, 67 W. Va. 546, 68 S. E. 181, 140 Am. St. Rep. 978. **Wis.**—*Dietz v. State*, 149 Wis. 462, 136 N. W. 166, Ann. Cas. 1913C, 732.

85. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *Dietz v. State*, 149 Wis. 462, 136 N. W. 166, Ann. Cas. 1913C, 732.

[a] **The mere declining the aid of counsel** is not proof of incompetency. *Dietz v. State*, 149 Wis. 462, 136 N. W. 166, Ann. Cas. 1913C, 732.

86. *State v. Whitesides*, 49 La. Ann. 352, 21 So. 540; *State v. De Serrant*, 33 La. Ann. 979; *State v. Kelly*, 25 La. Ann. 381; *State v. Terry*, 201 Mo. 697, 701, 100 S. W. 432. But see *Com. v. Jester*, 256 Pa. 441, 100 Atl. 993, holding that ignorance of his right to counsel excuses a defendant's default

alone,<sup>87</sup> though this fact will be considered with others in determining whether defendant was accorded a full opportunity for defense.<sup>88</sup>

(III.) **Assignment of Counsel.**— Courts have inherent power to assign counsel to defend destitute persons accused of serious crimes.<sup>89</sup> Generally, however, the matter is regulated by statutes,<sup>90</sup> which require the court to assign counsel on the request of a defendant unable to employ any,<sup>91</sup> or which require the court to inform the accused before being arraigned, of his right to have counsel, ask him if he desires such aid and assign him counsel if he does.<sup>92</sup> Three things must be found before counsel is assigned: first, that the defendant is without counsel;<sup>93</sup> second, that he is unable to employ counsel,<sup>94</sup> and third, that he has requested or indicated a desire that counsel be appointed for him.<sup>95</sup>

Some statutes limit the right to have counsel appointed to capital cases.<sup>96</sup> In cases not covered by the statute, the matter of appointment rests in the discretion of the court.<sup>97</sup>

**When Assignment Made.**— A statute providing for the assignment of counsel when the defendant appears for arraignment should not be construed to limit the exercise of the power of appointment to the time of arraignment, but should be construed to authorize the appointment of counsel at any time in the proceeding when essential to give the accused the benefit of his constitutional guaranty.<sup>98</sup>

in failing to request to be represented by counsel.

[a] **To constitute ground for reversal** it must appear that the right to counsel was denied. *Barnes v. Com.*, 92 Va. 794, 23 S. E. 784.

87. *State v. De Serrant*, 33 La. Ann. 979; *Lopez v. State*, 46 Tex. Crim. 473, 80 S. W. 1016.

88. *State v. Rollins*, 50 La. Ann. 925, 24 So. 664.

89. *Hendryx v. State*, 130 Ind. 265, 29 N. E. 1131; *Webb v. Baird*, 6 Ind. 13; *Carpenter v. Dane*, 9 Wis. 274, 278.

90. See the statutes.

[a] **It is competent for the legislature** to reasonably regulate and prescribe the manner of assignment of counsel. *Korf v. Jasper County*, 132 Iowa 682, 108 N. W. 1031.

[b] **Statute Is Mandatory.**— *Burden v. State*, 70 Tex. Crim. 349, 156 S. W. 1196.

91. *State v. Terry*, 201 Mo. 697, 701, 100 S. W. 432.

92. *Fla.*— *Cutts v. State*, 54 Fla. 21, 45 So. 491. *La.*— *State v. Bridges*, 109 La. 530, 33 So. 589. *Okla.*— *Baker v. State*, 9 Okla. Crim. 62, 130 Pac. 820. *Utah.*— *Pardee v. Salt Lake County*, 39 Utah 482, 118 Pac. 122, Ann. Cas. 1913E, 200, 36 L. R. A. (N. S.) 377.

See 3 STANDARD PROF. 861.

93. *Korf v. Jasper County*, 132 Iowa 682, 108 N. W. 1031; *State v. Terry*, 201 Mo. 697, 701, 100 S. W. 432.

94. *Ia.*— *Korf v. Jasper County*, 132 Iowa 682, 108 N. W. 1031. *Mo.*— *State v. Terry*, 201 Mo. 697, 701, 100 S. W. 432. *Okla.*— *Baker v. State*, 9 Okla. Crim. 62, 130 Pac. 820. *Vt.*— *State v. Gomez*, 89 Vt. 490, 96 Atl. 190. *Wis.*— *Carpenter v. Dane*, 9 Wis. 274, 278.

95. *Ia.*— *Korf v. Jasper County*, 132 Iowa 682, 108 N. W. 1031. *La.*— *State v. Sims*, 117 La. 1036, 42 So. 494. *Mo.*— *State v. Terry*, 201 Mo. 697, 701, 100 S. W. 432.

**Right to appear without counsel**, see *supra*, VII, I, 2, b, (II).

[a] **It will be presumed that counsel** was appointed at the request of the defendant. *Korf v. Jasper County*, 132 Iowa 682, 108 N. W. 1031.

96. *Lopez v. State*, 46 Tex. Crim. 473, 80 S. W. 1016; *Austin v. State* (Tex. Crim.), 51 S. W. 249; *Gutierrez v. State* (Tex. Crim.), 47 S. W. 372.

97. *Mass v. State* (Tex. Crim.), 81 S. W. 45.

98. *People ex rel. Acritelli v. Grout*, 87 App. Div. 193, 84 N. Y. Supp. 97.

[a] **Exigencies may arise after arraignment** such as change of residence, disability or death, rendering the sub-



**Who Should Be Assigned.**—When called upon to appoint counsel, it is the duty of the court to appoint a person who has been admitted as an attorney and counsellor in the state,<sup>99</sup> and to see that the counsel assigned has sufficient ability and experience to fairly represent the defendant, present his defense and protect him from undue oppression,<sup>1</sup> and that he has no interest adverse to the prisoner which would interfere with a fair presentation of the defense.<sup>2</sup> But unless the statute provides that the court must allow the accused to select counsel,<sup>3</sup> he must be content with such counsel as the court may provide for him.<sup>4</sup>

The number of counsel to be appointed to defend an accused is a matter to be determined by the trial court in the exercise of its sound discretion<sup>5</sup> within the limitations prescribed by statute.<sup>6</sup>

**(IV.) Consultation With Counsel.**—The right of an accused to be heard by counsel includes the right to a full and confidential consultation with such counsel with no other persons present to hear what is said.<sup>7</sup> It is the duty of officers having the custody of persons charged with

stitution of another attorney necessary. So too, it may be necessary to appoint additional counsel to place the accused on something like equality in professional ability and experience, with the forces opposed. *Korf v. Jasper County*, 132 Iowa 682, 108 N. W. 1031.

[b] **Before indictment found**, the court may appoint counsel for the defendant. *Charlon v. State*, 106 Ga. 400, 32 S. E. 347.

[c] **At any time before trial or upon trial**, (1) the court may assign counsel. *People ex rel. Acritelli v. Grout*, 87 App. Div. 193, 84 N. Y. Supp. 97. (2) Upon the trial, it is not erroneous for the court to examine the defendant in the presence of the jury as to whether he has counsel, and whether he is financially able to employ counsel. *Waggoner v. State* (Tex. Crim.), 98 S. W. 255.

99. *Baker v. State*, 9 Okla. Crim. 62, 130 Pac. 820; *Harkins v. Murphy*, 51 Tex. Civ. App. 568, 112 S. W. 136.

[a] **The appointment of a person not authorized to appear as attorney at law is a denial of a fundamental right and constitutes reversible error.** *Baker v. State*, 9 Okla. Crim. 62, 130 Pac. 820.

1. *Simmons v. State*, 116 Ga. 583, 42 S. E. 779; *Fambles v. State* 97 Ga. 625, 25 S. E. 365; *People v. Blevins*, 251 Ill. 381, 96 N. E. 214, Ann. Cas. 1912C, 451. See *State v. Briggs*, 58 W. Va. 291, 52 S. E. 218.

[a] **It will be presumed that lawyers willing and able to discharge their full duty toward the accused were appointed.** *Delk v. State*, 99 Ga. 667, 26 S. E. 752.

[b] **The objection to the appointment of inexperienced counsel must be made a special ground for motion for new trial and must be supported by proper evidence to be available on appeal.** *Delk v. State*, 99 Ga. 667, 26 S. E. 752.

2. *People v. Bopp*, 279 Ill. 184, 191, 116 N. E. 679.

3. See the statutes.

4. **Ga.**—*Walker v. State*, 17 Ga. App. 321, 86 S. E. 735. **Ind.**—*Burton v. State*, 75 Ind. 477. **N. Y.**—*People v. Fuller*, 35 Misc. 189, 71 N. Y. Supp. 487, 15 N. Y. Crim. 473. **Wis.**—*Baker v. State*, 86 Wis. 474, 56 N. W. 1088.

5. **Ga.**—*Fambles v. State*, 97 Ga. 625, 25 S. E. 365. **Ind.**—*Keyes v. State*, 122 Ind. 527, 23 N. E. 1097. **N. Y.**—*People ex rel. Roth v. Fitch*, 51 N. Y. Supp. 683.

See *Korf v. Jasper County*, 132 Iowa 682, 108 N. W. 1031.

6. See the statutes.

7. **Ga.**—*Reliford v. State*, 140 Ga. 777, 79 S. E. 1128. **La.**—*State v. Ferris*, 16 La. Ann. 424. **N. J.**—*State v. Murphy*, 87 N. J. L. 515, 531, 94 Atl. 640. **N. Y.**—*People ex rel. Burgess v. Risley*, 13 Abb. N. C. 186, 66 How. Pr. 67. **Okla.**—*State ex rel. Tucker v. Davis*, 9 Okla. Crim. 94, 98, 130 Pac. 962, 44 L. R. A. (N. S.) 1083.

crime to afford them reasonable opportunity for such consultation,<sup>8</sup> and this right and duty is sometimes recognized by statute.<sup>9</sup> It is the duty of the trial court to make such orders as will secure the right.<sup>10</sup>

(V.) **Presence of Counsel.** — In criminal cases, it is the defendant's constitutional right to have his counsel present during the trial.<sup>11</sup> But the right to the presence of counsel is in the nature of a personal privilege and may be waived.<sup>12</sup> The court cannot be required to issue process to compel the attendance of counsel,<sup>13</sup> or employ express messengers to send for them,<sup>14</sup> although notice to counsel when absent is sometimes required.<sup>15</sup> Pending the deliberation of the jury, counsel must

8. *State ex rel. Tucker v. Davis*, 9 Okla. Crim. 94, 130 Pac. 962, 44 L. R. A. (N. S.) 1083.

9. See the statutes.

[a] **Extent of Right.** — The fact that an accused has made a statement before the grand jury and the district attorney has agreed to dismiss the case against the accused does not deprive him of his right to the advice of counsel. It is not necessary that the party desiring counsel should be preparing a defense against some accusation after indictment found or after arrest. The statute is broader and fully comprehends every possible situation in which an accused person, or persons under arrest or not under arrest desire to consult with counsel, or communicate with counsel, or obtain advice or services of counsel in the protection of his rights or even supposed legal rights. *Hamilton v. State*, 68 Tex. Crim. 419, 427, 153 S. W. 331.

10. *State ex rel. Tucker v. Davis*, 9 Okla. Crim. 94, 130 Pac. 962, 44 L. R. A. (N. S.) 1083.

[a] What consultations and when and where they may be had rests within the sound discretion of the trial court. *State ex rel. Tucker v. Davis*, 9 Okla. Crim. 94, 130 Pac. 962, 44 L. R. A. (N. S.) 1083.

11. *Ga.*—*Martin v. State*, 51 Ga. 567. *La.*—*State v. Davenport*, 33 La. Ann. 231. *N. C.*—*State v. Denton*, 154 N. C. 641, 70 S. E. 839. *Ohio.*—*Crusen v. State*, 10 Ohio St. 258, 270; *Kirk v. State*, 14 Ohio 511.

On arraignment, see 2 STANDARD PROC. 869.

When giving additional instructions, see 18 STANDARD PROC. 979.

On reception of verdict, see the title "Verdict."

At imposition of sentence, see the title "Sentence and Judgment."

[a] When testimony is read or restated to jury after retirement, see 17 STANDARD PROC. 582, and *Wesley v. State*, 67 Tex. Crim. 507, 150 S. W. 197.

[b] On application for change of venue, see *State v. Blackman*, 113 La. 765, 37 So. 719.

[c] The exclusion of one of defendant's counsel from the courtroom during the entire trial under a rule excluding witnesses is error, notwithstanding the defendant has other counsel. *Jackson v. State*, 55 Tex. Crim. 79, 115 S. W. 262, 131 Am. St. Rep. 792. An exception to the rule excluding witnesses is usually made in favor of attorneys. See 14 ENCY. OF EV. 595.

12. *Ga.*—*Martin v. State*, 51 Ga. 567. *Ohio.*—*Crusen v. State*, 10 Ohio St. 258, 270. *Tex.*—*Brown v. State*, 62 Tex. Crim. 592, 138 S. W. 604.

[a] The absence of one of defendant's counsel, not made a ground for continuance, cannot be urged as a ground for reversal. *Cox v. City of Jonesboro*, 112 Ark. 96, 164 S. W. 767.

[b] Waiver by counsel, see *Lyons v. State*, 7 Ga. App. 50, 66 S. E. 149.

13. *Crusen v. State*, 10 Ohio St. 258, 270.

[a] If counsel during trial see fit to absent themselves from the courtroom, it is proper practice for him to ask permission to be absent, and request the court to suspend the proceedings, stating the necessity. *State v. Newman* (S. C.), 80 S. E. 482.

14. *Crusen v. State*, 10 Ohio St. 258, 270.

15. See the statutes and the titles "Sentence and Judgment;" "Verdict." See also *Cowart v. State*, 65 Tex. Crim. 482, 145 S. W. 341.

[a] Where the statute requires counsel to be called when giving ad-

either be in attendance at court or advise the court or proper officers where they can be found.<sup>16</sup> Judicial proceedings cannot stop because of a failure of counsel to do their duty in this respect.<sup>17</sup>

J. ARRANGEMENTS WITHIN COURT ROOM.—The bench, bar, and clerk's box are intended for the officers of the court.<sup>18</sup> Strictly speaking, no person has a right to go into the bar but attorneys,<sup>19</sup> although the ordinary clients of lawyers sit by the side of their counsel by the general acquiescence of the bar.<sup>20</sup> And it has been held proper to permit relatives of the deceased to sit with the attorneys for the prosecution during a homicide trial.<sup>21</sup> The spectators should be confined to that part of the court room set apart to their use.<sup>22</sup> The practice with respect to the place in court of a defendant in a criminal case does not seem to be uniform.<sup>23</sup> In some states a defendant on bail may be allowed to sit just within the bar near his counsel.<sup>24</sup> If in custody, his place is behind the bar within sight of the court.<sup>25</sup> In some jurisdictions, the uniform rule during the trial of felonies is for the prisoner to remain in the prisoner's dock.<sup>26</sup> It has been held that he has a right to sit with his counsel,<sup>27</sup> but a request for permission to do so has been refused.<sup>28</sup>

ditional instructions or rereading evidence to jurors after their retirement, it is not error to proceed in his absence after the court attempts to find him but cannot. *Wesley v. State*, 67 Tex. Crim. 507, 150 S. W. 197.

**Notification of Giving of Additional Instructions.**—See 13 STANDARD PROC. 978.

16. *State v. Denton*, 154 N. C. 641, 70 S. E. 839.

17. *State v. Denton*, 154 N. C. 641, 70 S. E. 839. See also *Wesley v. State*, 67 Tex. Crim. 507, 150 S. W. 197.

18. *State v. Underwood*, 2 Overt. (Tenn.) 92.

19. *State v. Underwood*, 2 Overt. (Tenn.) 92.

20. *State v. Underwood*, 2 Overt. (Tenn.) 92.

21. *Freels v. State*, 130 Ark. 189, 196 S. W. 913.

22. *People v. Munday*, 280 Ill. 32, 68, 117 N. E. 286; *State v. Weldon*, 91 S. C. 29, 74 S. E. 43, Ann. Cas. 1913E, 801, 39 L. R. A. (N. S.) 667.

**Denial of right to counsel by allowing spectators in space set apart for officers of court, etc.** See *supra*, VII, 1, 2, b, (I).

23. See *infra*, this note.

[a] In England, (1) a defendant charged with a felony, who surrenders in discharge of his bail must be tried at the bar of the court, and cannot take his trial at any other part of

the court even with the consent of the prosecutor. *Reg. v. St. George*, 9 Carr. & P. (Eng.) 483, 38 E. C. L. 285. (2) In strictness, a defendant charged with a misdemeanor ought to stand in the dock, but this is not usually insisted upon. *Rex v. Carlisle*, 6 Car. & P. (Eng.) 636, 25 E. C. L. 614. (3) And when he defends himself, he may be allowed to take a seat at the table. *Reg. v. Lovett*, 9 Carr. & P. (Eng.) 462, 38 E. C. L. 273. 24. *State v. Underwood*, 2 Overt. (Tenn.) 92.

25. *State v. Underwood*, 2 Overt. (Tenn.) 92.

26. *Del.*—*State v. Quinn*, 2 Penne. 339, 45 Atl. 544. *Pa.*—*Com. v. Boyd*, 246 Pa. 529, 92 Atl. 705, Ann. Cas. 1916D, 201. *Tenn.*—*Matthews v. State*, 9 Lea 128, 42 Am. Rep. 667.

27. *Com. v. Boyd*, 246 Pa. 529, 92 Atl. 705, Ann. Cas. 1916D, 201. See also *United States v. Gibert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204; *Grabowski v. State*, 126 Wis. 447, 105 N. W. 805.

28. *State v. Quinn*, 2 Penne. (Del.) 339, 45 Atl. 544.

[a] In the absence of prejudice a denial of a request to sit with counsel is not reversible error. But "we would sustain the assignment were it not made so apparent that in this case the refusal was harmless error." *Com. v. Boyd*, 246 Pa. 529, 92 Atl. 705, Ann. Cas. 1916D, 201.



**K. RESTRAINT OF PRISONER.**—As a general rule a prisoner should not, during his trial, be manacled or handcuffed; but should be left free from shackles,<sup>29</sup> unless some such restraint is necessary to prevent escape.<sup>30</sup> The matter is largely in the discretion of the court,<sup>31</sup> but shackling should not be permitted under ordinary circumstances, or in any case where the prisoner is not violent and obstreperous or does not threaten to escape.<sup>32</sup> It is not erroneous, however, to conduct the prisoner to and from the court room in shackles and remove the shackles immediately upon arrival there and put them on again upon the eve of returning him to jail.<sup>33</sup>

An armed guard may be permitted to attend the defendant if he is a desperate and dangerous character.<sup>34</sup>

**L. RESTRAINT OF WITNESSES.**—Witnesses should be unshackled,<sup>35</sup> unless a different course is necessary for sufficient reasons.<sup>36</sup>

**M. READING INDICTMENT OR INFORMATION AND STATING PLEA.**—At common law, a prisoner on trial for a felony may demand that the in-

29. **Ariz.**—Parker v. Territory, 5 Ariz. 283, 52 Pac. 361. **Cal.**—People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296. **Ky.**—Blair v. Com., 171 Ky. 319, 188 S. W. 390. **Miss.**—Lee v. State, 51 Miss. 566. **Mo.**—State v. Rudolph, 187 Mo. 67, 85 S. W. 584; State v. Craft, 164 Mo. 631, 65 S. W. 280; State v. Kring, 64 Mo. 591. **Tenn.**—Matthews v. State, 9 Lea 128, 42 Am. Rep. 667. **Tex.**—Zunago v. State, 63 Tex. Crim. 58, 138 S. W. 713, Ann. Cas. 1913D, 665; Powell v. State, 50 Tex. Crim. 592, 99 S. W. 1005; Rainey v. State, 20 Tex. App. 455. **Wash.**—State v. Miller, 78 Wash. 268, 138 Pac. 896; State v. Williams, 18 Wash. 47, 50 Pac. 580, 63 Am. St. Rep. 869, 39 L. R. A. 821. **W. Va.**—State v. Allen, 45 W. Va. 65, 30 S. E. 209.

[a] **This Is the Common Law Rule.** People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296.

30. **Cal.**—People v. Harrington, 42 Cal. 165, 10 Am. Rep. 296. **Ky.**—Blair v. Com., 171 Ky. 319, 188 S. W. 390. **Miss.**—Lee v. State, 51 Miss. 566. **Tenn.**—Matthews v. State, 9 Lea 128, 42 Am. Rep. 667. **Tex.**—Rainey v. State, 20 Tex. App. 455.

31. **Ala.**—Faire v. State, 58 Ala. 74. **Ind.**—McPherson v. State, 178 Ind. 583, 99 N. E. 984. **Mo.**—State v. Rudolph, 187 Mo. 67, 85 S. W. 584; State v. Duncan, 116 Mo. 288, 308, 22 S. W. 699. **N. M.**—Territory v. Kelly, 2 N. M. 292. **Tenn.**—Poe v. State, 10 Lea 673. **W. Va.**—State v. Allen, 45 W. Va. 65, 30 S. E. 209.

32. State v. Craft, 164 Mo. 631, 65 S. W. 280; State v. Allen, 45 W. Va. 65, 30 S. E. 209.

[a] "To justify the keeping of shackles upon the prisoner during the trial, there must arise, during the trial, some good reason therefor based upon the conduct of the prisoner, in the absence of which such action would be improper." State v. Temple, 194 Mo. 228, 235, 92 S. W. 494.

33. **Ky.**—Donehy v. Com., 170 Ky. 474, 186 S. W. 161. **Mo.**—State v. Temple, 194 Mo. 228, 92 S. W. 494. **Tex.**—Rainey v. State, 20 Tex. App. 455.

[a] **A failure to remove the shackles until the prisoner is in the court room is not reversible error, if the oversight is promptly corrected.** Canon v. State, 59 Tex. Crim. 398, 128 S. W. 141; State v. Allen, 45 W. Va. 65, 30 S. E. 209.

34. State v. Rudolph, 187 Mo. 67, 85 S. W. 584; State v. Duncan, 116 Mo. 288, 308, 22 S. W. 699; State v. Kenny, 77 S. C. 236, 57 S. E. 859.

35. State v. Rudolph, 187 Mo. 67, 85 S. W. 584.

36. State v. Rudolph, 187 Mo. 67, 85 S. W. 584.

[a] **But when a witness is brought from jail to testify, it is not reversible error to put shackles on the witness immediately after announcement of adjournment, in the presence of the jury, when the court instructs the jury not to take the fact into consideration in determining their verdict.** People v. Metzger, 143 Cal. 447, 77 Pac. 155.

dictment be read over once,<sup>37</sup> and statutes frequently require, as the first step in a criminal trial after the impanelling and swearing of the jury, that the clerk or other officer read the indictment or information and state the plea of the defendant to the jury.<sup>38</sup> Some courts hold that such statutes are mandatory, and that a noncompliance therewith is reversible error,<sup>39</sup> especially in felony cases,<sup>40</sup> whereas others hold that an omission of the reading is not reversible error when the jury were otherwise fully informed as to the charge and the plea.<sup>41</sup> Counts in the indictment which have been quashed or abandoned, should not be read,<sup>42</sup> and, by statute, statements in the indictment as to previous

37. *Reg. v. Dowling*, 3 Cox C. C. (Eng.) 509; *Reg. v. Newton*, 1 Car. & K. (Eng.) 469, 47 E. C. L. 467. See *Reg. v. Frost*, 9 Carr. & P. (Eng.) 129, 38 E. C. L. 87.

[a] A reading three times cannot be demanded. *Reg. v. Dowling*, 3 Cox. C. C. (Eng.) 509.

[b] In Missouri, the indictment is generally read to the jury as a part of the prosecuting attorney's statement of the case. But a failure to read the indictment is not ground for new trial. *State v. Gamble*, 108 Mo. 500, 18 S. W. 1111.

38. See the statutes and the following cases: Cal.—*People v. Douglass*, 87 Cal. 281, 25 Pac. 417. Ky.—*Donehy v. Com.*, 170 Ky. 474, 186 S. W. 161; *Hendrickson v. Com.*, 23 Ky. L. Rep. 1191, 64 S. W. 954; *Galloway v. Com.*, 4 Ky. L. Rep. 720, 5 Ky. L. Rep. 213, by the clerk or commonwealth's attorney. Pa.—*Onofri v. Com.*, 7 Sad. 520, 11 Atl. 462. Tex.—*Messenger v. State*, 81 Tex. Crim. 465, 198 S. W. 330; *Essary v. State*, 53 Tex. Crim. 596, 111 S. W. 927; *Murray v. State*, 21 Tex. App. 466, 1 S. W. 522.

Reading indictment on arraignment, see 2 STANDARD PROC. 862.

39. Idaho.—*State v. Crea*, 10 Idaho 88, 76 Pac. 1013; *State v. Chambers*, 9 Idaho 673, 75 Pac. 274. Ky.—*Farris v. Com.*, 111 Ky. 236, 63 S. W. 615; *Hendrickson v. Com.*, 23 Ky. L. Rep. 1191, 64 S. W. 954; *Galloway v. Com.*, 5 Ky. L. Rep. 213. Tex.—*Essary v. State*, 53 Tex. Crim. 596, 111 S. W. 927; *Murray v. State*, 21 Tex. App. 466, 1 S. W. 522; *Wilkins v. State*, 15 Tex. App. 420.

[a] A substantial compliance with the statute is (1) essential (*Hendrickson v. Com.*, 23 Ky. L. Rep. 1191, 64 S. W. 954; *Galloway v. Com.*, 5 Ky. L. Rep. 213) and (2) sufficient. *Donehy*

*v. Com.*, 170 Ky. 474, 186 S. W. 161; *Combs v. Com.*, 31 Ky. L. Rep. 822, 104 S. W. 270.

[b] A reading by the attorney employed to prosecute, instead of by the clerk or commonwealth's attorney as required by statute, is a substantial compliance with the statute. *Galloway v. Com.*, 5 Ky. L. Rep. 213.

[c] Failure To State Plea.—Where the defendant enters his plea of not guilty in the presence of the jury after the reading of the indictment and before the statement of the prosecuting attorney, a failure to state the defendant's plea is not ground for reversal. *Donehy v. Com.*, 170 Ky. 474, 186 S. W. 161.

[d] The reading of an exact copy of the indictment is a sufficient compliance, where no objection is interposed until after the evidence is closed. *Orner v. State*, 78 Tex. Crim. 415, 183 S. W. 1172.

Reading of indictment by assistant counsel, see *supra*, VII, I, 2, a, (II), the catchline "Control of Prosecution."

40. *Murray v. State*, 21 Tex. App. 466, 1 S. W. 522.

41. *People v. Sprague*, 53 Cal. 491; *Penn v. State*, 62 Miss. 450. See *State v. Gamble*, 108 Mo. 500, 18 S. W. 1111.

42. *Thornton v. Com.*, 24 Gratt. (65 Va.) 657; *Grottkau v. State*, 70 Wis. 462, 36 N. W. 31.

[a] But any irregularity in doing so is cured by a rereading of the indictment (1) omitting such counts (*Thornton v. Com.*, 24 Gratt. (65 Va.) 657), or (2) by a correction and direction of the court that the trial would be on the first count only, and an explanation by the court of the nature of the charge in that count. *Grottkau v. State*, 70 Wis. 462, 36 N. W. 31.

convictions which are admitted by the plea, should be omitted in the reading and not referred to in the trial.<sup>43</sup> Where the indictment contains a number of counts which are alike except as to the amounts and dates, it is sufficient to read the first count and explain to the jury the difference as to the remaining counts.<sup>44</sup> Furthermore, the defendant may waive a reading of the entire indictment.<sup>45</sup> It is sufficient to read the indictment and enter the plea after the case is closed if the evidence is reintroduced,<sup>46</sup> or such reintroduction is waived,<sup>47</sup> but not otherwise.<sup>48</sup>

**N. CIVIL TRIALS BY COURT WITHOUT A JURY.—1. In General.** When an ordinary action at law is submitted to a court without a jury, the court or judge is clothed with all the functions of a jury in determining the facts and rendering judgment thereon.<sup>49</sup> He acts in the double capacity of judge and jury and may exercise all the powers both of the judge and jury,<sup>50</sup> and in the latter capacity pass upon issues of fact,<sup>51</sup> and the credibility of witnesses,<sup>52</sup> and determine the weight of testimony.<sup>53</sup> But he has no powers in addition to those which the court and jury have in any ordinary case.<sup>54</sup> The same technical rules of evidence controlling trials by jury do not necessarily prevail.<sup>55</sup>

43. *People v. Wheatley*, 88 Cal. 114, 26 Pac. 95.

44. *Gallot v. United States*, 87 Fed. 446.

45. *Gardes v. United States*, 87 Fed. 172, 30 C. C. A. 596.

46. *Phillips v. State*, 28 Fla. 77, 9 So. 826; *Hearne v. State* (Tex. Crim.), 58 S. W. 1009.

[a] A reading before the close of the evidence for the commonwealth, while it is within the power of the court to recall the witnesses and give to the party desiring an opportunity to re-examine them is not prejudicial error. *Galloway v. Com.*, 5 Ky. L. Rep. 213.

47. *Barbee v. State*, 32 Tex. Crim. 170, 22 S. W. 402.

48. *Essary v. State*, 53 Tex. Crim. 596, 111 S. W. 927; *Barbee v. State*, 32 Tex. Crim. 170, 22 S. W. 402.

49. *Cal.*—*Hubbell v. Hubbell*, 7 Cal. App. 661, 95 Pac. 664. *Ky.*—*E. T. V. & G. R. Co. v. Adams*, 14 Ky. L. Rep. 862. *N. J.*—*Vail v. Goodman* (N. J. L.), 53 Atl. 692. *N. H.*—*Fowler v. Towle*, 49 N. H. 507. *W. Va.*—*Griffie v. McCoy*, 8 W. Va. 201.

50. *Fowler v. Towle*, 49 N. H. 507. See generally the title "Province of Judge and Jury."

51. *Cal.*—*Touchar d v. Crow*, 20 Cal. 150, 163, 81 Am. Dec. 108. *Md.*—*Richardson v. Anderson*, 109 Md. 641, 650, 72 Atl. 485, 130 Am. St. Rep. 543, 25

*L. R. A.* (N. S.) 393. *Mich.*—*Edwards v. Nelson*, 51 Mich. 121, 16 N. W. 261. *Mo.*—*Billings v. Cal. Hirsch & Sons Iron & Rail Co.*, 86 Mo. App. 228; *Todd v. Terry*, 26 Mo. App. 598, 610. *Tex.* *National Bank v. Gough* (Tex. Civ. App.), 197 S. W. 1119. See 21 *STANDARD PROC.* 834.

As to findings, see the title "Findings and Conclusions."

52. *In re Man Wo Chan*, 87 Cal. 155, 25 Pac. 271.

53. *Henry v. Beers*, 48 Mo. 366; *McKee v. Verdin*, 96 Mo. App. 268, 70 S. W. 154.

54. *Fowler v. Towle*, 49 N. H. 507.

[a] **Cannot Consider Matters Not Proved by Evidence.**—*In re Man Wo Chan*, 87 Cal. 155, 25 Pac. 271.

55. *Andrews v. Johnston*, 7 Colo. App. 551, 44 Pac. 73.

[a] Objections not properly or seasonably made are waived as in jury trials, and if the evidence received without objection is relevant and material it can not be disregarded by the court even though it might have been excluded as incompetent had proper objection been made. *Rupert v. Penner*, 35 Neb. 587, 53 N. W. 598, 17 L. R. A. 824. See 9 *ENCY. OF EV.* 135.

[b] Any testimony not deemed pertinent may be disregarded by the court in arriving at a conclusion. *Andrews v. Johnston*, 7 Colo. App. 551, 44 Pac. 73.



The court may decline to hear oral argument.<sup>56</sup> But it is error to enter judgment upon issues of fact raised by the pleadings without hearing evidence.<sup>57</sup> Findings of fact and conclusions of law are generally required by statute or rule of court.<sup>58</sup>

**2. Power To Call Jury Notwithstanding Waiver.**—It has been held that the court may call a jury for the trial of a cause though both parties have waived a jury pursuant to constitutional and statutory provisions that the right may be waived in a specified manner.<sup>59</sup>

**3. Issues to Jury.**—Courts of equity<sup>60</sup> and probate courts,<sup>61</sup> may direct an issue of fact to be tried by a jury. Whether a court of law sitting without a jury may do so is questionable.<sup>62</sup>

**4. Instructions, Declarations and Propositions of Law.**—While formal instructions to an imaginary jury are out of place,<sup>63</sup> in some jurisdictions,<sup>64</sup> sometimes by express statute,<sup>65</sup> in actions at law in which the parties are entitled to demand a jury,<sup>66</sup> and in which the evi-

56. See 2 STANDARD PROC. 726.

57. *Thompson v. Malmin*, 204 Ill. App. 374.

58. See 8 STANDARD PROC. 994, et seq.

59. *Bullock v. Consumers' Lumb. Co.*, 96 Cal. xvii, 31 Pac. 367, on the authority of *Doll v. Anderson*, 27 Cal. 248; *McCarthy v. Missouri R. Co.*, 15 Mo. App. 385.

[a] It is a matter of discretion whether he will call a jury in such case. *McCarthy v. Missouri R. Co.*, 15 Mo. App. 385.

[b] **Court May Direct a Trial by Jury, Ex Officio.**—*Burke v. Breazeale*, 1 Rob. (La.) 73; *Davis' Heirs v. Prevost*, 6 Mart. N. S. (La.) 265.

60. See 14 STANDARD PROC. 526.

61. See 21 STANDARD PROC. 660.

62. See the following: Cal.—*Doll v. Anderson*, 27 Cal. 248. Me.—*Gordon v. Wilkins*, 20 Me. 134. Va.—*Barrett & Co. v. Tazewell*, 1 Call (5 Va.) 215, 222, query.

Compare 3 Bl. Com. 452.

[a] Where a party has waived his right to a jury trial, the court cannot try some issues of fact and refer others to the jury. *Dumas v. Robinson*, 40 Ga. 349. But see *Doll v. Anderson*, 27 Cal. 248. Compare *supra*, VII, N. 2.

63. See 13 STANDARD PROC. 712.

**Instructions in equity**, see 13 STANDARD PROC. 711.

64. *Jaquith v. Davenport*, 191 Mass. 415, 78 N. E. 93; *Cunningham v. Snow*, 82 Mo. 587, 593; *White v. Black*, 115 Mo. App. 28, 90 S. W. 1153; *E. E. Souther Iron Co. v. Laclede Power Co.*, 109 Mo. App. 353, 84 S. W. 450; *Vog-*

*elsanger v. Russell*, 92 Mo. App. 682. See *Richardson v. Anderson*, 109 Md. 641, 650, 72 Atl. 485, 130 Am. St. Rep. 543, 25 L. R. A. (N. S.) 393.

[a] In California the practice once regarded as proper, is no longer permissible. See *Lamb v. Harbaugh*, 105 Cal. 680, 692, 39 Pac. 56; *Wheatland Mill Co. v. Pirrie*, 89 Cal. 459, 26 Pac. 964; *Touchar d. Crow*, 20 Cal. 150, 81 Am. Dec. 108.

65. See the statutes and the following cases: *Sanitary District v. Industrial Board*, 282 Ill. 182, 118 N. E. 475; *Kimball & Co. v. Doggett*, 62 Ill. App. 528; *Lazarus v. Metropolitan El. Ry. Co.*, 145 N. Y. 581, 40 N. E. 240; *Teschemacher v. Lenz*, 82 Hun 594, 31 N. Y. Supp. 543, 64 N. Y. St. 178; *Matchett v. Lindberg*, 2 App. Div. 340, 37 N. Y. Supp. 854, 37 N. Y. St. 66. See also N. Y. Code Civ. Proc. §1023.

66. *Sanitary District v. Industrial Board*, 282 Ill. 182, 118 N. E. 475; *Martin v. Martin*, 170 Ill. 18, 48 N. E. 694; *Sampson v. Comr. of Highways*, 115 Ill. App. 443 (under statute); *Harbison v. School Dist. No. 1*, 89 Mo. 184, 1 S. W. 30; *Cunningham v. Snow*, 82 Mo. 587, 593.

[a] In equity suits, declarations of law are improper, and if made, will be disregarded by the appellate court. *Gill v. Clark*, 54 Mo. 415; *Ozark Land & Lumb. Co. v. Robertson*, 89 Mo. App. 480; *Adams v. Harper*, 20 Mo. App. 684.

[b] **Certiorari proceedings to review proceedings under a workmen's compensation act** are not within the Illinois statute. *Sanitary District v. In-*

dence is conflicting,<sup>67</sup> or in which, it has been held, the facts are agreed upon,<sup>68</sup> they may submit propositions of law to the court for its decision, or request the court to declare the law specially upon any conclusion of facts found, in order that the appellate court may ascertain the theory of law on which the court proceeded and the facts found.<sup>69</sup> These formal demands are sometimes termed "instructions to the court."<sup>70</sup> It has been held that statutes requiring the court, when requested, to state in writing its conclusions of fact and of law, do not change the practice in this respect;<sup>71</sup> but there is authority to the contrary.<sup>72</sup> When such declarations or instructions are given, the finding, in some jurisdictions, may be general for the plaintiff or defendant, as in the case of a verdict.<sup>73</sup>

**Request.**—A party desiring such instructions or declarations must request them<sup>74</sup> on the trial<sup>75</sup> before argument,<sup>76</sup> or under statute, within such time as the court shall require,<sup>77</sup> or at the latest before the announcement of the decision.<sup>78</sup> They should offer declarations

dustrial Board, 282 Ill. 182, 118 N. E. 475.

67. *Kostuba v. Moeller*, 137 Mo. 161, 173, 38 S. W. 946; *Dollarhide v. Mahary*, 125 Mo. 197, 28 S. W. 332; *First Nat. Bank v. Hunt*, 25 Mo. App. 170.

[a] When a case is disposed of without a trial, propositions of law are not proper. *Rhodes v. Rhodes*, 115 Ill. App. 335.

68. *Grabbs v. City of Danville*, 166 Ill. 441, 46 N. E. 1116.

69. *Grabbs v. City of Danville*, 166 Ill. 441, 46 N. E. 1116; *Baumhoff v. St. Louis & K. R. Co.*, 171 Mo. 120, 71 S. W. 156, 94 Am. St. Rep. 770; *Kostuba v. Moeller*, 137 Mo. 161, 173, 38 S. W. 946; *Suddarth v. Robertson*, 118 Mo. 286, 24 S. W. 151; *Patterson v. Kansas City, Ft. S. & M. Ry. Co.*, 47 Mo. App. 570.

[a] **Effect of Omission To Submit Propositions.**—When no question is raised on the hearing in regard to the admission of evidence, and no written propositions of law are submitted to the court to be held as law in the decision of the case, no question of law is presented on appeal or writ of error for decision. *Grabbs v. City of Danville*, 166 Ill. 441, 46 N. E. 1116.

[b] **Request for findings not requisite to a review**, see *Matchett v. Lindberg*, 2 App. Div. 340, 37 N. Y. Supp. 854, 37 N. Y. St. 66.

70. See *Richardson v. Anderson*, 109 Md. 641, 650, 72 Atl. 485, 130 Am. St. Rep. 543, 25 L. R. A. (N. S.) 393; *Sud-*

*darth v. Robertson*, 118 Mo. 286, 24 S. W. 151.

71. *Cochran v. Thomas*, 131 Mo. 258, 268, 33 S. W. 6.

[a] **The special finding of fact has the effect of a special verdict.** This finding with the general finding and judgment apparently is sufficient to indicate the theory of the trial court. Yet separate declarations of law are not only proper but necessary when requested. *Green v. Whaley*, 271 Mo. 636, 197 S. W. 355; *Rausch v. Michel*, 192 Mo. 293, 302, 91 S. W. 99; *Sutter v. Raeder*, 149 Mo. 297, 307, 50 S. W. 813; *Deal v. Mississippi County Bank*, 79 Mo. App. 262.

[b] **But the two courses are inconsistent** and the court cannot pursue both. *Kostuba v. Moeller*, 137 Mo. 161, 173, 38 S. W. 946.

72. *Lamb v. Harbaugh*, 105 Cal. 680, 692, 39 Pac. 56; *Wheatland Mill Co. v. Pirrie*, 89 Cal. 459, 26 Pac. 964.

73. *Suddarth v. Robertson*, 118 Mo. 286, 24 S. W. 151.

74. *Cochran v. Thomas*, 131 Mo. 258, 33 S. W. 6.

**Request for instructions**, see the title "Instructions."

75. *Allman v. Lumsden*, 159 Ill. 219, 42 N. E. 797.

76. *Stauffer v. Volentine*, 104 Ill. App. 382.

77. See the statutes, and *Allman v. Lumsden*, 159 Ill. 219, 42 N. E. 797.

78. *Allman v. Lumsden*, 159 Ill. 219, 42 N. E. 797; *Stauffer v. Volentine*, 104 Ill. App. 382; *Morehouse v. Ware*, 78 Mo. 100.

of law<sup>79</sup> which make it clear what the trial court finds as to the facts, and what it declares to be the law applicable to the facts.<sup>80</sup>

**Form and Sufficiency of.** — As a rule, the declarations of law for the court should be framed in accordance with the rules governing instructions to a jury.<sup>81</sup> But the same strictness requisite in instructions to a jury is not demanded.<sup>82</sup> The declarations should state the law only,<sup>83</sup> and must be predicated upon a hypothetical statement of the contested facts.<sup>84</sup> They must be applicable to the facts found by the court.<sup>85</sup> They must not ignore part of the evidence,<sup>86</sup> and must not assume the existence of facts in dispute.<sup>87</sup> When certain declarations or propositions substantially cover the law of the case, others may be refused.<sup>88</sup> And the conclusions of law by the court are shown by the giving or refusal of the declarations offered.<sup>89</sup>

**Withdrawal of.** — The trial court may permit a party to withdraw propositions submitted by him.<sup>90</sup>

**O. SUMMARY TRIALS OF CRIMINAL CASES.** — It is a general rule that jurisdiction for the summary trial of minor offenses is conferred upon mayors and police justices and justices of the peace,<sup>91</sup> and a defend-

79. *Cochran v. Thomas*, 131 Mo. 258, 268, 33 S. W. 6.

80. *Methudy v. Ross*, 10 Mo. App. 101.

81. *Hahn v. Hull* (Md.), 4 Atl. 407; *Kent v. Holliday*, 17 Md. 387; *Springfield Grocer Co. v. Shackelford*, 65 Mo. App. 364; *Cape Girardeau v. Harbison*, 58 Mo. 90; *King v. Allemania F. Ins. Co.*, 37 Mo. App. 102. See the title "Instructions."

[a] An instruction commenting on the evidence should not be given. *King v. Allemania F. Ins. Co.*, 37 Mo. App. 102, 109.

[b] A proposition which is a mixed proposition of law and fact is properly refused. *Illinois Central R. Co. v. Seitz*, 214 Ill. 350, 73 N. E. 585, 105 Am. St. Rep. 108.

82. *Trotter v. Dunker & Renard Carpet Co. v. Hutton*, 55 Mo. App. 320. See also *Edwards v. Cary*, 60 Mo. 572.

[a] And therefore, ambiguity is not necessarily a ground for reversal. *Methudy v. Ross*, 10 Mo. App. 101.

[b] While an instruction in general and abstract terms is improper where the trial is before a jury, such a proposition is not improper in a trial before the court, as the reason of the rule, that such an instruction may mislead the jury, does not exist in the latter case. *Vigus v. O'Bannon*, 118 Ill. 334, 348, 8 N. E. 778.

83. *Lest & Matthews Lumber Co. v. Sedlacek*, 104 Ill. App. 153. See also

*Rafferty v. Easley*, 111 Ill. App. 413.

84. *Patterson v. Kansas City, Ft. S. & M. Ry. Co.*, 47 Mo. App. 570.

85. *Wardwell v. Hocking Valley Ry. Co.*, 208 Ill. App. 315; *Pierce v. Kolikof* (Mass.), 122 N. E. 558.

86. *Wardwell v. Hocking Valley Ry. Co.*, 208 Ill. App. 315.

87. *Illinois Cent. R. R. Co. v. Seitz*, 214 Ill. 350, 73 N. E. 585, 105 Am. St. Rep. 108; *Wardwell v. Hocking Valley Ry. Co.*, 208 Ill. App. 315; *Seehorn v. American Nat. Bank*, 148 Mo. 256, 265, 49 S. W. 886.

[a] Propositions of law requesting the court to find certain facts from the evidence, and thereupon to find the issues for a party are improper, and may be refused. *Lesh & Matthews Lumber Co. v. Sedlacek*, 104 Ill. App. 153.

88. *Willis Coal & M. Co. v. Missouri & Ill. Coal Co.*, 206 Ill. App. 192.

89. *Cochran v. Thomas*, 131 Mo. 258, 268, 33 S. W. 6.

[a] A failure of the trial judge to rule upon requests for rulings is equivalent to a refusal to make such rulings. *Joseph S. Waterman & Sons v. Soliday*, 231 Mass. 422, 121 N. E. 155.

90. *Comrs. of Highways v. Kline*, 96 Ill. App. 318.

[a] If the adverse party desires to have the same questions passed upon, he may submit them himself. *Comrs. of Highways v. Kline*, 96 Ill. App. 318.

91. See the constitutions and statutes and the following cases: *Ala.*



ant in such case has the right to waive a trial by jury.<sup>92</sup>

The proceedings on the summary trial of such offenses are generally prescribed by statute.<sup>93</sup>

**Preliminary Proceedings.** — Before a summary trial is had, the court should first set it for trial<sup>94</sup> and advise the accused of his right to counsel,<sup>95</sup> and to communicate with relatives or friends.<sup>96</sup>

**Presence of Accused.** — Some statutes require that the defendant be personally present before the trial can proceed,<sup>97</sup> while others only require that he be present at the trial, either personally or by counsel.<sup>98</sup>

*Ex parte* Gibson, 89 Ala. 174, 7 So. 833. Mo.—State *v.* Ledford, 3 Mo. 102. N. Y.—Cohen *v.* Warden of Workhouse, 150 N. Y. Supp. 596. Va.—Ragsdale *v.* Danville, 116 Va. 484, 82 S. E. 77.

**Right to trial by jury in trials of petty offenses,** see 16 STANDARD PROC. 910.

**As to criminal jurisdiction generally,** see 17 STANDARD PROC. 752.

**Jurisdiction of justice to hold the defendant to answer,** see 21 STANDARD PROC. 498.

**As to complaint on which trial is had,** see 12 STANDARD PROC. 285.

**Right to a Preliminary Examination.** See 21 STANDARD PROC. 498.

[a] **In Kentucky,** although there is no provision in the code authorizing a judge to try an accused upon the evidence, an agreement to this effect which has been executed will be sustained in misdemeanor cases. *Ellison v. Com.*, 6 Ky. L. Rep. 306.

92. **Right of defendant to waive trial by jury,** see 16 STANDARD PROC. 943, note 74.

**As to mode of waiver,** see 16 STANDARD PROC. 945.

[a] **Under a statute providing that if the defendant waives a trial by jury, then the judge "shall" proceed to try the case,** the defendant by such waiver gains the right to demand a trial by the judge. *Logan v. State*, 86 Ga. 266, 12 S. E. 406; *Green v. State*, 6 Ga. App. 324, 64 S. E. 1121.

93. See the statutes.

[a] **Statutes prescribing the mode of trial of indictments are not applicable to proceedings before a municipal court, because the proceeding by indictment is there unknown.** *State v. Wagner*, 23 Minn. 544.

[b] **Statutes regulating proceedings on preliminary examination do not apply to summary trials.** *People v.*

*Griessman*, 149 N. Y. Supp. 63; *People v. Hines*, 57 App. Div. 419, 68 N. Y. Supp. 276, 9 N. Y. Ann. Cas. 357; *People v. Giles*, 12 App. Div. 495, 42 N. Y. Supp. 749.

94. See *infra*, this note.

[a] **The fact that a summary trial is had without first setting it for trial is not a sufficient reason for rendering the judgment therein void and to warrant a discharge on habeas corpus.** *Ex parte* Gaston, 8 Porto Rico 342.

[b] **Trial on Earlier Day Than Day Set.**—But when a defendant is bound over to appear for trial on a certain day, it is a denial of due process of law to try him in his absence, on an earlier day, without notifying him of the change of date. *State v. Spray*, 74 S. C. 443, 54 S. E. 600.

95. See *infra*, this note.

[a] **It is better practice to notify a defendant about to be tried summarily of his right to an adjournment to obtain counsel, but it is not necessary to do so in the absence of statute requiring it. And a statute requiring such notification on preliminary examination does not apply to summary trials.** *People v. Griessman*, 149 N. Y. Supp. 63; *People v. Cook*, 45 Hun (N. Y.) 34, 9 N. Y. St. 412.

**Right to and presence of counsel,** see *supra*, VII, I, 2, b.

96. See *infra*, this note.

[a] **Statute requires the magistrate to notify the defendant that he is entitled to communicate with relatives or friends.** See *People v. Patterson*, 153 N. Y. Supp. 569; *People v. Griessman*, 149 N. Y. Supp. 63.

97. Cal. Pen. Code §1434.

**Presence of accused generally,** see *supra*, VII, G, 2.

98. **Ark.**—*Warren v. State*, 19 Ark. 214, 68 Am. Dec. 214. **Pa.**—*Grant v. Com.*, 16 Pa. Dist. 826; *Denzin v. Com.*,

**Trial and Reception of Evidence.**—Upon a plea to the complaint or information other than a plea of guilty, if the parties waive a trial by jury,<sup>99</sup> and if an adjournment<sup>1</sup> or change of venue<sup>2</sup> is not granted, the court must proceed to try the case.<sup>3</sup> In fairness to the accused, the state should present its case in the opening,<sup>4</sup> but it is not required to call to the stand any other witnesses than such as the prosecuting officer considers most available for that purpose.<sup>5</sup> Sometimes statutes require that the evidence be taken down in writing.<sup>6</sup> It is discretionary with the judge whether or not he will hear argument of counsel.<sup>7</sup> He need not give instructions.<sup>8</sup> Statutes authorizing the submission of propositions of law to the court when a civil action is tried without a jury,<sup>9</sup> or requiring special findings of fact and conclusions of law,<sup>10</sup> have no application to summary trials of criminal cases.

3 Pa. Co. Ct. 654. **Vt.**—*Sawyer v. Joiner*, 16 Vt. 497.

[a] Under such statute it is purely a matter of discretion with the court whether the defendant shall be permitted to answer to the indictment by attorney or by agent without appearing personally. *Warren v. State*, 19 Ark. 214, 68 Am. Dec. 214. Compare *supra*, VII, G, 2, b and c.

99. See *supra*, this section.

1. See *supra*, IV, D, 2 and the title, "Continuances."

2. See the title, "Change of Venue."

3. Cal. Pen. Code §1430.

[a] Which Judge or Magistrate. It is not necessary that the judge or magistrate who records the plea be the one who shall try the case. *People v. Brown*, 77 Misc. 611, 138 N. Y. Supp. 569.

4. *State v. Nejin*, 140 La. 793, 74 So. 103.

5. *State v. Nejin*, 140 La. 793, 74 So. 103.

6. *People v. Hines*, 57 App. Div. 419, 68 N. Y. Supp. 276, 9 N. Y. Ann. Cas. 357; *People v. Giles*, 12 App. Div. 495, 42 N. Y. Supp. 749; *People v. Benison*, 32 Misc. 366, 66 N. Y. Supp. 734; *Sumter v. Hogan*, 96 S. C. 302, 80 S. E. 497; *State v. Conkle*, 64 S. C. 371, 42 S. E. 173.

[a] A failure of a witness to sign his testimony is not of itself ground for setting aside the judgment rendered. *State v. Conkle*, 64 S. C. 371, 42 S. E. 173.

[b] The Requirement May Be Waived.—(1) *Sumter v. Hogan*, 96 S. C. 302, 80 S. E. 497. (2) If the defendant's attorney does not call the court's attention to a failure to comply with the statute, the requirement is waived. *Sumter v. Hogan*, 96 S. C. 302, 80 S. E. 497. (3) Taking the testimony in shorthand is a mere irregularity when the defendant's attorney fails to object. *Lake City v. Gilliland*, 101 S. C. 152, 85 S. E. 312.

7. *Lewis v. State*, 11 Ga. App. 14, 74 S. E. 442. See generally the title "Arguments."

[a] Where the case is submitted by consent without argument, it is not error, after the court has intimated the probability of an adverse decision, to refuse to permit counsel to withdraw his consent and make an argument. *Lewis v. State*, 11 Ga. App. 14, 74 S. E. 442.

8. *State v. Martin*, 230 Mo. 1, 129 S. W. 1, 139 Am. St. Rep. 628. Compare *supra*, VII, N, 4.

9. *People v. Johnson*, 288 Ill. 442, 123 N. E. 543; *People v. Taylor*, 279 Ill. 481, 117 N. E. 62; *Jacobs v. People*, 218 Ill. 500, 75 N. E. 1034; *Chicago, W. & V. Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770. See *supra*, VII, N, 4.

10. *Thomas v. State*, 155 Ala. 125, 46 So. 771; *Morris v. State*, 73 Tex. Crim. 67, 163 S. W. 709. See also *Com. v. Collier*, 181 Ky. 319, 204 S. W. 74.

See the titles "Conclusions of Law;" "Findings and Conclusions."

**Rendering Judgment.**—When the defendant pleads guilty or is convicted, the court must render judgment thereon. If acquitted, the defendant must be discharged.<sup>11</sup>

**P. APPOINTMENT OF INTERPRETERS.**—When the defendant in a criminal case is unable to understand the English language he is, as a general rule, entitled to the appointment of an interpreter.<sup>12</sup> However, the right to have an interpreter appointed is waived if the appointment is not requested before the evidence is introduced.<sup>13</sup>

**Q. RECEPTION OF EVIDENCE.**—1. **Generally.**—Matters relating to the reception of evidence are discussed in particular titles in this and its companion work.<sup>14</sup>

11. See the title "Sentence and Judgment."

12. Haw.—King v. Ah Har, 7 Hawaii 319. N. M.—State v. Cabodi, 18 N. M. 513, 138 Pac. 262. N. Y.—People v. Constantino, 153 N. Y. 24, 47 N. E. 37. Tex.—Zunago v. State, 63 Tex. Crim. 58, 138 S. W. 713, Ann. Cas. 1913D, 665.

For witness speaking foreign language, deaf mute, etc., see 7 ENCY. OF EV. 652.

[a] This right is said to be based upon a constitutional or statutory provision in the absence of which the court is not required to make an appointment. Rex v. Mecelette, 18 Ont. L. Rep. (Can.) 408, reviewing the Hawaiian cases, *supra*, and *distinguishing* Com. v. Lenowsky, 206 Pa. 277, 55 Atl. 977. See Livar v. State, 26 Tex. App. 115, 9 S. W. 552. But see Zunago v. State, 63 Tex. Crim. 58, 138 S. W. 713, Ann. Cas. 1913D, 665.

[b] Interpreter used for witnesses may be resorted to. People v. Constantino, 153 N. Y. 24, 47 N. E. 37. But see Livar v. State, 26 Tex. App. 115.

13. Haw.—King v. Ah Har, 7 Hawaii 319. N. M.—State v. Cabodi, 18 N. M. 513, 138 Pac. 262. Tex.—Zunago v. State, 63 Tex. Crim. 58, 138 S. W. 713, Ann. Cas. 1913D, 665.

14. See indexes and titles dealing with specific phases of trial practice respecting evidence and witnesses, both in this work and in the ENCY. OF EV.

**Compelling calling of witnesses and production of evidence**, see 14 ENCY. OF EV. 567.

**As to confrontation of witnesses**, see 14 ENCY. OF EV. 574. **Confrontation of witnesses at preliminary examination**, see 21 STANDARD PROC. 508.

**Exclusion of witnesses**, see 14 ENCY. OF EV. 587. **Exclusion of witnesses on preliminary examination**, see 21 STANDARD PROC. 511.

**Limiting number of witnesses**, see 3 STANDARD PROC. 930.

**Consultation between counsel and witnesses**, see 14 ENCY. OF EV. 573.

**Privilege of refusing to produce evidence or testify**, see 14 ENCY. OF EV. 632.

**Privilege against self crimination**, see 14 ENCY. OF EV. 641.

**Privilege of accused in criminal cases**, see 14 ENCY. OF EV. 660.

**Compelling witnesses to ascertain facts**, see 14 ENCY. OF EV. 574.

**As to agreed statement of facts, and stipulations as to the facts**. See 3 ENCY. OF EV. 195, and the title "Stipulations."

**Statement by accused**, see the title, "Statement by Accused." **Statement by accused on preliminary examination**, see 21 STANDARD PROC. 516.

**Competency of judge as witness in proceeding before him**, see 3 ENCY. OF EV. 217.

**Competency of jurors as witnesses in proceeding before them**, see 3 ENCY. OF EV. 218.

**Attorney as witness**, 3 ENCY. OF EV. 237.

**Prosecuting attorney as witness**, see 3 ENCY. OF EV. 238.

**Interpreter as witness**, see 3 ENCY. OF EV. 238.

**Election between transactions developed by evidence**, see 12 STANDARD PROC. 687.

**Instructions limiting evidence competent for certain purposes only**, see 3 ENCY. OF EV. 188, and 13 STANDARD PROC. 926.

**Depositions as evidence**, see 7 STANDARD PROC. 390.



**2. Reopening Case for Further Evidence.**—It is within the discretion of a trial court,<sup>15</sup> upon proper application,<sup>16</sup> to reopen a case,

**Examination of witnesses by court,** see 5 ENCY. OF EV. 381.

**Control of court over examination of witnesses,** see 5 ENCY. OF EV. 379.

**Comment by court on evidence,** see 13 STANDARD PROC. 837, and 845.

**Presence of jury during argument on admissibility of evidence,** see 17 STANDARD PROC. 455.

**Receiving of evidence by jury out of court,** see 17 STANDARD PROC. 516.

**Sending evidence to jury room,** see 17 STANDARD PROC. 560.

**Rehearing witnesses and testimony after retirement of jury,** see 17 STANDARD PROC. 578.

**Recalling and reexamination of witnesses,** see 14 ENCY. OF EV. 611, and *infra*, VII, Q, 2.

15. **Ala.**—*Dyer v. State*, 88 Ala. 225, 7 So. 267. **Ark.**—*Garner v. State*, 97 Ark. 63, 132 S. W. 1010, Ann. Cas. 1912C, 1059. **Cal.**—*People v. Oxnam*, 170 Cal. 211, 149 Pac. 165; *Watson v. Anderson*, 36 Cal. App. 778, 173 Pac. 394. **Conn.**—*State v. Williams*, 90 Conn. 126, 96 Atl. 370. **Ga.**—*Whitehead v. State*, 126 Ga. 558, 55 S. E. 404; *McClain v. State*, 17 Ga. App. 750, 88 S. E. 409. **Ill.**—*People v. St. Louis*, 1. M. & S. R. Co., 278 Ill. 25, 115 N. E. 854. **Ia.**—*Robinson v. Hawkeye Com. Men's Assn.*, 171 N. W. 118; *Buck v. Bender*, 159 N. W. 990. **Md.**—*Guyer v. Snyder*, 104 Atl. 116. **Mass.**—*Com. v. Ricketson*, 5 Mete. 412. **Mich.**—*Cornell v. Fidler*, 194 Mich. 509, 160 N. W. 840; *People v. Blake*, 157 Mich. 533, 122 N. W. 113. **Mont.**—*State v. Hediccan*, 35 Mont. 381, 89 Pac. 730. **N. M.**—*Holthoff v. Freudenthal*, 22 N. M. 377, 162 Pac. 173. **N. Y.**—*People v. Ferrone*, 204 N. Y. 551, 98 N. E. 8, Ann. Cas. 1913C, 1008. **N. C.**—*State v. Harris*, 63 N. C. 1. **Okl.**—*Federal Life Ins. Co. v. Whitehead*, 174 Pac. 784; *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837. **E. I.**—*Arnold v. Draper*, 106 Atl. 581. **Tex.**—*W. T. Wilson Grain Co. v. Fitch* (Tex. Civ. App.), 208 S. W. 556.

[a] The trial court is vested with a liberal discretion in this regard. *W. T. Wilson Grain Co. v. Fitch* (Tex. Civ. App.), 208 S. W. 556.

[b] "The wide discretion of a trial judge in regulating the order in which

evidence shall be produced, in permitting the examination of witnesses out of the natural order, in allowing the recall of witnesses and in relieving a party from his error and default in not calling a witness at the proper time is so well established that no authorities need be cited." *People v. Ferrone*, 204 N. Y. 551, 98 N. E. 8, Ann. Cas. 1913C, 1008.

[c] A liberal practice in this respect is most favorable to the ends of justice. *Bigelow v. Young*, 30 Ga. 121; *Autry v. State* (Ga. App.), 99 S. E. 389.

[d] The discharge of all the witnesses for one side after the case has been announced closed, is good ground for refusing to reopen the case on the application of the other party, especially when the salient features of the evidence to be offered appeared in the testimony already given. *Bundrick v. State*, 125 Ga. 753, 54 S. E. 683; *Madrox v. State*, 68 Ga. 294; *Hendrick v. State*, 47 Tex. Crim. 371, 83 S. W. 711. See also *State v. Pilegge*, 61 Wash. 264, 112 Pac. 263.

16. *Hedstrom v. Union Trust Co.*, 7 Cal. App. 278, 94 Pac. 386; *Slade v. State ex rel. McClaskey*, 2 Ind. 33.

[a] **Showing Required.**—(1) On application to introduce a witness after the testimony is closed, the party must, not only show a sufficient excuse for the failure to introduce the witness before, but also that the testimony would probably produce a verdict different from what it would otherwise be. *Haley v. Hickman's Heirs*, Litt. Sel. Cas. (Ky.) 266. See also *Paducah & E. R. Co. v. Com.*, 4 Ky. L. Rep. 625. (2) When there is nothing in the affidavit accompanying the application either as to the nature of the evidence sought to be added to what had already been received, or as to the witness by whom it was expected to be given, or as to the reason why they had not been offered sooner, to require the reopening of the case, the motion is properly denied. *Alexis v. United States*, 129 Fed. 60, 63 C. C. A. 502.

[b] The withdrawal of an announcement that the evidence was closed, without the assignment of a reason therefor, may be permitted. *Noft-singer v. State*, 7 Tex. App. 301, 321.

at any stage of the proceedings,<sup>17</sup> to enable parties to introduce further proof. As the matter rests in the discretion of the court, its action will not be reversed,<sup>18</sup> unless there is such an abuse of discretion to defeat the ends of justice.<sup>19</sup> If it appear that the proposed testimony is of any substantial importance to a party,<sup>20</sup> or if it appear that it is necessary to a due administration of justice,<sup>21</sup> the application should be granted. But if the party knew of and had an opportunity to introduce the evidence before submission the application may be denied.<sup>22</sup>

**Particular Stage of Proceedings.**—The stage of the case at which it may be opened for additional evidence is sometimes prescribed by statute.<sup>23</sup> In the absence of statute, however, it is within the discretion of the court whether to reopen a case for additional evidence, after a party has rested his case,<sup>24</sup> after pending a motion for nonsuit or similar objection made,<sup>25</sup> or after the close of the evidence and be-

17. *Abbott v. State*, 11 Ga. App. 43, 74 S. E. 621. See *infra*, this section.

**Evidence after verdict in criminal case** to determine character of punishment, see the title, "**Sentence and Judgment.**"

**After retirement of jury**, see 17 STANDARD PROC. 578.

18. **Ga.**—*Bundrick v. State*, 125 Ga. 753, 54 S. E. 683; *Maddox v. State*, 68 Ga. 294. **Mo.**—*Goodrich v. Kansas City C. & S. R. Co.*, 152 Mo. 222, 53 S. W. 917. **Tex.**—*Kemp v. State*, 38 Tex. 110; *Hamilton v. State*, 41 Tex. Crim. 599, 58 S. W. 93. **Wash.**—*State v. Pilegge*, 61 Wash. 264, 112 Pac. 263.

19. **Ga.**—*Hoxie v. State*, 114 Ga. 19, 39 S. E. 944; *Bone v. Ingram*, 27 Ga. 382. **Ia.**—*Buck v. Bender*, 159 N. W. 990. **N. Y.**—*Champion Shoe Mach. Co. v. Landman*, 97 Misc. 642, 162 N. Y. Supp. 346. **Okla.**—*Frisby v. State*, 5 Okla. Crim. 660, 115 Pac. 472. **Tex.**—*Kemp v. State*, 38 Tex. 110, 111; *Timbrook v. State*, 18 Tex. App. 1; *Noft-singer v. State*, 7 Tex. App. 301.

[a] **Not Unless Decided Injustice Results.**—**Ga.**—*Bundrick v. State*, 125 Ga. 753, 54 S. E. 683; *Maddox v. State*, 68 Ga. 294. **Okla.**—*Cochran v. United States*, 14 Okla. 108, 76 Pac. 672. **Tex.**—*W. T. Wilson Grain Co. v. Fitch* (Tex. Civ. App.), 208 S. W. 556.

20. *People v. Oxniam*, 170 Cal. 211, 149 Pac. 165.

21. *Cohea v. State*, 11 Tex. App. 153, 157, under statute.

22. *Mitchell v. Southern Ry. Co.* (Ga. App.), 98 S. E. 184; *Buck v. Bender* (Iowa), 159 N. W. 990.

23. See the statutes.

[a] **In Texas**, (1) the code of criminal procedure provides that the court may allow testimony to be introduced at any time before argument is concluded, if he deems it necessary to the due administration of office. *Johnson v. State*, 67 Tex. Crim. 441, 149 S. W. 165. (2) The statute makes no distinction between an argument to the court and an argument to the jury after the testimony is closed. In either case it is reversible error to permit further proof after the conclusion of the argument. *Lockett v. State* (Tex. Crim.), 55 S. W. 336. (3) The only exception to this rule is the one provided by the statute which permits the jury, after its retirement, to have a witness re-examined. *Williams v. State*, 35 Tex. Crim. 183, 32 S. W. 893. As to reexamination of witnesses and evidence after retirement of jury, see 17 STANDARD PROC. 578.

24. **Permission to give additional proof after party has rested**, see 9 ENCY. OF EV. 237.

25. **U. S.**—*Illinois Cent. R. Co. v. Griffin*, 80 Fed. 278, 25 C. C. A. 413. **Cal.**—*Tuller v. Arnold*, 98 Cal. 522, 33 Pac. 445; *Fee v. McPhee Co.*, 31 Cal. App. 295, 160 Pac. 397. **Conn.**—*Trumbull v. O'Hara*, 68 Conn. 33, 35 Atl. 764. **Ga.**—*Penn v. Georgia S. & F. Ry. Co.*, 129 Ga. 856, 60 S. E. 172; *Macon v. Harris*, 75 Ga. 761; *Bone v. Ingram*, 27 Ga. 382. **Ill.**—*Lawler v. Herren*, 210 Ill. App. 203. **Ia.**—*Dobson v. Waterloo*, 180 Iowa 199, 161 N. W. 667; *Botkin v. Cassidy*, 106 Iowa 334, 76 N. W. 722. **N. H.**—*Stone v. Boscawen Mills*, 71 N. H. 288, 52 Atl. 119. **Okla.**

fore submission of the cause,<sup>26</sup> after the argument has begun,<sup>27</sup> after the oral charge of the court,<sup>28</sup> and even after the submission of the

*Frisby v. State*, 5 Okla. Crim. 660, 115 Pac. 472. **S. C.**—*Kairson v. Puckhaber*, 14 S. C. 626. **Wash.**—*Simpson v. Brown*, 182 Pac. 88; *State v. Hornaday*, 67 Wash. 660, 122 Pac. 322.

[a] It is common practice to allow the case to be reopened to prevent a nonsuit where counsel has omitted evidence by accident, inadvertence or even because of a mistake as to the necessity of offering a particular witness or evidence. *Penn v. Georgia S. & F. Ry. Co.*, 129 Ga. 856, 60 S. E. 172; *Ellenberg v. Southern Ry. Co.*, 5 Ga. App. 389, 63 S. E. 240.

[b] It is almost a matter of course to let in new evidence on a point to save a nonsuit. *McColgan v. McKay*, 25 Ga. 631.

[c] Until the court signs the order granting a nonsuit, (1) it is not too late to move to reopen the case for further testimony. *Moore v. Dixie F. Ins. Co.*, 19 Ga. App. 800, 92 S. E. 302. (2) After the court announces that it will grant the motion for nonsuit and before he signs the order, it can reopen the case. *Penn v. Georgia S. & F. Ry. Co.*, 129 Ga. 856, 60 S. E. 172.

[d] After the denial of such a motion, the court can reopen the case. *Garber v. Gianella*, 98 Cal. 527, 33 Pac. 458; *State v. Meister*, 60 Ore. 469, 120 Pac. 406.

[e] But this is not a matter of absolute right and the court may deny the application when there is some good reason for this exercise of discretion. *Penn v. Georgia S. & F. Ry. Co.*, 129 Ga. 856, 60 S. E. 172; *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46, when party knew of evidence before he announced closed.

26. **Ala.**—*Western Union Tel. Co. v. Bowman*, 141 Ala. 175, 37 So. 493. **Ark.**—*Walker v. State*, 100 Ark. 180, 139 S. W. 1139. **Cal.**—*People v. Lewis*, 124 Cal. 551, 57 Pac. 470, 45 L. R. A. 783; *Consolidated Nat. Bank v. Pacific Coast S. S. Co.*, 95 Cal. 1, 30 Pac. 96, 29 Am. St. Rep. 85. **Ga.**—*Chatman v. State*, 8 Ga. App. 842, 70 S. E. 188. **Ill.**—*People v. Shortall*, 287 Ill. 150, 122 N. E. 60; *People v. Lukoszus*, 242 Ill. 101, 89 N. E. 749; *Bolen v. People*, 184 Ill. 338, 56 N. E. 408; *Kersul v. Baldwin Piano Co.*, 208 Ill. App. 265. **Ia.**

*Thomas v. Chicago M. & St. P. Ry. Co.*, 114 Iowa 169, 86 N. W. 259. **Ky.**—See *Haley v. Hickman's Heirs*, Litt. Sel. Cas. 266. **Mass.**—*Reynolds v. Missouri, K. & T. Ry. Co.*, 224 Mass. 379, 113 N. E. 413. **Miss.**—*State v. Martin*, 102 Miss. 165, 59 So. 7. **N. Y.**—*People v. Benham*, 160 N. Y. 402, 436, 55 N. E. 11, 14 N. Y. Crim. 188. **Okla.**—*Cochran v. United States*, 14 Okla. 108, 76 Pac. 672. **Tex.**—*Gulf C. & S. F. R. Co. v. Matthews* (Tex. Civ. App.), 89 S. W. 983; *Harper v. Marion County*, 33 Tex. Civ. App. 653, 77 S. W. 1044; *Pittsburg Plate Glass Co. v. Roquemore* (Tex. Civ. App.), 88 S. W. 449. **Utah.**—*Musgrave v. Studebaker Bros. Co.*, 48 Utah 410, 160 Pac. 117. **Wash.**—*Godefroy v. Hupp*, 93 Wash. 371, 160 Pac. 1056, Ann. Cas. 1918E, 494.

**Reexamination of witnesses after close of evidence**, see 14 ENCY. OF EV. 612, notes 17, 18, and 19.

27. **Conn.**—*State v. Ricker*, 90 Conn. 147, 96 Atl. 941. **Fla.**—*Hughes v. State*, 61 Fla. 32, 55 So. 463. **Ga.**—*Bundrick v. State*, 125 Ga. 753, 54 S. E. 683; *Autrey v. State* (Ga. App.), 99 S. E. 389; *Cowart Co. v. Sheffield*, 18 Ga. App. 512, 89 S. E. 1101. **Ia.**—*State v. Thomas*, 158 Iowa 687, 138 N. W. 864. **Mich.**—*People v. Blake*, 157 Mich. 533, 122 N. W. 113. **Mo.**—*State v. Boles* (Mo. App.), 181 S. W. 601. **N. H.**—*Keefe v. Sullivan County R. R.*, 78 N. H. 139, 97 Atl. 565. **Okla.**—*Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837. **Tex.**—*Webb v. State*, 69 Tex. Crim. 413, 154 S. W. 1013; *Welch v. State*, 66 Tex. Crim. 525, 147 S. W. 572; *Hamilton v. State*, 41 Tex. Crim. 599, 58 S. W. 93.

[a] **After Argument of Prosecution.** *Bolen v. People*, 184 Ill. 338, 56 N. E. 408.

[b] **In Louisiana the reopening of a case is permissible after evidence closed and before argument begun, but not afterwards.** *State v. Paul*, 39 La. Ann. 329, 1 So. 666; *construing State v. Colbert*, 29 La. Ann. 715.

28. *Dyer v. State*, 88 Ala. 225, 7 So. 267. But see *State v. Paul*, 39 La. Ann. 329, 1 So. 666, holding it error to allow the prosecution to introduce additional evidence after the giving of the general charge.



cause, to the court or jury, and before verdict,<sup>29</sup> or, it has been held, after the announcement by the court of its decision, on a showing that other and material evidence has been discovered since the submission of the case.<sup>30</sup> In an equity case, the court may reopen the case for further testimony after verdict.<sup>31</sup> But the court should not permit the introduction of additional testimony after judgment.<sup>32</sup>

**Testimony Allowable.**—It is largely within the discretion of the court what further testimony to allow.<sup>33</sup> But he must not open the door

29. **Ark.**—Garner v. State, 97 Ark. 63, 132 S. W. 1010, Ann. Cas. 1912C, 1059. **Cal.**—Loewenthal v. Coonan, 135 Cal. 381, 67 Pac. 324, 1033, 68 Pac. 303, 87 Am. St. Rep. 115; Douglass v. Willard, 129 Cal. 38, 61 Pac. 572. **Fla.**—Wilson v. Johnson, 51 Fla. 370, 41 So. 395. **Ga.**—Moulton v. State, 18 Ga. App. 285, 89 S. E. 341. **Ill.**—Indiana D. & W. R. Co. v. Hendrian, 190 Ill. 501, 60 N. E. 902. **Mass.**—Com. v. Ricketson, 5 Mete. 412, after the jury had been out. **Miss.**—Royston v. Illinois Cent. R. Co., 67 Miss. 376, 70 So. 320, after retirement of jury. **N. Y.**—People v. Ferrone, 204 N. Y. 551 98 N. E. 8, Ann. Cas. 1913C, 1008, affirming 148 App. Div. 896, 132 N. Y. Supp. 1141. **W. Va.**—State v. Littleton, 77 W. Va. 804, 88 S. E. 458. **Wis.**—Leary v. Leary, 68 Wis. 662, 32 N. W. 623.

But see Tarver v. State, 43 Tex. 564, 566, under statute.

**Limitations on the evidence to be introduced, see *infra*, this section.**

[a] **In refusing to open a case for the purpose of permitting a supplementary statement by an accused, after the submission of the case to the jury, the court does not abuse its discretion.** Pollard v. State, 144 Ga. 229, 86 S. E. 1096. See generally the title "**Statement by Accused.**"

**Rehearing witnesses and testimony after submission of case, see 17 STANDARD PROC. 578.**

**As to receiving evidence after verdict to determine the character of punishment to be imposed for a crime, see the title "**Sentence and Judgment.**"**

30. Leary v. Leary, 68 Wis. 662, 667, 32 N. W. 623. But see Lockett v. State (Tex. Crim.), 55 S. W. 336, under Texas statute.

[a] **When the findings are left blank as to the amount, the court may hear further evidence as to attorney's fees.** Maynard v. Shorb, 85 Ind. 501.

31. Clavey v. Lord, 87 Cal. 413, 25 Pac. 493. See 14 STANDARD PROC. 537.

[a] **But proof of an assignment to the plaintiff on which his right of action depends cannot be allowed after verdict.** Bahnsen v. Horwitz, 90 N. Y. Supp. 428.

32. Webb's Heirs v. Galloway, 1 Litt. (Ky.) 78.

33. Lee v. Murphy, 119 Cal. 364, 51 Pac. 549, 955; Phillips v. State, 6 Tex. App. 44.

[a] **Under a statute providing (1) that the court shall allow the introduction of testimony before the conclusion of argument, "if it appear that it is necessary to a due administration of justice," it is largely within the discretion of the judge whether the testimony is necessary for the due administration of justice.** Phillips v. State, 6 Tex. App. 44, 59. (2) **The courts have not been inclined to extend such testimony beyond the proof of some omitted fact in the case that appears to be necessary to the due administration of justice.** Phipps v. State, 34 Tex. Crim. 608, 611, 31 S. W. 657. (3) **Perhaps impeaching testimony may be permitted.** Phipps v. State, 34 Tex. Crim. 608, 611, 31 S. W. 657. (4) **But there is no error in refusing to reopen a case to permit the introduction of such testimony.** Garrett v. State, 37 Tex. Crim. 198, 201, 38 S. W. 1017, 39 S. W. 108.

[b] **When counsel asks leave to recall a witness for some particular purpose, the court may restrict the examination to that purpose.** State v. Harris, 63 N. C. 1; Priddy v. Tabor (Tex. Civ. App.), 189 S. W. 111.

[c] **Cumulative Evidence.**—(1) **The court may refuse to reopen the case if the evidence sought to be introduced is merely cumulative** (State v. Dlugozima, 7 Pennw. [Del.] 151, 74 Atl. 1086; Macon v. Harris, 75 Ga. 761); or (2) **similar to that already in-**

to one party and close it to the other.<sup>34</sup> The court may allow a witness to be recalled to explain, correct or restate his former testimony,<sup>35</sup> or to be examined as to new matter.<sup>36</sup> The introduction of new evidence is permitted by some authorities, for good cause shown, even after submission of the case to the jury,<sup>37</sup> but others limit the evidence at this stage to a re-examination of witnesses as to matter already testified to or to a re-reading of the testimony.<sup>38</sup>

**R. CONDUCT OF JUDGE. — 1. In General.** — The average juror is prone to attach great weight to the convictions of the presiding judge as to the rights of litigants. Consequently the judge should, during a trial, avoid indicating what his convictions are. He should refrain from any manifestation of partiality, or from any unnecessary remarks which might tend to prejudice any litigant or to influence the jury.<sup>39</sup> He should not make remarks which may mislead the jury as to the law applicable to the case,<sup>40</sup> nor should he express or intimate his opinion upon any disputed facts,<sup>41</sup> or upon the guilt of the

troduced. *People v. Oxnam*, 170 Cal. 211, 149 Pac. 165.

34. Ill.—*Bolen v. People*, 184 Ill. 338, 56 N. E. 408. S. C.—*Strait v. Rock Hill*, 104 S. C. 116, 88 S. E. 469. Vt.—*Phelps v. Utley*, 101 Atl. 1011. Va.—*Livingston v. Com.*, 7 Gratt. (48 Va.) 658, 661.

35. See 14 ENCY. OF EV. 612.

36. See 14 ENCY. OF EV. 615.

37. *People v. Ferrone*, 204 N. Y. 551, 98 N. E. 8, Ann. Cas. 1913C, 1008 (on essential point overlooked); *Livingston v. Com.*, 7 Gratt. (48 Va.) 658, discretionary power.

[a] Even after the jury has passed out of the room or has entered upon the consideration of the case, the court has discretionary power to recall the jury for the purpose of taking further evidence. While this practice is not to be encouraged, the power of the court is not to be denied. *People v. Ferrone*, 204 N. Y. 551, 98 N. E. 8, Ann. Cas. 1913C, 1008.

38. *Wait v. Krewson*, 59 N. J. L. 71, 77, 35 Atl. 742. See 17 STANDARD PROC. 578.

39. Cal.—*People v. Williams*, 17 Cal. 142. Fla.—*Gilbert v. State*, 61 Fla. 25, 55 So. 464. Ill.—*Schintz v. People*, 178 Ill. 320, 52 N. E. 903; *Pinkerton v. Sydnor*, 87 Ill. App. 76. Ia.—*State v. Allen*, 100 Iowa 7, 69 N. W. 274. Kan.—*State v. Miller*, 90 Kan. 230, 133 Pac. 878, Ann. Cas. 1915B, 818. Ky.—*Wilson v. Wilson*, 174 Ky. 771, 193 S. W. 7. Mich.—*Cronkhite v. Dickerson*, 51 Mich. 177, 16 N. W. 371. Miss.—*Collins v. State*, 99 Miss. 47, 54 So.

665, Ann. Cas. 1913C, 1256. Mo.—*State v. Doerries*, 168 Mo. App. 324, 153 S. W. 1062. N. Y.—*People v. Wansker*, 108 Misc. 84, 177 N. Y. Supp. 295. B. I.—*State v. Mariano*, 37 R. I. 168, 91 Atl. 21.

See also the following: Ga.—*McLeod v. Wilson*, 108 Ga. 790, 33 S. E. 851. Ill.—*Chicago City Ry. Co. v. McDonough*, 125 Ill. App. 223. Ia.—*Coldren v. Le Gore*, 118 Iowa 212, 91 N. W. 1066. Okla.—*Stuedle v. State*, 6 Okla. Crim. 494, 119 Pac. 1022. S. C.—*State v. Jackson*, 87 S. C. 407, 69 S. E. 883. Tex.—*Lagrone v. State* (Tex. Crim.), 209 S. W. 411; *Texas & Louisiana Lumber Co. v. Rose* (Tex. Civ. App.), 103 S. W. 444.

[a] He must not intimate which way the verdict ought to go, (1) except through the legitimate channel of his instructions. *Wright v. Richmond*, 21 Mo. App. 76. (2) "Judges presiding at trials should be exceedingly discreet in what they say and do in the presence of a jury, lest they seem to lean towards or lend their influence to one side or the other." *State v. Allen*, 100 Iowa 7, 69 N. W. 274.

Referring to failure of an accused to testify, see 14 ENCY. OF EV. 678.

40. *Brinkerhoff v. Briggs*, 92 Ill. App. 537.

41. Ala.—*Hair v. Little*, 28 Ala. 236. Cal.—*People v. Pitisci*, 29 Cal. App. 727, 157 Pac. 502; *People v. Conboy*, 15 Cal. App. 97, 113 Pac. 703. Ga.—*Chapman v. State* (Ga. App.), 98 S. E. 243; *Cox v. State*, 13 Ga. App. 687, 79 S. E. 909; *Rouse v. State*, 2

accused,<sup>42</sup> or upon the character or credibility of a witness,<sup>43</sup> or of the accused.<sup>44</sup> He should not compliment one counsel at the expense of the other,<sup>45</sup> or use language tending to bring an attorney into contempt before the jury,<sup>46</sup> or use any language tending to prejudice

Ga. App. 184, 58 S. E. 416. See *Woodson v. Holmes*, 117 Ga. 19, 43 S. E. 467. Ill.—*People v. Lurie*, 276 Ill. 630, 115 N. E. 130; *Illinois Cent. R. Co. v. Souders*, 178 Ill. 585, 53 N. E. 408. Ia.—*Ball v. Skinner*, 134 Iowa 298, 111 N. W. 1022. Mich.—*McDuff v. Detroit Evening Journal Co.*, 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673. Nev.—*State v. Harkin*, 7 Nev. 377. N. C.—*State v. Ownby*, 146 N. C. 677, 61 S. E. 630. Ore.—*State v. Reed*, 52 Ore. 377, 97 Pac. 627; *Keen v. Keen*, 49 Ore. 362, 90 Pac. 147, 10 L. R. A. (N. S.) 504. W. Va.—*State v. McCausland*, 96 S. E. 938.

Comment on evidence, see 13 STANDARD PROC. 837, et seq.

Instructions as to the facts or evidence, see 13 STANDARD PROC. 829, et seq.

42. *Cason v. State*, 148 Ga. 477, 97 S. E. 74; *Burke v. State*, 66 Ga. 157; *Parker v. State*, 3 Ga. App. 21, 59 S. E. 204; *Drinkwater v. State*, 168 Wis. 176, 169 N. W. 285.

[a] But a remark that "the presumption of innocence only obtains until overcome by proof" made for the purpose of correcting counsel's statement of the law is not improper. *People v. Threewitt*, 251 Ill. 509, 513, 96 N. E. 242.

43. Cal.—*People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54. Del.—*State v. Robinson*, 103 Atl. 657. Ga.—*Alexander v. State*, 114 Ga. 266, 40 S. E. 231. Ill.—*People v. King*, 276 Ill. 138, 114 N. E. 601; *Pardridge v. Cutler*, 104 Ill. App. 89. Kan.—*State v. Hughes*, 33 Kan. 23, 5 Pac. 381. La.—*State v. Johns*, 135 La. 552, 65 So. 738. Mich.—*McDuff v. Detroit Evening Journal Co.*, 84 Mich. 1, 10, 47 N. W. 671, 22 Am. St. Rep. 673. Neb.—*Johns v. State*, 88 Neb. 145, 129 N. W. 247. N. C.—*State v. Ownby*, 146 N. C. 677, 61 S. E. 630. Okla.—*Harrison v. State*, 11 Okla. Crim. 14, 141 Pac. 236; *Reed v. State*, 5 Okla. Crim. 365, 114 Pac. 1114; *Hicks v. United States*, 2 Okla. Crim. 626, 103 Pac. 873. Wash.—*State v. Jackson*, 83 Wash. 514, 145 Pac. 470.

[a] *People's Witnesses*.—(1) *People v. Shenk*, 181 App. Div. 753, 168

N. Y. Supp. 886. (2) But remarks reflecting upon the people's witnesses are not prejudicial. *People v. Ametta*, 73 App. Div. 623, 77 N. Y. Supp. 177.

Province of court, see 3 ENCY. OF EV. 752, and the title "Province of Judge and Jury."

Instructions as to credibility of witnesses, see 13 STANDARD PROC. 899.

44. Cal.—*People v. Willard*, 92 Cal. 482, 28 Pac. 585, where the court stated that the accused had contradicted herself several times. Fla.—*Newberry v. State*, 26 Fla. 334, 8 So. 445. Ill.—*Synon v. People*, 188 Ill. 609, 59 N. E. 508. N. Y.—*People v. Hill*, 37 App. Div. 327, 56 N. Y. Supp. 282, 13 N. Y. Crim. 550. Tex.—*Chaney v. State*, 50 Tex. Crim. 85, 96 S. W. 12.

[a] Illustrations.—(1) It is improper for the court to admonish the defendant before going on the stand to make a statement, that "all that you say must be true." *Newberry v. State*, 26 Fla. 334, 8 So. 445. (2) But it is not error to instruct the jury to consider the prisoner's statement in connection with the evidence, the instruction as to the statement being otherwise full and complete. *McTyler v. State*, 91 Ga. 254, 18 S. E. 140. (3) Cautioning an accused on trial for perjury to tell the truth is calculated to prejudice him in the minds of the jury. *People v. McElheny* (Mich.), 172 N. W. 546.

Instructions as to statements of accused, see 13 STANDARD PROC. 912, and title "Statement by Accused."

45. *McDuff v. Detroit Evening Journal Co.*, 84 Mich. 1, 10, 47 N. W. 671, 22 Am. St. Rep. 673.

46. Cal.—*People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54. Mich.—*People v. Leonzo*, 181 Mich. 41, 147 N. W. 543; *Williams v. West Bay City*, 119 Mich. 395, 78 N. W. 328; *McDuff v. Detroit Evening Journal Co.*, 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673; *Wheeler v. Wallace*, 53 Mich. 355, 19 N. W. 33. Minn.—*Kramer v. Northwestern Elevator Co.*, 91 Minn. 346, 350, 98 N. W. 96, where the court said, "I prefer, counsel, that if there



them.<sup>47</sup> Neither should he lose his temper in the presence of the jury and make remarks necessarily following such a state of mind.<sup>48</sup> But a judge may speak to a witness in an undertone in the presence of the jury,<sup>49</sup> or converse privately with the state's attorney.<sup>50</sup> In ruling on the admissibility of evidence, it is not improper for the court to state that it is relevant to prove certain facts,<sup>51</sup> to state his reasons for a particular ruling,<sup>52</sup> or to make remarks incidental to his ruling,<sup>53</sup> especially when the court clearly states that it is the sole province of the jury to determine whether such fact is proven.<sup>54</sup> While reading testimony to the jury, it is not improper for a judge to move to a table in front of them.<sup>55</sup>

**2. Rebuking Counsel.**—While it is better practice to send the jury from the room before reprimanding counsel,<sup>56</sup> it is not improper or prejudicial error to admonish, rebuke or reprimand counsel, in the presence of the jury, for irregularity of practice or misconduct occurring in the particular case.<sup>57</sup> The court may prevent unneces-

is to be any stealing done on technicalities that the supreme court say so." **R. I.**—*State v. Deslovers*, 40 R. I. 89, 100 Atl. 64. **Tex.**—*Crowder v. State*, 77 Tex. Crim. 122, 177 S. W. 501.

47. *McDuff v. Detroit Evening Journal Co.*, 84 Mich. 1, 10, 47 N. W. 671, 22 Am. St. Rep. 673. See *Ashley v. Lance*, 88 Ore. 109, 171 Pac. 561.

48. *Echols v. State*, 75 Tex. Crim. 369, 170 S. W. 786; *Stephens v. State* (Tex. Crim.), 97 S. W. 483.

49. *City Bank v. Kent*, 57 Ga. 283; *Young v. State*, 49 Tex. Crim. 207, 92 S. W. 841.

50. *Gorrell v. State*, 73 Tex. Crim. 232, 164 S. W. 1012.

51. *People v. Phelan*, 123 Cal. 551, 56 Pac. 424.

52. *State v. Inich* (Mont.), 173 Pac. 230.

53. **Cal.**—*People v. Wademan* (Cal. App.), 175 Pac. 791. **Ill.**—*Hoch v. People*, 219 Ill. 265, 76 N. E. 356, 109 Am. St. Rep. 327. **Mo.**—*State v. Ruck*, 194 Mo. 416, 92 S. W. 706; *State v. May*, 172 Mo. 630, 72 S. W. 918. **Tex.** *Willis v. State* (Tex. Crim.), 75 S. W. 790.

See 13 STANDARD PROC. 849, note 40.

54. *People v. Phelan*, 123 Cal. 551, 56 Pac. 424.

55. *Seawell v. Carolina Cent. R. Co.*, 132 N. C. 856, 44 S. E. 610.

56. *Echols v. State*, 75 Tex. Crim. 369, 170 S. W. 786; *Ward v. State*, 70 Tex. Crim. 393, 159 S. W. 272.

57. **Ark.**—*Schuman v. State*, 106 Ark. 362, 153 S. W. 611. **Colo.**—*Al-*

*mond v. People*, 55 Colo. 425, 135 Pac. 783. **Ill.**—*People v. Hotz*, 261 Ill. 239, 103 N. E. 1007; *People v. Phipps*, 268 Ill. 210, 109 N. E. 25; *People v. Curran*, 207 Ill. App. 264. **La.**—*State v. Williams*, 124 La. 779, 50 So. 711. **N. Y.**—*Finan v. New York Cent. & H. R. R. Co.*, 111 App. Div. 383, 97 N. Y. Supp. 859. **Okla.**—*Smith v. State*, 12 Okla. Crim. 513, 159 Pac. 941; *Porter v. State*, 8 Okla. Crim. 64, 126 Pac. 699. **Tex.**—*Drake v. State*, 68 Tex. Crim. 94, 151 S. W. 315. **Utah.**—*Lisonbee v. Monroe Irr. Co.*, 18 Utah 343, 54 Pac. 1009, 72 Am. St. Rep. 784. **Wis.**—*Friemark v. Rosenkrans*, 81 Wis. 359, 51 N. W. 557.

**For improper argument**, see 2 STANDARD PROC. 846, notes 82 and 83.

[a] **The court may correct counsel** when (1) misstating the law to the jury (*People v. Threewitt*, 251 Ill. 509, 96 N. E. 242; *State v. Simon*, 131 La. 520, 59 So. 975), or (2) when misstating the evidence. *State v. Lane*, 47 Ore. 526, 84 Pac. 804.

[b] **When counsel persists in putting an improper question to a witness** after it has been ruled improper, the court may rebuke him. *Hein v. Mildebrandt*, 134 Wis. 582, 115 N. W. 121.

[c] **Limitation on Power.**—While it is the province of the court to interrupt counsel during argument and caution him when he goes outside of the record, it should only be done when there is occasion for it. And even when counsel go outside the record, the court is rarely justified in using strong language in cautioning him.

sary wrangling and objections, and may require attorneys to be seated.<sup>58</sup> It has incidental power to protect itself against a violation of the duties of attorneys to maintain the respect due to the court,<sup>59</sup> and may punish counsel by fine as for contempt.<sup>60</sup>

**3. Rebuking Witnesses.**—A trial judge may, in the presence of the jury, rebuke witnesses for the use of profanity,<sup>61</sup> or for other improper conduct.<sup>62</sup> The degree of courtesy to be exercised by the court toward a witness is not a subject for judicial review, unless it clearly appears that defendant's rights were prejudiced thereby.<sup>63</sup>

**4. Rebuking Bystanders.**—The rebuking of bystanders for disorderly conduct in the court room is not misconduct on the part of the judge.<sup>64</sup> Indeed, it is the duty of the judge to check such misconduct as tends to influence the jury.<sup>65</sup>

**5. Causing Arrests and Punishing for Contempt.**—A court may, in the presence of the jury, arrest and punish a witness,<sup>66</sup> the defendant's counsel,<sup>67</sup> or other person<sup>68</sup> for a contempt of court committed on the trial, or in the presence of the court.<sup>69</sup> According to some authorities it is within the discretion of the trial judge to cause a witness to be arrested, in the presence of the jury, for perjury,<sup>70</sup> while other courts hold such action is erroneous, in either a criminal

*People v. Hamilton*, 268 Ill. 390, 109 N. E. 329.

[d] **It is error to reprimand counsel** for objecting to improper argument of opposing counsel. *Adams v. Fisher*, 83 Neb. 686, 120 N. W. 194. See *People v. Wansker*, 108 Misc. 84, 177 N. Y. Supp. 295.

[e] **A rebuke for conduct in other cases** and on other occasions is improper. *Friemark v. Rosenkrans*, 81 Wis. 359, 51 N. W. 557.

58. *Dailey v. State* (Tex. Crim.), 55 S. W. 821.

59. *Redman v. State*, 28 Ind. 205.

60. See *infra*, this section, and the title "Contempt."

61. *People v. Vukojevich*, 25 Cal. App. 459, 143 Pac. 1058.

62. *Patterson v. State*, 191 Ala. 16, 67 So. 997, Ann. Cas. 1916C, 968, failure to answer question.

63. *People v. Vukojevich*, 25 Cal. App. 459, 143 Pac. 1058; *People v. Casselman*, 10 Cal. App. 234, 101 Pac. 693; *Carter v. State*, 2 Ga. App. 254, 58 S. E. 532.

64. *Ala.*—*Smith v. State*, 107 Ala. 139, 18 So. 306. *N. Y.*—*People v. Soule*, 142 N. Y. Supp. 876. *N. C.* *State v. Robertson*, 121 N. C. 551, 28 S. E. 59.

65. See *infra*, VII, V.

66. *Ala.*—*Sims v. State*, 146 Ala. 109, 41 So. 413. *Kan.*—*State v. Marshall*, 95 Kan. 628, 148 Pac. 675. *Ky.* *Mareum v. Hargis*, 31 Ky. L. Rep. 1117, 104 S. W. 693, where witness was intoxicated. *Tex.*—*Wright v. State*, 47 Tex. Crim. 433, 84 S. W. 593. *Wash.* *State v. Dalton*, 43 Wash. 278, 86 Pac. 590.

See also *Seawell v. Carolina Central R. Co.*, 132 N. C. 856, 44 S. E. 610.

67. *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747; *Grant v. State*, 67 Tex. Crim. 155, 148 S. W. 760; *Miller v. State*, 32 Tex. Crim. 266, 22 S. W. 880.

68. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

69. See generally the title "Contempt."

70. *La.*—*State v. Strado*, 38 La. Ann. 562. *N. Y.*—*People v. Hayes*, 140 N. Y. 484, 497, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830; *Lindsay v. People*, 63 N. Y. 143. *Pa.*—*Com. v. Salawich*, 28 Pa. Super. 330.

[a] **Statute Applied.**—The arrest of a witness for perjury at the instance of the judge is not within the purview of a statute providing that "in his charge to the jury, the judge shall not state or repeat the testimony of any witness, nor shall he give any opinion as to what facts have been proved or disproved." *State v. Strado*, 38 La. Ann. 562.

or civil action, as an indication of the court's opinion upon the credibility of the witness.<sup>71</sup>

**6. Effect of Misconduct and Cure.** — Misconduct of the court may be ground for new trial,<sup>72</sup> or for reversal if prejudicial.<sup>73</sup> If it does not appear that the remarks of the court were heard by the jury, there is no reversible error.<sup>74</sup> Instructions directing the jury to disregard the improper remarks made in their hearing,<sup>75</sup> or may not<sup>76</sup> correct the irregularity, depending upon the character of the misconduct.<sup>77</sup>

71. *Ga.*—*Burke v. State*, 66 *Ga.* 157, quoted in *Parker v. State*, 3 *Ga.* App. 21, 25, 59 *S. E.* 204. *Idaho.*—*State v. Clark*, 27 *Idaho* 48, 57, 146 *Pac.* 1107. *Kan.*—*State v. Hughes*, 33 *Kan.* 23, 5 *Pac.* 381. *Miss.*—*Golden v. State*, 75 *Miss.* 130, 21 *So.* 971. *N. C.*—*State v. Swink*, 151 *N. C.* 726, 66 *S. E.* 448. *Okla.*—*Reed v. State*, 5 *Okla.* *Crim.* 365, 114 *Pac.* 1114. *Tex.*—*Coleman v. State* (*Tex. Crim.*), 199 *S. W.* 473; *Hughes v. State*, 81 *Tex. Crim.* 526, 197 *S. W.* 215; *Taylor v. State*, 38 *Tex. Crim.* 241, 42 *S. W.* 384. *Wash.*—*State v. Primmer*, 69 *Wash.* 400, 125 *Pac.* 158.

[a] If in the opinion of the judge, there is necessity for such arrest, injury to the party offering the witness can be avoided by sending the jury out and keeping the action of the court from them. *N. C.*—*State v. Swink*, 151 *N. C.* 726, 66 *S. E.* 448. *Okla.*—*Nicholson v. State*, 13 *Okla. Crim.* 123, 162 *Pac.* 447. *Wash.*—*State v. Roberts*, 91 *Wash.* 560, 158 *Pac.* 101. See also *State v. Williams*, 124 *La.* 779, 50 *So.* 711.

[b] There is no prejudice to the accused if the witness is arrested in a quiet manner out of the view or hearing of the jury, as he approaches the court room door. *Taylor v. State*, 38 *Tex. Crim.* 241, 42 *S. W.* 384.

72. See 20 *STANDARD PROC.* 454, 464.

73. *Ill.*—*Brinkerhoff v. Briggs*, 92 *Ill. App.* 537. *Mich.*—*McDuff v. Detroit Evening Journal Co.*, 84 *Mich.* 1, 10, 47 *N. W.* 671, 22 *Am. St. Rep.* 673. *Minn.*—*Kramer v. Northwestern Elevator Co.*, 91 *Minn.* 346, 98 *N. W.* 96.

[a] Remarks otherwise improper are not ground for reversal when counsel agree that the jury might remain during the discussion as to what should be incorporated in the instructions. *Moore v. Rose*, 130 *Mo. App.* 668, 105 *S. W.* 1105.

[b] The probable effect or influence of the remarks of the court, (1) and not the motive, of the judge, determines whether the party whose right to a fair trial has been thus impaired is entitled to another trial. *State v. Ownby*, 146 *N. C.* 677, 61 *S. E.* 630. (2) A reviewing court will not stop to inquire whether the jury were actually influenced, but will presume against the purity of the verdict if they were exposed to improper influences which might have produced the verdict. *Green v. State*, 97 *Miss.* 834, 53 *So.* 415.

74. *Van Driel v. Stevens*, 200 *Mich.* 291, 166 *N. W.* 974; *Gipson v. State*, 58 *Tex. Crim.* 403, 126 *S. W.* 267.

75. *Schieffelin v. Schieffelin*, 127 *Ala.* 14, 28 *So.* 687; *Klinker v. Third Ave. R. Co.*, 26 *App. Div.* 322, 49 *N. Y. Supp.* 793. See 13 *STANDARD PROC.* 853.

76. *Ill.*—*Swenson v. Erickson*, 90 *Ill. App.* 358. *Minn.*—*Kramer v. Northwestern Elevator Co.*, 91 *Minn.* 346, 98 *N. W.* 96. *N. Y.*—*Davidson v. Herring*, 24 *App. Div.* 402, 48 *N. Y. Supp.* 760, 5 *N. Y. Ann. Cas.* 111.

77. See *infra*, this note.

[a] Ordinarily an admonition of the trial judge to the jury to disregard misconduct of either the judge or district attorney will, in the absence of an affirmative showing of injury, suffice to remove any prejudice therefrom in the minds of the jury. The rule in this behalf is founded upon the presumption that the jury will heed the admonition of the trial judge. But this presumption does not prevail when the misconduct of the judge is in its very nature calculated to weaken, if not utterly destroy, a legitimate and substantial defense apparently interposed in "good faith." *People v. Pitisci*, 29 *Cal. App.* 727, 735, 157 *Pac.* 502.



**S. CONDUCT OF JURY.**—Matters relating to the conduct of the jury are elsewhere discussed.<sup>78</sup>

**T. CONDUCT OF PARTIES.**—When the misconduct of a party is brought to the attention of the court, it may investigate the matter in the presence of the jury,<sup>79</sup> although a private examination out of the hearing of the jury is ordinarily, at least in the first instance, a preferable course.<sup>80</sup> Instead of objecting immediately to the misconduct of a party, the adverse party may wait until after verdict and seek to remedy the wrong by motion for new trial.<sup>81</sup> But misconduct of a party is not ground for reversal if not prejudicial.<sup>82</sup>

**U. CONDUCT OF COUNSEL.**—An attorney is an officer of the court, and it is his duty to uphold its honor and dignity.<sup>83</sup> It is his duty to abstain from all offensive personality, to maintain the respect that is due to the court,<sup>84</sup> and not to resort to sharp practice.<sup>85</sup>

It is the duty of the prosecuting attorney in a criminal prosecution to refrain from conduct infringing the accused's right to a fair trial.<sup>86</sup> He owes a duty to the accused as well as to the state, and should not endeavor to exclude competent evidence,<sup>87</sup> or to introduce that of doubtful competency.<sup>88</sup> He should not indulge in abuse of the defendant,<sup>89</sup> or make baseless insinuations against his witnesses,<sup>90</sup>

78. See 17 STANDARD PROC. 508.

79. *Atchison & N. R. Co. v. Wagner*, 19 Kan. 335.

80. *Atchison & N. R. Co. v. Wagner*, 19 Kan. 335.

81. *Atchison & N. R. Co. v. Wagner*, 19 Kan. 335.

As ground for new trial, see 20 STANDARD PROC. 457.

82. *Ashland Land & L. S. Co. v. May*, 59 Neb. 735, 82 N. W. 10; *Ledwith v. Campbell*, 1 Neb. Unof. 695, 95 N. W. 838.

83. *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747.

84. *Redman v. State*, 28 Ind. 205; *In re Pryor*, 18 Kan. 72, 26 Am. Rep. 747.

85. *Simmons v. State*, 4 Okla. Crim. 490, 114 Pac. 752.

86. Cal.—*People v. Ah Len*, 92 Cal. 282, 28 Pac. 286, 27 Am. St. Rep. 103; *People v. Bowers*, 79 Cal. 415, 21 Pac. 752; *People v. Hail*, 25 Cal. App. 342, 143 Pac. 803; *People v. Pang Sui Lin*, 15 Cal. App. 260, 114 Pac. 582. Colo.—*Bailey v. People*, 54 Colo. 337, 130 Pac. 832, Ann. Cas. 1914C, 1142, 45 L. R. A. (N. S.) 145. Conn.—*State v. Raymond*, 88 Conn. 148, 89 Atl. 1118. Fla.—*Thalheim v. State*, 38 Fla. 169, 186, 20 So. 938. Idaho.—*State v. Irwin*, 9 Idaho 35, 44, 71 Pac. 608, 60 L. R. A. 716. Ky.—*Howerton v. Com.*, 129 Ky. 482, 112 S. W. 606. Mich.—*People v.*

*Evans*, 72 Mich. 367, 40 N. W. 473. Nev.—*State v. Scott*, 37 Nev. 412, 142 Pac. 1053. N. D.—*State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686. Okla.—*Porter v. State*, 8 Okla. Crim. 64, 126 Pac. 699; *Wright v. State*, 7 Okla. Crim. 280, 123 Pac. 434.

[a] **Limitation on Rule.**—While the prosecuting attorney should see that no unfair advantage is taken of the accused, yet he is not a judicial officer. He is necessarily a partisan in the case. If he were compelled to proceed with the same circumspection as the judge and jury, the conviction of criminals would be at an end. Zeal in the prosecution of criminal cases is therefore to be commended. It is zeal of the counsel in the courtroom alone, of which the accused can complain. *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686.

87. *Hillen v. People*, 59 Colo. 280, 149 Pac. 250.

[a] **He Should Not Attempt To Dissuade Witnesses From Testifying.** *Gandy v. State*, 24 Neb. 716, 40 N. W. 302.

88. *Hillen v. People*, 59 Colo. 280, 149 Pac. 250; *State v. Irwin*, 9 Idaho 35, 44, 71 Pac. 608, 60 L. R. A. 716.

89. *Hillen v. People*, 59 Colo. 280, 149 Pac. 250.

90. *Hillen v. People*, 59 Colo. 280, 149 Pac. 250.

or act disrespectfully toward opposing counsel.<sup>91</sup> He should guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced.<sup>92</sup>

Misconduct of counsel is ground for new trial,<sup>93</sup> and for reversal.<sup>94</sup> And the attorney may be punished by fine as for contempt.<sup>95</sup>

**V. CONDUCT OF BYSTANDERS.**—Courts should use every precaution, during the trial of a case, to prevent any utterance, demonstration, or other act, by the public or individual bystanders, which would tend to influence the minds of the jurors either for or against a party.<sup>96</sup> Where prejudice is shown as a result of a demonstration or misconduct of spectators a new trial should be granted,<sup>97</sup> but where there is no prejudice shown,<sup>98</sup> as well as when the improper action is of such a nature as to preclude the effect of prejudice resulting therefrom, a new trial should be denied.<sup>99</sup> The presence of a large num-

91. *Hillen v. People*, 59 Colo. 280, 149 Pac. 250; *People v. Wansker*, 108 Misc. 84, 177 N. Y. Supp. 295.

92. *State v. Irwin*, 9 Idaho 35, 44, 71 Pac. 608, 60 L. R. A. 716.

[a] To call for a bench warrant for a witness of the defendant who has just testified, (1) is misconduct. *State v. Kyle*, 259 Mo. 401, 412, 168 S. W. 681. But see *State v. McKay*, 89 S. C. 234, 71 S. E. 858, (2) holding that it is not improper for him to direct the sheriff to arrest a witness as he comes off the stand to await indictment for perjury.

93. See 20 STANDARD PROC. 461.

94. See the title "Arguments."

95. See generally the title "Contempt."

96. Cal.—*People v. Fleming*, 166 Cal. 357, 136 Pac. 291, Ann. Cas. 1915B, 881. S. C.—*State v. Weldon*, 91 S. C. 29, 40, 74 S. E. 43, Ann. Cas. 1913E, 801, 39 L. R. A. (N. S.) 667. Tex.—*Dailey v. State* (Tex. Crim.), 55 S. W. 821; *Manning v. State*, 37 Tex. Crim. 180, 39 S. W. 118.

See 17 STANDARD PROC. 499, et seq.

[a] Courts do not desire to control public sentiment as to the merits of a cause, but they are required, if there be anything in the guaranty of a fair and impartial trial, to see that such public sentiment is not expressed to or in the presence of the jury in such a way as to be likely to influence their determination. *People v. Fleming*, 166 Cal. 357, 136 Pac. 291, Ann. Cas. 1915B, 881.

[b] The place for spectators is (1) that part of the court room set aside for their use and they should not be

permitted to occupy positions that would tend to obstruct the orderly conduct of the business of the court. *People v. Munday*, 280 Ill. 32, 117 N. E. 286. (2) But it is not prejudicial to permit several ladies, in a prosecution for rape, to sit immediately behind the prosecutrix when all seats in the spectators' section of the courtroom are occupied. *People v. Ayres*, 195 Mich. 274, 161 N. W. 870.

[c] Procedure.—On the first occasion the parties should be reprimanded and warned. On the second offense, some of the offenders should be identified and fined. *Manning v. State*, 37 Tex. Crim. 180, 39 S. W. 118.

97. Ga.—*Stevens v. State*, 93 Ga. 307, 26 S. E. 331. La.—*State v. Wimby*, 119 La. 139, 43 So. 984, 121 Am. St. Rep. 507, 12 L. R. A. (N. S.) 98; *State v. Renard*, 50 La. Ann. 662, 23 So. 894. N. C.—*State v. Wilcox*, 131 N. C. 707, 42 S. E. 536. S. C.—*State v. Gens*, 107 S. C. 448, 93 S. E. 139, L. R. A. 1918E, 957. Tenn.—*Turner v. State*, 89 Tenn. 547, 15 S. W. 838; *Brake v. State*, 4 Baxt. 361. Tex. *Hamilton v. State*, 36 Tex. Crim. 372, 37 S. W. 431.

See 17 STANDARD PROC. 500, and 20 STANDARD PROC. 464.

98. *State v. Thomas*, 135 Iowa 717, 109 N. W. 900; *Young v. State*, 49 Tex. Crim. 207, 92 S. W. 841; *Lax v. State*, 46 Tex. Crim. 628, 79 S. W. 578.

99. La.—*State v. Wimby*, 119 La. 139, 43 So. 984, 121 Am. St. Rep. 507, 12 L. R. A. (N. S.) 98. N. C.—*State v. Jackson*, 112 N. C. 851, 17 S. E. 149. Tex.—*Cooper v. State*, 72 Tex. Crim. 645, 163 S. W. 424; *Long v.*

ber of persons in the court room known to bear malice against a party is ground for a new trial where it is evident that he was prejudiced thereby,<sup>1</sup> but not otherwise.<sup>2</sup> As a general rule, where it appears that the person or persons guilty of misconduct in the presence of the jury were at once reprimanded by the court and the jurors instructed to disregard the incident and not permit it to influence them, a mistrial will not result.<sup>3</sup> Moreover, if the act is not noticed by the court,<sup>4</sup> or if disregarded by the court and no objection is made,<sup>5</sup> it is not ground for a new trial; but when the misconduct is perceived by the court it should at once act to prevent any prejudice resulting therefrom.<sup>6</sup> It is not error to refuse to declare a mistrial because a relative of one of the parties faints during the course of the trial,<sup>7</sup> or indulges in weeping and other manifestations of grief.<sup>8</sup>

**Excluding Spectators.**—The court, in the exercise of its discretion, and for the purpose of obtaining a fair trial for all parties, may order the court room cleared of spectators or of certain individuals, upon a demonstration by the public,<sup>9</sup> or in case of the presence of a hostile

State, 59 Tex. Crim. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244. **Wash.** State v. Hodooff, 88 Wash. 413, 153 Pac. 377.

1. **Ga.**—Myers v. State, 97 Ga. 76, 25 S. E. 252. **S. C.**—State v. Weldon, 91 S. C. 29, 40, 74 S. E. 43, Ann. Cas. 1913E, 801, 39 L. R. A. (N. S.) 667. **Tex.**—Manning v. State, 37 Tex. Crim. 180, 39 S. W. 118. **Va.**—Doyle v. Com., 100 Va. 808, 40 S. E. 925.

[a] **Effect of Silent Enmity of Crowd.**—The mere presence in the courtroom of a large number of persons bearing enmity against the accused, though they conduct themselves in an orderly manner, may charge the atmosphere with hostility and overawe the minds of the jurors to such an extent as to justify a new trial. State v. Wildon, 91 S. C. 29, 40, 74 S. E. 43, Ann. Cas. 1913E, 801, 39 L. R. A. (N. S.) 667.

2. Long v. State, 59 Tex. Crim. 103, 127 S. W. 551, Ann. Cas. 1912A, 1244.

3. **Ark.**—Rhea v. State, 104 Ark. 162, 147 S. W. 463. **Ga.**—Clements v. State, 123 Ga. 547, 51 S. E. 595; Woolfolk v. State, 81 Ga. 551, 8 S. E. 724. **Ia.**—State v. Thomas, 135 Iowa 717, 109 N. W. 900. **Kan.**—State v. Killian, 95 Kan. 371, 148 Pac. 643. **Ky.**—Green v. Com., 26 Ky. L. Rep. 1221, 83 S. W. 638; Arnold v. Com., 21 Ky. L. Rep. 1566, 55 S. W. 894. **La.**—State v. Wimby, 119 La. 139, 43 So. 984, 121 Am. St. Rep. 507, 12 L. R. A. (N. S.)

98; State v. Spillers, 105 La. 163, 29 So. 480; State v. Robinson, 52 La. Ann. 541, 27 So. 129; State v. Renard, 50 La. Ann. 662, 23 So. 894. **Mo.**—State v. Gartrell, 171 Mo. 489, 71 S. W. 1045; State v. Dusenberry, 112 Mo. 277, 20 S. W. 461. **Neb.**—Debnay v. State, 45 Neb. 856, 64 N. W. 446, 34 L. R. A. 851. **Nev.**—State v. Larkin, 11 Nev. 314. **N. C.**—State v. Harrison, 145 N. C. 408, 59 S. E. 867. **Ore.**—State v. Brown, 28 Ore. 147, 41 Pac. 1042. **Tenn.**—Hughes v. State, 126 Tenn. 40, 148 S. W. 543, Ann. Cas. 1913D, 1262. **Tex.**—Parker v. State, 33 Tex. Crim. 111, 21 S. W. 604, 25 S. W. 967; Weathersby v. State, 29 Tex. App. 278, 15 S. W. 823. **Va.**—Bowles v. Com., 103 Va. 816, 48 S. E. 527; Doyle v. Com., 100 Va. 808, 40 S. E. 925.

4. Stevens v. State, 93 Ga. 307, 20 S. E. 331; Burns v. State, 89 Ga. 527, 15 S. E. 748.

5. Stevens v. Com., 124 Ky. 32, 98 S. W. 281.

6. Cartwright v. State, 16 Tex. App. 473, 49 Am. Rep. 826.

7. Graves v. Rivers, 3 Ga. App. 510, 60 S. E. 274.

8. State v. Barrington, 198 Mo. 23, 95 S. W. 235.

9. State v. Keeler, 52 Mont. 205, 156 Pac. 1080, Ann. Cas. 1917E, 619, 1916E, 472.



crowd,<sup>10</sup> or of misconduct by individuals.<sup>11</sup> But it is not error to refuse to exclude from the court room during the trial certain individuals merely because they are relatives of one of the parties.<sup>12</sup>

**W. MISTRIAL AND NEW TRIAL.** — **Mistrial.** — A mistrial is a trial which is nugatory trial by reason of a failure of the jury to agree upon a verdict, or by reason of some error or defect in the proceedings.<sup>13</sup> It is largely in the discretion of the trial court,<sup>14</sup> except perhaps in capital cases,<sup>15</sup> when and under what circumstances it will declare a mistrial. Whenever a verdict is set aside, or the jury disagree, or a mistrial is declared, the cause is restored to the status it had before any trial took place.<sup>16</sup> The trial must be begun de novo;<sup>17</sup>

**As affecting publicity of proceedings,** see *supra*, VII, C.

10. *Myers v. State*, 97 Ga. 76, 25 S. E. 252; *Doyle v. Com.*, 100 Va. 808, 40 S. E. 925.

11. *People v. Ong Git*, 23 Cal. App. 148, 137 Pac. 283.

12. *Freels v. State*, 130 Ark. 189, 196 S. W. 913; *Louisville & N. R. Co. v. Foard*, 104 Ky. 456, 47 S. W. 342.

13. See *infra*, this note.

**[a] Definitions and Illustrations.**

(1) A mistrial is "an erroneous, invalid, or nugatory trial; a trial of an action which cannot stand in law because of want of jurisdiction, or a wrong drawing of jurors, or disregard of some other fundamental requisite." *Black's L. Dict.* 785. (2) It is "a trial legally of no effect by reason of some error in the proceedings; loosely, any trial not resulting in a lawful decision or verdict." *Webster's New Int. Dict.* 1384. (3) A mistrial has been defined to be an erroneous trial on account of some defect in the persons trying, as if the jury come from the wrong county; or because there was no issue formed, as if no plea be entered, etc. *Wilbridge v. Case*, 2 Ind. 36, *quoting* *Bouv. L. Dict.* (4) "Where a jury is discharged without a verdict, the proceeding is properly known as a mistrial; and where a verdict is set aside because it ought not to stand, the result is the same. The proceeding has miscarried, and the consequence is not a trial but a mistrial." *Fisk v. Henarie*, 32 Fed. 417, 427.

**[b] A mistrial is a nugatory trial, whereas a new trial recognizes a completed trial which for sufficient reason has been set aside so that the issues may be litigated de novo.** *Stern v. Wabash R. Co.*, 52 Misc. 12, 101 N. Y. Supp. 181.

**[c] A trial of a cause upon a theory outside of any issue formed by the pleadings is a mistrial, and cannot be sustained by an appellate court, except, perhaps, in a case in which a palpably just conclusion is reached on the real merits of the cause.** *Indiana B. & W. Ry. Co. v. Quick*, 109 Ind. 295, 9 N. E. 788, 925.

**[d] Where there is no general verdict, and the jury's answer to specific questions do not cover all the facts in issue, there is a mistrial requiring a reversal of the judgment.** *Ward v. Gradin*, 15 N. D. 649, 658, 109 N. W. 57, per *Young, J.*, concurring.

**Discharge of jury as an acquittal,** see 14 STANDARD PROC. 559.

**Removal of causes after a mistrial,** see 22 STANDARD PROC. 823.

14. *Avery v. State*, 26 Ga. 233, 237; *State v. Hall*, 108 N. C. 776, 13 S. E. 189. Compare *State v. Tilghman*, 33 N. C. 513.

**As to grounds for discharge of jury,** see 17 STANDARD PROC. 612.

**Illness of judge as ground,** see *supra*, VII, D, 3.

15. *State v. Hall*, 108 N. C. 776, 13 S. E. 189.

16. **U. S.**—*Fisk v. Henarie*, 32 Fed. 417, 427, *citing* *Spear's Law of Federal Judiciary* 468. **Ind.**—*Leas v. Patterson*, 38 Ind. 465. **S. C.**—*Hester v. Hagood*, 3 Hill 195.

Compare 20 STANDARD PROC. 648, and the title "Mandate and Proceedings Thereafter."

**[a] The case stands as if no attempt to try the case had ever been made.** *Hester v. Hagood*, 3 Hill (S. C.) 195.

17. See 17 STANDARD PROC. 628, note 81.

but it is not necessary to rearraign the accused.<sup>18</sup> The new trial may be had at the same term as the former trial,<sup>19</sup> or at the next regular term,<sup>20</sup> in the discretion of the court, and it may be had before the same judges who presided at the preceding trial.<sup>21</sup> Amendments to the pleadings may be allowed after a mistrial,<sup>22</sup> in accordance with the general rules regulating amendments.<sup>23</sup>

**New Trial.**—Where a new trial is granted on the motion or an accused, the court may proceed to retry him at the same term against his consent.<sup>24</sup> The proceedings on the new trial are elsewhere treated.<sup>25</sup>

18. See 2 STANDARD PROC. 867, note 32.

19. **U. S.**—United States *v.* White, 5 Cranch C. C. 38, 28 Fed. Cas. No. 16,675. **Conn.**—State *v.* Allen, 47 Conn. 121, 136. **Del.**—State *v.* Updike, 4 Harr. 581. **Ga.**—Little *v.* State, 54 Ga. 24; Malone *v.* State, 49 Ga. 210; Mager *v.* State, 21 Ga. App. 139, 94 S. E. 82. **Ore.**—State *v.* Clark, 86 Ore. 464, 168 Pac. 944. **Tex.**—Texas & P. Ry. Co. *v.* Garcia, 62 Tex. 285.

[a] **The rule of the federal court** that a defendant, once tried, cannot be tried again at the same term unless by consent does not apply where there is a mistrial because of disagreement of the jury. It applies only to causes which have been tried, and a verdict found, and a new trial granted. United States *v.* White, 5 Cranch C. C. 38, 28 Fed. Cas. No. 16,675.

20. State *v.* Clark, 86 Ore. 464, 168 Pac. 944.

**As affected by provision as to speedy trial, see *supra*, IV, B, 2, a.**

21. State *v.* Allen, 47 Conn. 121, 136.

22. Hester *v.* Hagood, 3 Hill (S. C.) 195; Syme *v.* Jude's Exrs., 3 Call. (7 Va.) 452. See 20 STANDARD PROC. 648; 19 STANDARD PROC. 324.

23. See the titles "Amendments and Jeofails;" "New Cause of Action or Defense;" "Parties."

24. Lott *v.* State, 41 Tex. 121; Garrett *v.* State, 37 Tex. Crim. 198, 38 S. W. 1017, 39 S. W. 108; Craft *v.* Com., 24 Gratt. (65 Va.) 602.

[a] **According to the practice in the federal court**, a defendant once tried cannot be tried again during the same term unless by consent. United States *v.* White, 5 Cranch C. C. 38, 28 Fed. Cas. No. 16,675.

**Application of provision as to speedy trial to new trial, see *supra*, IV, B, 2, a.**

25. See 20 STANDARD PROC. 648.









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